Missouri Attorney General's Opinions - 1953

Opinion	Date	Topic	Summary
1-53	Apr 29	MOTOR VEHICLES. CRIMINAL LAW. PENALTY.	Calculation of allowable weight per tire as provided under Sec. 304.180, Mo. RS. Cum. Supp. 1951. Lack of criminal intent no defense for violation of foregoing statute under Sec. 304.240, Mo. RS. Cum. Supp. 1951.
1-53	July 9	INTANGIBLE PERSONAL PROPERTY TAX.	Payments received by Educational Credit Bureau, Inc., a Missouri corporation, from students located outside the State of Missouri are not to be included for the purpose of determining the tax of that corporation under the provisions of Credit Institutions Act.
1-53	Oct 2	ELECTIONS. ELECTION COMMISSIONERS.	Members of boards of election commissioners provided for in Senate Bill No. 5 of 67th General Assembly, applicable to counties containing city or part of city of more than 400,000, do not have to be confirmed by Senate.
2-53	Jan 29	HEALTH, DEPARTMENT OF. ADULTERATED FOODS.	The offering for sale of meat product designated as "tenderette," the advertisement of which states the ingredients contained therein, none of which ingredients are injurious to health in the proportion used in such product and none of which ingredients are prohibited by Missouri law, is not in violation of the laws of Missouri.
2-53	Jan 31	DIVISION OF HEALTH.	It is the duty of the Director of the Division of Health to enforce Section 315.080, RSMo 1949, throughout the State of Missouri, in all cities, including those under special constitutional charter, except as to hotels of fireproof construction of more than three stories in height situated in cities now having fire and building ordinance regulations and which are erected and maintained in compliance with such fire and building ordinances.
2-53	Feb 17	HEALTH, DIVISION OF. REGULATIONS, EFFECT OF.	State Milk Regulations of Division of Health promulgated under authority of Sections 196.045 and 196.050 RSMo 1949, of food and drug laws, and coming within narrow limits of subject matter and scope of operation, and have the force and effect of statutory laws.
2-53	Mar 26	DIVISION OF HEALTH. BIRTH CERTIFICATES.	The Division of Health may accept for filing, after the time prescribed for filing, the birth certificate of one whose birth certificate is on file in another state, upon the submission of proof by such person sufficient to convince the Division of Health that he was born in this state.
2-53	Apr 21	DIVISION OF HEALTH. BIRTH CERTIFICATES.	Division of Health may not amend or alter a birth certificate except at request of person whose birth certificate it is sought to have altered or amended, then only upon submission of such proof as required by Div.

			or court.
2-53	Apr 22	SEWER DISTRICTS.	It is illegal for city, town, village or sewer district to place a rental charge on its sewer system for maintenance thereof or for building up construction reserve, unless revenue bonds are first voted and issued.
2-53	Apr 29	Hon. James R. Amos, M.D.	WITHDRAWN
2-53	May 1	DIVISION OF HEALTH. ILLEGITIMATE CHILDREN. BIRTH CERTIFICATES.	The information required in a birth certificate is very largely a matter of discretion resting in the Department of Health of the State of Missouri; that mothers may assign names to their children in those cases where paternity is doubtful or in which the child is illegitimate; that birth records, based upon information furnished by the mother of the child, which records supply personal particulars relating to the father, but not the name of the father, should not have the name of the child removed nor the information relating to the father, prior to the filing of the birth certificate.
2-53	May 7	COUNTY HEALTH CENTERS. TRUSTEES' LIABILITY FOR MEDICAL AND NURSING MALPRACTICE.	Board of Trustees of County health Center, or members, when performing statutory duties, act officially. Not legally liable for medical or nursing malpractice allegedly committed by board, or members during performance of official acts. But if board directs, participates in, or subsequently ratifies acts of malpractice of its personnel, or knowingly employs doctors and nurses lacking necessary professional qualifications, experience and fitness to perform assigned duties, then board, or members engaging in such activities would be personally liable to patient injured by malpractice of said personnel.
2-53	May 11	DIVISION OF HEALTH. BIRTH CERTIFICATES. ADOPTION.	Birth certificate of illegitimate child adopted by husband of child's mother in adoption proceeding in which natural mother did not join should contain information regarding adopting father and information contained in original birth certificate regarding the natural mother.
2-53	Sept 3	DIVISION OF HEALTH.	A soft drink consisting of orange juice, water, stabilizer and preservatives, in a container labeled "Orange Blend" is not misbranded under the Missouri Food, Drug and Cosmetic Law. Definitions: "drink" "mix" and "blend."
2-53	Sept 17	CONSTRUCTION OF STATUTES. FOOD AND DRUGS. NONALCOHOLIC DRINKS.	Sections 196.125, 196.130 and 196.135, RSMo 1949, to be read and construed along with other sections of RSMo 1949, particularly Sections 196.010, 196.045, and 196.050. Nonalcoholic drink a food within meaning of Section 196.010. Manufacturer of such drink containing fluoride compound, who makes, sells, offers or exposes to sale, or has same in his possession with intention to sell, when drink is adulterated, is subject to criminal prosecution for violating Sections 196.130 and 196.135, unless satisfactory evidence offered to State

			Division of Health as provided by Section 196.085, that fluoride compound in drink was required or could not be avoided in manufacturing process. Division of Health to promulgate regulations limiting fluoride compounds, and allow production to continue. Product not deemed adulterated, and manufacturer cannot be criminally prosecuted under Sections 196.130 and 196.135, RSMo 1949.
2-53	Sept 21	NARCOTIC DRUGS. HOUSE BILL 185. DIVISION OF HEALTH.	Division of Health should issue a license for the sale of narcotic drugs by wholesale to such applicants as give satisfactory proof of the matters set forth in paragraphs 1 and 2 of Section 195.040, RSMo. 1949; Division of Health is not justified in withholding such a license until such applicant furnishes proof that he is a licensed pharmacist or has a licensed pharmacist in his employ.
3-53	Mar 11	APPROPRIATIONS.	No disbursements to be made under Section 10.380, Laws of Mo., 1951, page 235, in absence of valid contract for work.
3-53	Mar 11	APPROPRIATIONS.	Comptroller should not certify any disbursements under H.S.H.R. No. 13 until termination of pending litigation.
3-53	Apr 16	APPROPRIATIONS. COMPTROLLER. CONSTITUTIONAL LAW. BOUNTIES.	Attempted limitation of reimbursement to Counties for payment of bounties by Perfected H.B. 224, Sec. 8, and Perfected H.B. 325, Sec. 3.160, unconstitutional and void.
3-53	Apr 25	COUNTY COURTS. PUBLIC FUNDS.	County Court cannot pay hospital and doctor bill of injured employee from public funds. Whether such employee may receive salary while hospitalized is matter within discretion of County Court. Unused balance of special fund, purpose for which raised having been accomplished, may be transferred to General Revenue Fund, or such other fund as may be in need of such fund.
3-53	May 5	SOCIAL SECURITY. COMPTROLLER. MOTOR VEHICLES.	Persons selling vehicle and driver's licenses and collecting of other taxes for the State Department of Revenue under the provisions of Laws of Mo. 1951, page 863, are not covered under the provisions of the Old Age and Survivor's Insurance, page 788, Laws Mo. 1951.
<u>3-53</u>	May 29	MISSOURI DENTAL BOARD.	Missouri Dental Board may employ legal counsel.
3-53	June 5	APPROPRIATIONS.	Kansas City not entitled to reimbursement from state for mental patients in hospital maintained by public funds in absence of appropriation therefor.
3-53	July 7	APPROPRIATIONS.	No statutory authority exists to permit the state to become obligated to pay the expenses of a band and drum and bugle corps designated by a particular Veterans' Organization in attending its National

			Convention.
3-53	July 30	CIRCUIT COURTS. JUDGES. SALARIES AND FEES.	A Circuit Judge retired under Article V, Sec. 27, Constitution of Missouri, 1945, is entitled to receive one-half of the amount of what would be his present salary were he not retired and remained in office, rather than one-half of his salary at the time of his retirement. Such retired Judges are entitled to the benefits of any increase of salary of Circuit Judges made after their retirement, but before the end of their term of office.
3-53	July 30	APPROPRIATION. DEPARTMENT OF PUBLIC HEALTH AND WELFARE. CONSTITUTIONAL. GENERAL ASSEMBLY.	Construing House Bill 396 passed by the 67th General Assembly. Part invalid as an attempt by the General Assembly to legislate in an appropriation act.
3-53	July 31	TAXATION.	Steamboats and other vessels owned by corporations to be assessed in the county in which such owner has its principal place of business.
3-53	Aug 19	Mr. Newton Atterbury	WITHDRAWN
3-53	Oct 14	Hon. Roderic R. Ashby	WITHDRAWN
3-53	Nov 16	GENERAL ASSEMBLY. APPROPRIATION. COMPTROLLER.	Contingent expenses of the General Assembly incurred prior to July 1, 1953 can be paid out of contingent fund General Assembly appropriation 1951-53 and out of Section 8.020, House Bill 397 passed by the 67th General Assembly.
3-53	Dec 22	CIVILIAN EMPLOYEES. SOCIAL SECURITY.	Civilian employees of the National Guard, who are paid by the Federal Government, are not subject to coverage under State Social Security Law.
4-53	Jan 8	CONDEMNATION FOR RIGHT OF WAY.	It is the duty of the Prosecuting Attorney to represent the county in condemnation of right-of-way for establishment of county road.
4-53	June 25	MOTOR VEHICLE. REGISTRATION. LICENSE.	A motor vehicle registration license is unnecessary where the motor vehicle is used exclusively on the private property of the owner.
5-53	Mar 30	CRIMINAL LAW. HIGHWAYS. MOTOR VEHICLES.	Mere accidental dropping of dangerous substances upon highways is not alone a criminal offense. Penalty for violation of Section 304.160, RSMo 1949, provided by Section 304.570, RSMo 1949.
5-53	Apr 3	SPECIAL ROAD DISTRICTS. ELECTIONS.	Manner of casting a ballot in an election to continue or discontinue the organization of a special road district.

<u>5-53</u>	May 21	SUBPOENAS. WITNESSES.	Circuit Clerk may issue subpoena in blank.
<u>5-53</u>	July 7	TAXATION. SERVICEMAN.	Penalty for delinquent state and county property taxes should not be assessed on property owned as tenants by the entirety, where such delinquency occurs during period that husband is absent from his home and engaged in the military service of this state or of the United States.
5-53	July 31	TAXATION.	Unassessed personal property may not be added to tax books after October 31 by assessor, collector or county court, and therefore person whose property was not assessed is entitled to a statement that no taxes were owed by him. County of residence on January 1 is county from which statement regarding personal property tax liability must be obtained for use under Section 301.025, MoRS, 1951 Supp.
<u>5-53</u>	Nov 16	LOTTERIES. GIFT ENTERPRISES.	An operation whereby a school issues numbered receipts for ten cents each, or twelve for \$1.00, which receipts entitle the holder to a chance for a prize, contains the elements of a lottery and is, therefore, illegal.
6-53	Sept 11	COUNTY COURTS THIRD CLASS COUNTIES. SALARY AND MILEAGE.	It is the opinion of this department that county court judges, in counties of the third class, will, for the remainder of their present terms, receive \$10.00 per day for the first ten days in any month in which court is held, and \$5.00 per day for each additional day in each month in which court is held, and 5¢ per mile necessarily travelled in going to and returning from the place of holding court.
6-53	Oct 22	Hon. J. Abner Beck	WITHDRAWN
6-53	Oct 29	TAXATION. MERCHANTS TAX.	Person who at his residence in one county, by telephone and mail, sells ties stored in another county is a merchant and subject to merchants tax.
7-53	Jan 1	SCHOOLS.	Board of directors of school district may direct where pupils will attend school within the district in order to provide best educational facilities for school children.
10-53	Apr 29	MUNICIPAL CORPORATIONS. BONDS.	(1) Bonds voted for sewer system may not be converted for use on water system; (2) city could not become indebted for 20% of its valuation for such purpose and also 10% of its valuation for water system.
10-53	May 27	CRIMINAL LAW. PRELIMINARY HEARING.	No authorization for payment for a copy of the transcript of the original examination in the preliminary hearing of a homicide case.
10-53	June 11	CONSERVATION COMMISSION. APPROPRIATION.	Construing Section 4.510 of House Bill No. 361, passed by the Sixty-seventh General Assembly.

		LEGISLATURE.	
10-53	June 24	CONSERVATION COMMISSION AGENTS POWERS.	No Conservation Commission agent or other officer has any lawful authority to confiscate or hold permanently or destroy property of an individual used in the violation of the Game and Fish Laws or regulations of the Conservation Commission. Such officer or agent may only take temporarily into his custody any such property to be used as evidence to convict a violator.
10-53	Nov 12	SCHOOLS. SCHOOL DISTRICTS. SCHOOL TRANSPORTATION.	Board of directors in common school district may employ parent of child to transport such child to school, but may not employ the child himself or make allowances to such child in lieu of transportation; school districts not liable in tort for negligence of driver.
11-53	June 15	PROSECUTING ATTORNEYS. SALARIES.	Effective date of H.B. 160 is August 29, 1953. In computing salary of prosecuting attorney in 3rd and 4th class county, determine the base salary; add 25% of base salary; add 25% of this figure; add \$600.00.
12-53	Mar 10	LEGISLATURE AND STATUTES.	Construction placed on proposed House Bill.
12-53	Apr 17	MOTOR VEHICLES. DIRECTOR OF REVENUE. LICENSE.	The term "owner" in Section 301.010, Laws Mo. 1951, •means: (1) The sholder of the legal title. (2) The vendee when the vehicle is subject to an agreement for conditional sale. (3) The vendee when the vehicle is subject to an agreement on a lease with a condition of sale. (4) A mortgagor in the event he is entitled to possession of the vehicle; in accordance with the definition in said section.
12-53	July 21	MOTOR VEHICLES. SALES OR USE TAX. EXEMPTIONS.	1) When a surviving spouse inherits motor vehicle from deceased owner who paid sales or use tax required by Secs. 144.440 and 144.450, Laws of Mo. 1951, and adds names of children to application for title as co-owners and surviving spouse's interest is exempt from tax under latter sec., children are not entitled to exemption under said sec. They are required to pay tax in amount of 2% of purchase price of vehicle less value of interest of surviving spouse. 2) A motor vehicle registered and operated in another state in good faith by owner 90 days, then moved into Missouri where certificate of title is sought, if sales tax paid by owner on purchase price in state of registry, and application for title is only in name of owner, he is exempt from sales or use tax under Sec. 144.450, supra. If owner gives spouse an interest in vehicle and desires spouse's name on application and certificate of title, Missouri sales or use tax is due. Tax is 2% of purchase price or appraised value of vehicle less value of interest retained by owner.
<u>12-53</u>	Sept 23	MOTOR VEHICLE. REGISTRATION. LICENSE AND FEE.	Payment of prescribed registration fees under Sec. 301.060, Laws Mo. 1951, is required and a certificate of ownership to a motor vehicle must first be obtained as a prerequisite to obtaining a certificate of

			registration under Sec. 301.010(19) RSMo. 1949. Under the provision of the definition of owner in Sec. 301.010(18) Laws Mo. 1951, page 695, 697, the Director of Revenue is not authorized to register a motor vehicle in the name of any person except the owner under the definition of said section.
13-53	Jan 29	OFFICERS. FEES AND SALARIES. SHERIFFS.	Salary of sheriff in fourth class elected in 1948 is reduced by change in population as shown by 1950 decennial census.
13-53	Feb 6	Mr. Hilary A. Bush	WITHDRAWN
13-53	Mar 5	EXTRADITIONS.	A finding by a juvenile court that a person under seventeen years of age is a juvenile delinquent is not the basis for extradition and such person cannot be extradited on the basis of the delinquency charge.
13-53	May 15	NEPOTISM. PUBLIC OFFICER.	Receiving personal service from wife does not violate Section 6, Article VII Constitution of Missouri 1945, where the wife does not occupy an official position nor render service to the State.
13-53	May 28	PUBLIC OFFICERS.	Offices of County Judge and Deputy Sheriff incompatible, and one person cannot hold both offices simultaneously.
13-53	July 13	CO-OPERATIVE ASSOCIATIONS. TAXES.	The Pure Milk Producers Assoc. of Kansas City, Missouri, is not exempt from payment of a merchant's tax levied by the County Court of Jackson County Missouri.
13-53	Aug 5	COUNTY ASSESSORS.	Compensation of assessor who takes office September 1, 1953, determined under Senate Bill No. 40 of the 67th General Assembly.
13-53	Oct 9	STATE MERIT SYSTEM LAW. SECRETARY BOARD OF PROBATION AND PAROLE.	That the provisions of the State Merit System Law do not apply to the Secretary of the Board of Probation and Parole.
13-53	Oct 28	SHERIFFS. COUNTY COURTS. DEPUTIES.	County court of a first class county has authority to authorize the appointment of deputy sheriffs in addition to statutory number and to appropriate money for their compensation regardless that the sheriff has voluntarily stated to the court that he proposes to have such additional deputies attend a full-time, two-month training course while employed as deputy sheriff.
13-53	Nov 17	COUNTY COURTS. PLANNING COMMISSION. JACKSON COUNTY.	The Planning Commission of Jackson County is not authorized to appoint attorneys to represent it; the Planning Commission of Jackson County, the Board of Zoning Adjustment of Jackson County, and the County Court of Jackson County, are to be represented by the county counselor of Jackson County.

14-53	Feb 6	BOARD OF ELECTION COMMISSIONERS.	Board of Election Commissioners of City of St. Louis has authority to provide for an additional magistrate district by virtue of the 1950 census and is vested with sole authority to create such new district.
14-53	Apr 28	COUNTY COLLECTOR. PROSECUTING ATTORNEY. TAXATION.	In suit to collect delinquent tangible personal property taxes in Class 2 counties: 1) Collector should institute necessary proceedings; 2) Prosecuting Attorney should prosecute such suites without additional compensation to himself, and, 3) Such suits should be in the name of the State of Missouri at the relation, and to the use of the Collector.
<u>15-53</u>	Jan 12	DEPARTMENT OF CORRECTIONS.	Department of Corrections has no authority to charge off items due Penitentiary Industries Revolving Fund. Unpaid sums due Penitentiary Industries Revolving Fund for Auto License plates furnished other departments of State Government.
<u>15-53</u>	Feb 16	MOTOR VEHICLES. DEPARTMENT OF REVENUE.	Reciprocity between Missouri and Illinois.
<u>15-53</u>	Mar 12	MOTOR VEHICLES OPERATORS' LICENSES.	Licenses not revocable for conviction of three offenses of careless driving within two years, when offense occurred prior to effective date of Section 302.271, V.A.M.S.
15-53	Apr 21	FEED. AGRICULTURE.	"Custom-mixed feeds" do not come within provisions of Missouri Feed Law, Sections 266.150-266.280, RSMo 1949. Feeds compounded by ingredients in proportions representing the average requested by various feeders and offered or exposed for sale to customers in the ordinary course of business as a "custom-made cattle feed" is a "commercial-feeding stuff" within the provisions of the Missouri Feed Law.
<u>15-53</u>	Aug 5	AGRICULTURE. STATE ENTOMOLOGIST.	Notice to a resident of an area found by the State Entomologist to be infested with the Japanese beetle, stating that on a given date the area would be treated with DDT, and advising such resident to take certain measures to protect his property, is not authorized or required by law, has no legal effect, and its service upon the resident is merely a matter of courtesy.
15-53	Aug 17	SCHOOLS. SCHOOL DISTRICTS.	Public meeting must be held in order to effect valid dissolution of reorganized school district in accordance with Sec. 165.310, RSMo 1949. Attempt to organize school districts from territory included in reorganized school district following invalid attempt at dissolution of reorganized school district is void and officers of such common school districts have no authority or legal standing as such.
<u>15-53</u>	Sept 1	AGRICULTURE.	Under Section 266.080, Mo. R.S., Cum. Supp. 1951, a farmer or seed producer selling seed of his own production, who delivers such seed to a purchaser via a common carrier, or who advertises same in a

			newspaper published outside the county of his residence, is a seedsman and must comply with all the requirements of the Missouri Seed Law. The membership of such producer in the Missouri Seed Improvement Association, an organization which tests and certifies seed produced by its members, does not take such producer outside the purview of such statute.
15-53	Sept 3	AGRICULTURE.	A statement in an advertisement that seed has been "cleaned" or "recleaned" is not a "statement of the quality, purity, or cleanliness of the seed" within the contemplation of Subsection (3) (d) of Section 266.080, Cum. Supp. 1951; and that a farmer selling seed of his own production is not, by reason of use of such description in advertising, deprived of the exemption provided him by said section.
15-53	Sept 22	AGRICULTURE. SEED.	A farmer offering unlabeled seed for sale by a public sales service violates Section 266.071, Paragraph 1, Subsection (2), RSMo, Cumulative Supplement, 1951, and the operator of a "community sales service" may also be held criminally liable for selling unlabeled seed in violation of the above section.
<u>15-53</u>	Dec 4	SPECIAL ROAD DISTRICT. COUNTY COURT. STATUTES.	Construction of Section 233.320 and 233.325 RSMo. 1949 relative to the formation of special road districts.
16-53	Oct 30	Hon. L. M. Chiswell	WITHDRAWN
18-53	June 6	GARNISHMENT. MAGISTRATE COURTS.	In Magistrate Court only money owed to the defendant, by the garnishee, at time of answer of interrogatories is subject to garnishment.
19-53	Mar 5	GRAND JURY. CRIMINAL LAW. EVIDENCE. CIRCUIT COURT.	Authority of member of a grand jury to testify in trial on an indictment as to a confession made before said grand jury by the defendant. Official court reporter who took testimony before grand jury unauthorized to testify at the trial on an indictment returned by the grand jury.
19-53	Mar 10	DEPARTMENT OF BUSINESS AND ADMINISTRATION.	No appropriation may be made for Bi-State Development Agency subsequent to December 31, 1951.
19-53	Apr 8	CONSTITUTIONAL LAW. GENERAL ASSEMBLY.	Members of General Assembly privileged from arrest except for cases of treason, felony or breach of the peace, during the session of the General Assembly and for the fifteen days next before the commencement and after the termination of each session.
19-53	June 11	ATHLETIC COMMISSION.	Sponsorship of private wrestling show by unlicensed organization not criminal. "Booking" of professional wrestlers for wrestling show, either

		CRIMINAL LAW. BOXING. WRESTLING.	public or private not criminal.
19-53	July 14	Hon. Bert Cooper	WITHDRAWN
<u>19-53</u>	Sept 2	APPROPRIATIONS.	Appropriation for the payment of salary of "other necessary employees" may not be used for payment of salary increase of the Director, Department of Business and Administration.
<u>19-53</u>	Sept 19	CONSERVATION COMMISSION.	Form denoted "Special Use Permit" is in proper legal form and, when duly executed, will be enforceable as to the provisions thereof.
19-53	Sept 19	CONSERVATION COMMISSION. DAMAGES.	Proposed form of easement for flood rights is in proper legal form and, when duly executed, will protect the Conservation Commission from claims for all damages resulting from the construction and maintenance of a dam on Big Lake in Holt County, Mo.
20-53	Jan 29	MERCHANDISE. ASSESSMENT. TAXATION.	Merchant's stock of goods should be taxed at the place where it is located.
20-53	Feb 3	COSMETOLOGY. PRACTICE OF. STATE BOARD OF COSMETOLOGY. COMPENSATION. TIPS, LICENSE.	A person who dresses hair and receives nothing for such service is not required to obtain a certificate of registration from the State Board of Cosmetology. What constitutes the occupation of hairdressing, cosmetology and manicuring is set forth in detail in Section 329.020, supra, and where the things enumerated are done for tips regularly give they constitute compensation and a license must be secured.
20-53	Feb 19	SCHOOLS. ELECTION.	Proponents and opponents of school bond issue under Section 165.040, RSMo 1949, not entitled to challengers and checkers at election on said bonds.
20-53	May 11	SCHOOLS.	Apportionment of "county foreign insurance tax fund" moneys referred to in Sec. 148.360, RSMo 1949, to be based on number of school children in each county. Where school district lies in two or more counties split enumeration must be considered according to rule announces in subparagraph 4 of Sec. 165.190.
20-53	June 19	SCHOOLS. ELECTIONS. ABSENTEE BALLOTS.	Absentee ballots must be cast in school elections on question of issuing bonds or increasing tax rate. Application for absentee ballots made to official charged with furnishing regular ballots. Absentee ballots counted by canvassers appointed by body or officials charged with duty of canvassing election returns.
20-53	July 16	SCHOOL DISTRICTS. TAXATION.	Revised estimate and changed levy may be filed if such action is taken prior to any action having been taken upon the original estimate and levy.

20-53	Sept 3	WORKMEN'S COMPENSATION. INSURANCE.	Employers under the Workmen's Compensation Act must pay the total cost of insurance covering their liability to their employees. The Employee is prohibited, by the Compensation Act of this State, from paying any part of such cost of insurance.
20-53	Dec 23	COUNTY COURTS. HEALTH. NURSES. PUBLIC HEALTH.	A County Court is not authorized to employ a public health nurse unless the Division of Health has made a formal written report that it considers the services of a public health nurse necessary, under Section 192.140, RSMo 1949, or unless a petition signed by two hundred and fifty taxpayers has been presented to the County Court asking for appointment of a public health nurse or nurses, under Section 192.160, RSMo 1949.
21-53	Feb 10	CONSTITUTIONAL LAW.	Missouri State Highway Commission determination of limited access to state highway prevails over inconsistent city ordinance.
21-53	Apr 9	Hon. Bill Davenport	WITHDRAWN
21-53	Apr 16	SCHOOLS. BUILDINGS.	Board of directors of local reorganization school district may rescind order for election to authorize issuance of bonds for borrowing money for purpose of erection of school building.
21-53	May 22	CRIMINAL LAW. CIRCUIT CLERKS.	(1) No criminal prosecution would lie for dumping rubbish along banks of stream on own property which washes down stream in high water; (2) Sec. 583.280, Mo. R.S., 1951 Supp., relating to compensation of clerks of courts of criminal jurisdiction, applies only in counties having population in excess of 500,000 or in cities of such population.
21-53	June 13	Hon. Bill Davenport	WITHDRAWN
21-53	Aug 17	COMPENSATION. COUNTY RECORDER.	That the county recorder in fourth class counties wherein the offices of circuit clerk and recorder have been combined, shall receive only that portion of the additional compensation provided in Section 2 of Senate Bill 166, passed by the 67th General Assembly, prorated from the effective date of said bill; furthermore, that such payment shall be made in monthly installments as provided under Section 50.330, RSMo 1949.
21-53	Oct 2	SPECIAL ROAD DISTRICTS. FOURTH CLASS, NON- TOWNSHIP COUNTIES. TREASURER'S DUTY.	Treasurer of fourth class, non-township county also treasurer of special benefit assessment road district organized under Sections 233.170 to 233.315, RSMo 1949. When district commissioners draw warrant on treasurer issued in payment of construction or improvements on district's roads to member of court of said county, and warrant is regular on face, it is duty of treasurer to cash same out of available district funds. He and sureties will not incur liability on official bond.
21-53	Nov 5	CRIMINAL	Under provisions of Section 544.530 RSMo. 1949, and Supreme Court

		PROCEDURE. SECTION 544.530, RSMO. 1949. SUPREME COURT RULE 32.01.	Rule 32.01, when defendant is charged by indictment or information with criminal offense in circuit court, bail not fixed, and court not in session, it is mandatory duty of circuit clerk to ascertain if offense is bailable within meaning of Article 1, Section 20, Constitution of Missouri, 1945. If bailable, to fix reasonable bail, and to release defendant when sufficient bond in that sum given. If offense not bailable, bail must be refused. Reasonableness of bail question of fact for clerk. Bail fixed in greater sum than will secure attendance of defendant at trial or from time to time, term to term continued to, and restrains defendant from departing without leave, is excessive within meaning of Article 1, Section 21, Constitution of Missouri, 1945, and denies defendant's constitutional right to bail for bailable offense. Subject to these exceptions clerk has no discretionary powers of refusal to admit defendant to bail or to prescribe time, place or conditions of admittance to bail.
22-53	Apr 21	CHARTER COUNTIES. CITIES, TOWNS AND VILLAGES.	The term "incorporated cities," found in Section 18(c), Article VI, Constitution of Missouri, includes all incorporated cities, towns and villages.
22-53	May 15	FOODS AND DRUGS. BUTTER. AGRICULTURE.	The mixing within the State of Missouri of butter, vegetable fats, vitamins and preservatives to make a product intended for human food without the labels specifying in what percentage the vegetable fats enter into the composition is a violation of Section 196.770, RSMo 1949, and that the offering of such product for sale, without informing the purchaser of the percentage or quantity of the various ingredients, is also a violation thereof.
22-53	June 12	COUNTY COURTS. DRAINAGE DISTRICTS.	County courts may organize drainage districts.
22-53	Sept 22	INTOXICATING LIQUOR. CHURCH. PREMISE.	(1) Where an annex, which is built onto a church and which becomes a part of the church, is, at its nearest point, within the prescribed distance from a premise where intoxicating liquor is sold, that the sale of intoxicating liquor on such premise is illegal without consent; (2) That a building where intoxicating liquor is sold, which at its nearest point is within the prescribed distance from a church, may be partitioned and that if after being partitioned, a premise is created which at its nearest point is without the prescribed distance from a church, the sale of intoxicating liquor on such premise is legal.
24-53	Jan 19	CRIMINAL LAW.	Secs. 12.010 and 12.020 RSMo 1949 divest State of Missouri of jurisdiction over violations of criminal law occurring on land occupied by Public Health Service Hospital, 525 Couch Avenue, Kirkwood, Missouri.
24-53	Jan 31	TOWNSHIP	(1) Resident of special road district may serve as member of township

		COUNTIES.	board, and (2) residents of special road district may vote in township elections.
24-53	Feb 6	CRIMINAL LAW. ASSAULT AND BATTERY. NOT GUILTY OF. WHEN.	A surgeon performing emergency operation upon a dead woman for the purpose of saving the life of her unborn child and no permission was given from any person who could legally give same, is not guilty of assault or battery, or any other offense under the criminal laws of Missouri.
24-53	Feb 20	CRIMINAL JURISDICTION OVER WELDON SPRINGS ORDNANCE PLANT AND SYNTHETIC FUELS DEMONSTRATION PLANT.	(1) That exclusive criminal jurisdiction of crimes committed on the 2,085 acre tract which comprises the U.S. Ordnance Plant area, is vested in the United States. (2) That exclusive criminal jurisdiction of crimes committed on the area which comprises the Synthetic Fuels Demonstration Plant, located in Pike County, at Louisiana, Missouri, is vested in the United States.
24-53	Mar 6	Mr. John E. Downs	WITHDRAWN
24-53	Mar 24	CONSTITUTIONAL LAW. PROBATE JUDGES AND EX OFFICIO MAGISTRATES.	Bill to provide increase in salary for probate judges where an activated armed services camp is located is constitutional.
24-53	Apr 4	CRIMINAL LAW. EXPOST FACTO. STATUTES.	Effective date of Section 563.374, Mo. R.S. Cumulative Supplement 1951, 90 days subsequent to adjournment of 66th General Assembly on April 30, 1952. Conviction for an offense prior to effective date of statute convicted under is invalid.
24-53	Apr 17	COUNTY COURT. TAXATION. PUBLIC IMPROVEMENT.	Real property held by a trustee under Section 140.260, RSMo 1949, is subject to the lien of a special tax bill for public improvement provided for in Section 88.333; that such special tax bill may not be enforced against the county court as a claim against general revenue; and that the county court has no authority to order such property conveyed to the general contractor in satisfaction of the lien of the special tax bill, although it may be sold and conveyed subject to the lien.
24-53	May 22	SCHOOLS.	Board of Trustees of the Retirement System can legally make payment of retirement allowances to a teacher who attained age seventy prior to July 1, 1952, who did not request a retirement allowance who served in a district included in the retirement system subsequent to July 1, 1952, and who is now requesting a retirement allowance; and to a teacher who attained age seventy prior to July 1, 1952, who requested a retirement allowance and received one or more monthly payments, who returned to teaching after July 1, 1952, and who is

			again requesting a retirement allowance.
<u>24-53</u>	June 5	SENATE. ELECTIONS.	Board of Election Commissioners for City of St. Louis cannot make any division of city into senatorial districts, new districts having already been established under last decennial census.
<u>24-53</u>	June 19	COUNTY CLERK.	Expiration of term of office of one appointed by the Governor to fill vacancy in the office of county clerk, who shall hold office between the next general election, when the regular term should be filled, and the beginning of such regular term.
<u>24-53</u>	July 6	ELECTIONS.	No constitutional or statutory provisions to prevent the use of voting machines as provided by Senate Committee Substitute for Senate Bills Nos. 134 and 135.
24-53	Oct 29	SUPPORT OF DEPENDENTS. EXTRADITION.	Uniform Support of Dependents Law does not obligate the state to pay costs incident to extradition for the crime of failing to support.
<u>25-53</u>	Mar 5	CORPORATIONS. EMPLOYEES' COMPENSATION. PAYMENT PERIOD.	No Missouri statutes require any corporation doing business in state to pay compensation to employees as often as once each week.
<u>25-53</u>	Mar 23	EMPLOYEES. HOLIDAYS. WAGES.	Missouri statutes do not require extra compensation to employees of private persons or corporations for work performed on Missouri public holidays listed.
<u>25-53</u>	Apr 13	MATTRESSES. USED BEDDING. SALE OF USED BEDDING. SECTION 421.070. RSMO 1949.	Section 421.070, RSMo. 1949, regulates the sale of used bedding only. Said section does not regulate the renting of used bedding.
<u>25-53</u>	Apr 17	STATE HOSPITAL. ELEEMOSYNARY INSTITUTIONS. WOMEN. LABOR. HOURS OF LABOR.	State hospitals are not "public institutions" within the meaning of Section 290.040, RSMo 1949.
<u>25-53</u>	July 30	CHILD LABOR. RADIO BROADCASTING.	Children 12 years or older not prohibited from participating in radio broadcasting.
26-53	Jan 13	EMBALMING. BOARD OF. DEATH CERTIFICATE.	No legal requirement that a licensed embalmer sign death certificate of one not embalmed.

		VITAL STATISTICS.	
26-53	Dec 16	ELECTIONS. VOTING MACHINES.	1) Propositions to be voted upon should appear on the ballot in the same order in which they appear in petitions circulated among voters; 2) In precincts where voting machines are used there need be no rotation of the names of candidates; 3) Not legal to reconstruct election precincts so that each precinct would have approximately 800 voters instead of the number now provided by law.
27-53	Jan 8	ARMORIES. ADJUTANT GENERAL. DEEDS.	Conditions and limitations in deeds reserving control under armories for non-military uses not affected by subsequent law vesting control in the adjutant general.
27-53	Jan 21	ADJUTANT GENERAL'S OFFICE. TITLE.	Examination of quitclaim deed and abstract of title to land located in Mexico, Mo., as site for construction of two-place hangar for Army liaison aircraft.
27-53	Mar 6	COUNTY CORONER.	Duty of county coroner in making a transcript of testimony at inquest proceedings involving several persons.
27-53	Mar 11	APPROPRIATIONS FOR LEASE.	A state agency may enforce its option on the renewal of a lease beyond the period for which appropriations are made if new appropriations can be obtained for payment of the rentals for the renewal period.
27-53	May 1	TAXATION.	Proceeds of erroneous sale for delinquent real property taxes to be reimbursed owner from county treasury.
30-53	Feb 4	COUNTY COUNSELOR.	County court of Jackson County authorized to appoint county counselor for a term ending December 31, 1954.
31-53	Mar 17	Hon. Arkley W. Frieze	WITHDRAWN
31-53	Apr 1	MAGISTRATE FEE.	Magistrate fee in criminal case allowed for each proceeding, and not for each defendant.
31-53	Apr 24	PROSECUTING ATTORNEYS.	Special prosecuting attorney to be appointed by court having jurisdiction of criminal case.
31-53	Aug 17	TAXATION. COLLEGE DORMITORIES EXEMPT FROM. WHEN.	A nonprofit educational corporation's dormitories and some other buildings used as housing facilities for its students and no space is rented to any others for residential or business purposes and transaction was not entered into by the college for investment purposes, then such buildings are used exclusively for educational purposes within meaning of Sub-section 6, Section 137.100 RSMo 1949, and buildings are exempt from taxation as long as they are thus used.
	1	Mr. William Geekie	WITHDRAWN

32-53	July 9	TAXATION. ST. LOUIS CITY CHARTER.	Charter of the City of St. Louis may be amended so as to authorize the levy of a city earnings tax on income earned by residents and income earned by nonresidents employed in such city, and statute is unnecessary.
32-53	Nov 10	SCHOOLS. SCHOOL DISTRICTS. SCHOOL TRANSPORTATION.	Board of education in reorganized district has authority to sell district- owned buses in manner and number deemed advisable by the board; sale must be for cash; board may contract with private bus owners to transport children of public schools and such contract may extend beyond one year's duration.
33-53	Jan 29	INHERITANCE TAXES. FOSTER BROTHER NOT ENTITLED TO EXEMPTIONS AND RATE OF NATURAL BROTHER.	"A's" adoption in Maine prior to 1917 to be given the same effect, insofar as "A's" rights under Missouri statutes are concerned as if "A" had been adopted in Missouri. "A" is child of adopting parents as fully as if born to them in lawful wedlock; can inherit from them, but not their kinsmen. "A" is not brother of "B", a child of adopting parents; upon "B's" death intestate in Missouri, "A" cannot inherit from "B", and "A" is not entitled to exemptions and rate allowable to brother under inheritance tax statutes.
33-53	Mar 19	BOND. ARREST.	One who is arrested under a misdemeanor warrant in a county other than the one in which the offense was committed and the warrant issued, is entitled to make bond before a Judge or a Magistrate of a court having original jurisdiction to try criminal offenses of the county where such arrest is made.
33-53	Apr 29	SANITY HEARINGS. PROSECUTING ATTORNEY MAY NOT BE GUARDIAN'S ATTORNEY. WHEN.	When probate court adjudges one insane and appoints guardian who was informant in inquiry. Prosecuting attorney who appeared for state or county at hearing cannot be retained as attorney for guardian subsequent to adjudication.
33-53	July 7	STATE HIGHWAY COMMISSION. COUNTY HIGHWAY COMMISSION.	Powers and duties of respective bodies distinguished.
33-53	Aug 19	DIVISION OF WORKMEN'S COMPENSATION. STATUTORY CONSTRUCTION.	Under House Bill No. 286, passed by the 67th General Assembly, employees who, heretofore, filed a rejection of the provisions of Chapter 287, RSMo 1949, that has not been withdrawn, need only file a new rejection upon obtaining new employment.
<u>34-53</u>	June 24	SAVINGS AND LOAN ASSOCIATIONS. BOARD OF	A savings and loan association not prohibited under its by-laws or any Missouri statutes, may pay bonuses to employees or affiliates for obtaining new accounts. By-law of an association prohibiting payment

		DIRECTORS' POWER.	of dividends upon accounts withdrawn can be amended to permit payment of dividends upon any portion of withdrawal between last dividend date and notice of withdrawal. Board of directors lack power under by-laws to create new office of chairman of board. Office cannot be created without amendment authorizing same.
34-53	Sept 11	SAVINGS AND LOAN ASSOCIATION. GENERAL CREDITOR'S PREFERENCE. WHEN.	General creditors of Savings and Loan Association being liquidated and dissolved entitled to have their claims, together with costs of proceedings, first satisfied before net proceeds are to be distributed to members pro rata according to participation value of each member's account.
35-53	Feb 20	PUBLIC WAREHOUSES. LICENSES.	The Douglas-Guardian Warehouse Corporation, a corporation, is conducting and operating a public warehouse in the City of Springfield, Greene County, Missouri, as defined in Section 415.010, RSMo 1949, and is required to comply with all of the terms of Chapter 415, RSMo 1949, relating to warehouses in this State.
35-53	Mar 17	Hon. Douglas W. Green	WITHDRAWN
35-53	Mar 24	TAXATION. TAXABLE PROPERTY.	1) The personal property of the Columbia Humane Society at Columbia, Boone County, Mo. exempt from taxation under Sec. 6, Art. X of the Constitution of Missouri, 1945, and Sec. 137.100, RSMo 1949, because such property is used exclusively for purposes purely charitable and benevolent; 2) Individuals named herein are the owners of certain buildings by the terms of a contract severing said buildings from real estate, conveyed by them to the State Highway Commission and as personalty such property is subject to taxation.
<u>35-53</u>	Mar 26	STATE PARK BOARD. STATE LANDS.	State Park Board may convey land for right-of-way purposes for the use of State Highway Commission.
35-53	May 28	STATE PARK BOARD.	State Park Board is vested with authority under Section 253.020, RSMo 1949, to purchase property within Roaring River State Park, being sold at auction by the Eagle Rock School Board.
35-53	Sept 16	Hon. Philip A. Grimes	WITHDRAWN
35-53	Sept 22	SCHOOLS. TAXATION. CONSTITUTIONAL LAW.	Property within school districts added or annexed to city district liable to assessment and subject to taxation on rate fixed and approved by vote of people within city district prior to annexation.
35-53	Dec 8	Hon. Douglas W. Greene	WITHDRAWN
35-53	Dec 14	STATE PARK BOARD. CONTRACT.	Validity of proposed forms for letting concession contracts. State Purchasing Agent has proper authority to purchase used equipment.

		PURCHASING AGENT.	
36-53	June 23	ADMINISTRATION. SURVIVAL OF PERSONAL INJURY CLAIMS. APPOINTMENT OF ADMINISTRATOR, AND SPECIAL ADMINISTRATOR FOR NON-RESIDENT.	"Personal representative" as used in Par. 2, Sec. 537.020, RSMo 1949, means executor or administrator of deceased person's estate. "Representative" as used in Par. 3, of said section means special administrator for deceased non-resident, whose powers are limited to those provided in said paragraph. Ancillary administrator of non-resident's estate, under administration statutes may also be appointed. But only when proper application and proof of facts involved are made, and court is convinced of sufficiency of same, is it mandatory to appoint administrator for deceased resident, or ancillary administrator, and or special administrator for deceased non-resident.
37-53	Jan 8	Hon. David E. Harrison	WITHDRAWN
37-53	Apr 28	Hon. C. D. Hamilton	WITHDRAWN
<u>37-53</u>	May 4	PROBATE COURT. MAY APPOINT GUARDIAN OF ADULT PERSON NOT ADJUDGED INSANE. WHEN.	Probate court lacks power under Missouri statute to appoint guardian of adult whose sole assets consist of benefit payments other than old age assistance authorized by Chapter 208, RSMo 1949, when recipient was never adjudged insane. But when person is adjudged insane, habitual drunkard, or narcotics addict and incapable of managing his affairs, guardian of person or estate of recipient may be appointed. Cost of proceeding to be paid from person's estate if sufficient, if insufficient, by county.
37-53	May 11	Hon. C. D. Hamilton	WITHDRAWN
37-53	June 26	AUTOPSY. CORONERS. PHYSICIANS.	Section 194.115 (Senate Bill No. 237), enacted by the 67th General Assembly, does not repeal Section 58.560, RSMo 1949, and does not require consent when an autopsy is authorized by the persons, and in the manner, provided by law.
37-53	Oct 23	Hon. Roy Hamlin	WITHDRAWN
37-53	Oct 26	Mr. C. D. Hamilton	WITHDRAWN
<u>37-53</u>	Nov 12	DEPARTMENT OF CORRECTIONS. STATE. CONVEYANCE.	Director of Department of Corrections unauthorized to execute easement to United States of America.
37-53	Dec 16	INHERITANCE TAXES. CORPORATE STOCK. ESTATE BY ENTIRETY. TRANSFER BY SURVIVOR. PROCEDURE.	Surviving owner of estate by entirety desires to sell or otherwise transfer certain corporate stocks. If certificates of stock are in surviving owner's possession or control, before delivery or transfer, he must give written notice to director of revenue and attorney general and comply with other requirements of sec. 145.210 RSMo 1949, unless he first secures written consent, or waiver, of director of revenue and attorney

			general authorized by sec. If such stock certificates are included in inventory and appraisement of estate of deceased joint owner during administration proceedings, and court orders that no inheritance taxes are due on the estate as provided by subsec. 2, sec. 145.150 RSMo 1949, then sec. 145.210 RSMo 1949, shall be inoperative as to surviving owner and no further tax proceedings shall be had. If certificates in possession or control of a corporation, then before delivery or transfer of same to surviving owner, or to another at said owner's direction, corporation must comply with requirements of sec. 145.210 RSMo 1949, particularly as to notice to director of revenue and attorney general, unless said corporation, as transfer agent, first secures consent or waiver authorized by said section.
38-53	July 30	CRIMINAL PROCEDURE. BAIL. SUPREME COURT RULE 21.14.	Under Rule 21.14, Supreme Court Rules of Criminal Procedure for all Missouri courts, one arrested without warrant for criminal offense of careless and reckless driving of a motor vehicle, a bailable offense under Sec. 20, Art. I, Cost. of Mo. 1945; while in custody said person may request and be granted bail by magistrate court of county having jurisdiction to try case if charge filed in such court. Condition of bond being that person will appear on specified date, or from time to time to which cause may be continued, to answer information that may be preferred against him, charging said offense. One arrested without warrant for alleged criminal offense and while in custody applies to the magistrate court of the county having jurisdiction if criminal charge filed, and court orders sheriff to bring the prisoner before court and be present during consideration of application for bail; order properly and legally made, and duty of sheriff to obey same.
39-53	Jan 6	RECORD OF DEEDS — 3RD CLASS COUNTIES — SEPARATE CIRCUIT CLERK AND RECORDER. SALARY AND NUMBER OF DEPUTIES.	Recorders in 3rd class counties where there is a separate Circuit Clerk and Recorder determines the amount of salary for deputy hire which must be reasonable. The Recorder in said counties shall also determine the number of deputies necessary to perform the duties of the office promptly, carefully and well. Such reasonable payment to necessary deputy or deputies may be deducted from Recorder's fees, balance paid County Treasurer.
39-53	Jan 29	COUNTY CLERK.	A county clerk of a third class county with a population of more than twenty-four thousand and less than thirty thousand shall be allowed as compensation for deputy and assistants an amount equal to 100% of his salary as determined in Section 51.300, exclusive of Section 51.415 and in addition thereto the amount specified in Section 51.415, RSMo 1949.
39-53	May 1	COUNTIES. COUNTY COURT.	County clerk not entitled to additional compensation for preparing payroll for county highway department employees.

		COUNTY CLERK. COMPENSATION. FEES AND SALARIES.	
<u>39-53</u>	Sept 21	SCHOOLS. COUNTY TREASURER.	County treasurer having in his possession funds derived in part or wholly from allocation from state aid to a reorganized school district should, upon application of district treasurer, transfer such funds to district treasurer or, absent such application, retain funds credited to district until ordered to refund them in whole or in part to public school fund by some legally constituted body authorized to make such an order. Funds derived from local taxation should be credited to district and transferred to treasurer of district upon application of such treasurer.
<u>39-53</u>	Sept 28	DIVISION OF HEALTH. PROSECUTING ATTORNEY. ATTORNEY GENERAL.	The Division of Health may join as realtor in an action by the Prosecuting Attorney of a county or the Attorney General of the state in a legal action; that the Prosecuting Attorney of a county may exercise discretion as to whether he institutes a civil action when requested to do so by a state department such as the Division of Health.
39-53	Dec 22	HIGHWAY ENGINEERS. PUBLIC OFFICERS. COMPENSATION.	1. That the county highway engineer in a county of the third class can claim his per diem wage only for those days in which he actually performs statutory services as county highway engineer. 1. 2. Consultation with "interested persons" other than those with whom it is the statutory duty of the highway engineer to consult, is not the performance of services as county highway engineer from which he is entitled to claim compensation. 3. The county court is vested with the broad discretion in determining whether on any given day the county highway engineer has devoted to his duties enough time to earn his daily wage.
40-53	Apr 28	DIVISION OF PENAL INSTITUTIONS. CONTRACTS.	Provision for "delayed shipment" incorporated in contract for purchase of raw materials by reference is valid.
40-53	Aug 4	SPECIAL ROAD DISTRICTS.	Commissioners of special road district should continue to carry on business of district pending appeal from county court decision dissolving such district. County treasurer may honor warrants properly issued by commission pending such appeal.
41-53	Feb 25	CORONERS. OFFICE SPACE. COUNTY COURT. SEC. 49.510, RSMO. 1949.	It is the duty of the county, in a county of the third class, to furnish the county coroner an office or space to carry on his official duties; to maintain and equip said office; to provide supplies and equipment as are shown to be absolutely necessary; all to be taken care of and paid for out of county treasury, as provided for in Sec. 49.510, RSMo. 1949, as county court may direct.

41-53	Mar 18	SHERIFFS. FEES.	When term "day" is used in Section 57.290 as to time spent by sheriffs or other officers in taking prisoners to the penitentiary "day" is used as a measure of time and means a natural or calendar day.
41-53	Apr 9	COUNTY COURTS.	County court is not authorized to subject funds of county to risks incident to trade or commerce.
41-53	June 23	RECIPROCITY. MOTOR VEHICLES. LICENSES.	Complete reciprocity as regards registration of motor vehicles does not exist between the states of Missouri and Indiana; then a motor vehicle owned and registered in Indiana and leased to a Missouri resident for a period of more than thirty days must be registered in Missouri.
41-53	Oct 2	TAXATION. INSURANCE. DELINQUENT TAXES. LIENS.	County has lien for delinquent taxes on proceeds from insurance policy paid for destruction of insured leased building assessed separately from land.
41-53	Oct 5	Hon. Haskell Holman	WITHDRAWN
41-53	Oct 22	COUNTY CLERK. COUNTY COURT. CLERICAL HIRE.	Increase in amount county clerk can expend for clerical hire or additional compensation to regular deputy or assistant, provided for in Senate Bill 290, 67th General Assembly, may be expended during present term of county clerk.
41-53	Nov 4	COUNTY CLERKS. FEES.	Fees under Section 140.100, Subsection 2, RSMo 1949, for county clerks are accountable fees.
41-53	Dec 10	Hon. Haskell Holman	WITHDRAWN
42-53	Feb 17	PRISONERS. CRIMINAL LAW.	Solvent convicted defendant in county of the third class liable for board bill accruing while committed to jail by lawful authority as part of costs.
42-53	June 17	ROADS AND BRIDGES.	Township special road and bridge tax paid to county treasurer under Sec. 137.585, RSMo 1949; county may retain not to exceed five cents on the one hundred dollars assessed valuation for the county special road and bridge fund and is not required to spend amount withheld in township in which collected.
42-53	Dec 2	SCHOOLS. MERCHANTS.	Section 163.370, RSMo 1949, is not violated by "merchant" in installing and operating coin-operated soft drink and candy vending machine in public schools.
43-53	Feb 13	CORONERS OF FOURTH CLASS COUNTIES.	Coroner of fourth class county shall receive, as his total annual compensation, the sum of \$60.00, \$90.00, or \$120.00, depending upon population of county. This compensation is to be paid in equal monthly installments, which would make the monthly pay \$5.00, \$7.50, or \$10.00, depending, as does the total, on population of county.
43-53	Apr 3	Hon. William L.	WITHDRAWN

		Hungate	
43-53	Apr 20	CITIES, TOWNS AND VILLAGES. MUNICIPAL CORPORATIONS.	Municipal corporations of Vienna legally reactivated on Nov. 13, 1951; tax levy made in Dec., 1951, by db. of trustees not made in conformity with law, invalid levy, uncollectible.
43-53	May 1	COUNTY COURTS. NEWSPAPERS.	(1) Mandamus does not lie against newspaper to compel publication of county financial statement; (2) posting of such statement, as provided by Sec. 50.800, RSMo 1949, is sufficient when newspapers refuse publication; (3) refusal of publication by single owner of all newspapers in county does not violate Anti-Trust law.
43-53	May 26	PUBLIC BUILDINGS. HIGHWAY COMMISSION.	Contract for addition of State Highway Commission building to be let by Director of Public Buildings. Contract for contemplated State Highway Patrol Warehouse need not be let by Director of Public Buildings, but contract must be approved by him.
43-53	May 27	FERRIES. STATE HIGHWAY COMMISSION.	Missouri Highway Commission has authority to purchase, operate and maintain a ferry across the Mississippi River; Missouri Highway Commission has authority to enter into contract with the State of Illinois whereby the two states could share equally the cost of purchase, operation and maintenance of such a ferry.
43-53	Aug 27	SCHOOLS. SCHOOL DISTRICTS.	School district has no authority to transport children to private schools even though the pro rata cost of transportation might be paid by the private school child so transported.
43-53	Oct 13	TREASURER. OFFICERS.	County treasurer not entitled to receive extra compensation for her services performed in receiving, disbursing and keeping account of tolls and other revenues received from the operation of said bridge or bridges.
45-53	Apr 21	APPROPRIATION. REFUNDS.	Appropriation under Section 3.120, Laws of Missouri, 1951, page 47, is available only for refund of "taxes."
45-53	May 1	STATE MERIT SYSTEM. EMPLOYEES. POLITICAL ACTIVITIES PROHIBITED WHEN.	Personnel Advisory Board Rule 15.4(b) prohibits employees under State Merit System from being candidates for nomination or election to public office, or engaging in political activities while holding such position. Merit system employee cannot become candidate for election of director to city school board without resigning or securing leave of absence. May attend political mass meeting but cannot take active part except to express opinion or vote on any proposition if afforded the opportunity.
46-53	Feb 25	COUNTY BUDGET LAW.	Attempted purchase of unbudgeted item by county officer does not create obligation against county.
46-53	Oct 16	CIRCUIT CLERK.	Circuit Clerk in Class 4 Counties, with an assessed valuation of more

		COMPENSATION. TAXATION. CERTIFICATE OF PURCHASE AT LAND SALES – RIGHTS OF HOLDER; RIGHTS OF COUNTY.	than Five Million Dollars, entitled to \$700.00 annually as Parole Commissioner, effective April 12, 1952. Holder of certificate of purchase loses all rights in land and purchase price paid if County Collector does not execute and record deed to purchaser within 4 years after date of certificate under Sec. 140.410, RSMo 1949. County does not thereby become the owner of such lands.
46-53	Dec 31	KANSAS CITY SCHOOL DISTRICT. GENERAL OBLIGATION BONDS. BLEACHERS.	Proceeds from the sale of General Obligation Bonds of the Kansas City School District, issued pursuant to a favorable vote on May 29, 1951, of more than two-thirds of the electors voting at a special election, may be used for the construction of bleachers and accompanying facilities on athletic fields on public high school sites owned and operated by the Kansas City School District.
48-53	Mar 6	MOTOR VEHICLES. PROBATE COURTS.	Creditor who obtains refusal of letters on estate of decedent in accordance with Section 461.120, RSMo 1949, entitled to transfer of motor vehicle but must show Director of Revenue authority from proper court if director requires.
48-53	June 9	LIQUOR. WATERS.	No intoxicating liquor or 3.2 per cent non-intoxicating liquor license may be issued to boats operating on Lake of the Ozarks.
48-53	Sept 23	BOARD OF ACCOUNTANCY.	State Board of Accountancy has no power with or without a rule to that effect to prohibit the use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy; nor does it have any power to refuse, on that ground alone, to register the name of a partnership or issue a permit to practice.
48-53	Nov 25	ELEEMOSYNARY INSTITUTIONS. CONSTRUCTION OF HOUSE BILLS NOS. 457 AND 459.	The grant by the City of St. Louis to the State of Missouri, on July 19, 1948, of the colony for feeble-minded and epileptics, and the state hospital for the insane, were absolute grants unconditioned and without possibility of reverter; the state of Missouri is not bound to perpetually maintain the two above institutions; personal property or additions made to them after the grant cannot revert to the City of St. Louis.
49-53	Jan 5	ELECTIONS. STATE REPRESENTATIVES.	A voter residing in that portion of Kansas City located in Clay County and who desires to vote in a special election to fill a vacancy in the office of state representative must comply with the city registration laws; precinct judges and clerks to the same in number as at general elections.
49-53	Jan 8	Hon. Milton B. Kirby	WITHDRAWN
49-53	July 21	OFFICERS. PUBLIC OFFICIALS.	The term of Honorable Charles F. Ford as Commissioner of the Bi-State Development Agency is for the term of five years from the regular expiration date of the term of his predecessor in office rather than five

			years from the date of his own appointment and qualification.
50-53	May 4	Hon. Paul Knudsen	WITHDRAWN
50-53	Oct 16	SHERIFFS. MILEAGE. COSTS.	When subpoenas, summons and warrants, all in one case, are given to the sheriff for service on one trip, that for all such service by the sheriff, he is entitled to receive mileage only for service had on one person which should be computed on service to the most remote point and return. If, for good cause shown, sheriff is unable to make all such service on the same trip, he shall be entitled to additional necessary mileage required to make such service which must be approved by the prosecuting attorney and county court. However, in no case shall the sheriff be entitled to but one mileage for service in any single case on any one person.
<u>50-53</u>	Nov 13	VOTING. ELECTIONS.	If an employer seeks to penalize an employee for taking time off from his employment to vote, on the ground that such employee did not utilize such time to vote, the burden of proof that the employee did not vote is upon the employer. All of the employees or any number of such employees of a company, may designate a representative to request of their employer that they be absent from their employment for the purpose of voting.
<u>52-53</u>	Jan 7	INSURANCE.	Articles of Incorporation of Automobile Owners Safety Insurance Company.
52-53	Apr 1	INSURANCE.	Articles of Incorporation of Grant Mutual Insurance Company.
<u>52-53</u>	Apr 10	INSURANCE.	Amendment of Articles of Incorporation of Postal Life and Casualty Insurance Company.
52-53	Apr 14	TAXATION. INSURANCE.	Insurance companies may deduct intangible personal property tax in computing premium tax under section 148.400, RS Mo 1949.
52-53	Apr 17	INSURANCE.	Contract, "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214", offered by The Guardian Credit Indemnity Corporation is a contract of insurance. Agent acting for unauthorized company in selling contract subject to prosecution under Section 375.300, RSMo 1949.
52-53	Apr 24	INSURANCE.	Amendment of Articles of Incorporation of Great Republic Life Insurance Company.
52-53	May 12	INSURANCE.	Amendment of Articles of Incorporation of Automobile Owners Safety Insurance Company.
<u>52-53</u>	May 14	INSURANCE.	Articles of Incorporation of Mid-America Fie and Marine Insurance Company.
52-53	May 14	INSURANCE.	Amendment of Articles of Incorporation of Mid-Continent Casualty

			Company inconsistent with laws of Missouri.
<u>52-53</u>	May 26	INSURANCE.	Amendment of Articles of Incorporation of American Automobile Insurance Company.
<u>52-53</u>	May 28	INSURANCE.	Amendment of Articles of Incorporation of Mid-Continent Casualty Company.
<u>52-53</u>	June 5	INSURANCE.	Articles of Incorporation of Meramec Mutual Insurance Company.
<u>52-53</u>	July 31	INSURANCE.	Articles of Incorporation of Columbia Mutual Insurance Company.
52-53	Aug 7	INSURANCE.	Described contract of Hill Funeral Home constitutes an insurance contract, and offering of the same to the public without meeting requirements of Missouri Insurance Code is an offense under Sec. 375.310, RSMo 1949.
<u>52-53</u>	Sept 8	INSURANCE.	Articles of Incorporation of Missouri National Life Insurance Company.
52-53	Nov 16	INSURANCE.	Farmers' mutual insurance companies subject to Sections 380.480 to 380.570, RSMo 1949, may not write "full coverage" policy on motor vehicles covering member's liability for personal injury or property damage to third persons.
52-53	Dec 10	INSURANCE.	\$100,000.00 limitation in subparagraph (d) of Section 375.330, RSMo 1949, applicable to insurance company's right to purchase, hold and convey real estate is applicable to mutual companies comprehended in subparagraphs (b) and (c) of said statute.
53-53	May 13	MOTOR VEHICLES. COUNTY COLLECTORS.	Under Section 301.025, Mo.R.S., Cum. Supp., 1951, the treasurer and ex-officio collector of a township organization county is not required to furnish to an applicant for a motor vehicle registration license, such applicant having paid his state and county tangible personal property taxes for the preceding year, a statement that no such taxes are due, nor is he required orally or informally at the request of the deputy commissioner of motor vehicle to make any statement as to whether an applicant has paid his taxes.
53-53	June 11	MOTOR VEHICLES. SALES TAX. USE TAX.	The "Retailers' Occupation Tax" levied in Illinois upon motor vehicle retailers is not a "sales tax or use tax" which may be credited to the purchase of a motor vehicle in Illinois who brings it to Missouri within ninety days after the purchase.
53-53	July 9	ROADS AND BRIDGES. TOWNSHIPS.	Township board not required to maintain streets of incorporated town nor to pay part of road taxes into town treasury.
<u>54-53</u>	Mar 5	MOTOR VEHICLES. OPERATORS' LICENSES.	Operation of overweight, overlength, or overwide vehicle upon the highway is not a nonmoving traffic violation.

56-53	Jan 21	BANKS. AGRICULTURE.	"Baled burlap" and "baled cotton" are "agricultural products or the manufactured or processed derivatives of agricultural products" as such language is used in subparagraph (1)(c) of Section 362.170, RSMo 1949.
56-53	May 6	Hon. Douglas Mahnkey	WITHDRAWN
<u>56-53</u>	May 15	CREDIT UNIONS. DISSOLUTION.	A solvent credit union, subject to provisions of Chapter 370, RSMo 1949, but which cannot effect liquidation and dissolution under the provisions of that chapter, may do so under the provisions of Chapter 351, RSMo 1949.
56-53	June 13	CHANGE OF VENUE. MAGISTRATE COURTS. COSTS.	(1) \$5 filing fee paid to clerk of Magistrate Court upon commencement of civil suit shall be paid by said clerk to Dir. of Revenue, or to county treasurer if magistrate court was created by order of circuit court, at end of month, not transferred to court receiving costs by reason of change of venue; (2) circuit clerk may not demand payment of filing fee on change of venue from magistrate court, may not lawfully refuse filing case transferred from magistrate court to circuit court on change of venue; (3) party taking change of venue shall be liable for costs, but magistrate is required to grant change of venue even though costs have accrued.
<u>57-53</u>	Jan 15	COUNTY ATTORNEY'S COMMISSION.	The county attorney's commission need not be recorded or filed in any county office.
<u>57-53</u>	Feb 25	GENERAL ASSEMBLY.	The General Assembly has the power to appropriate money for the refund of taxes collected under an unconstitutional statute.
<u>57-53</u>	Mar 11	COSTS. CHANGE OF VENUE.	The costs incurred in a criminal case on change of venue are payable by the county in which the proceedings originated.
57-53	Mar 31	Hon. Frank W. May	WITHDRAWN
57-53	Aug 7	THIRD CLASS COUNTY. COUNTY BUDGET LAW. SURPLUSES.	1. A county of third class, having accumulated a surplus over a period of years from the balances of funds of which the objects of their creation are fully satisfied, may use such surplus funds in the building of a county jail. Such expenditure should be specifically budgeted. 2. Use of such funds for such purpose is within the discretion of the county court, and does not require voter approval. 3. Bonds may be issued to supply any money needed in addition to such surplus fund.
<u>57-53</u>	Oct 22	SCHOOLS. SCHOOL DISTRICTS.	County treasurer having state apportioned free textbook money belonging to district located in part in another county to remit such money to treasurer of said district.
58-53	Feb 10	Mr. Leon McAnally	WITHDRAWN

58-53	Feb 13	SCHOOLS. PROSECUTING ATTORNEY.	Duty of the Prosecuting Attorney to prosecute for violation of compulsory school attendance law. (Chapter 164, RSMo 1949).
<u>58-53</u>	Feb 19	CRIMINAL LAW.	Construction of Section 561.440, RSMo 1949.
<u>58-53</u>	Mar 18	RECORDER OF DEEDS. FEES. OFFICERS.	Recorder of deeds of 3rd class counties having a separate circuit clerk and recorder shall make annual report of fees received by him to the county court at end of each calendar year.
<u>58-53</u>	Apr 14	COUNTY HOSPITALS. TAXATION.	County court must levy tax sufficient to provide fund required by board of trustees for annual operation of county hospital.
<u>58-53</u>	June 2	ROADS. DRAINS.	The willfull and knowing depositing of refuse in the side drainage ditches of a public road in sufficient quantities substantially to obstruct water therein, regardless whether the road is damaged or the traveled portion thereof is obstructed, is a punishable offense under Section 229.150, RSMo 1949.
<u>58-53</u>	July 7	STATE FEDERAL SOLDIERS' HOME. ADMISSION. WIDOW.	When widow of a veteran remarries she will lose her eligibility as an entrant to the State Federal Soldiers' Home on the basis of being the widow of the aforesaid deceased veteran.
<u>58-53</u>	Aug 28	COSMETOLOGY. EMBALMERS.	One who performs work upon the hair of a corpse is not practicing the occupation of hairdressing.
58-53	Nov 6	Hon. John J. McAtee	WITHDRAWN
<u>58-53</u>	Nov 13	COSMETOLOGY. UNITED STATES.	The Missouri law relating to the registration of shops in which the occupation of hairdressers, cosmetologists and manicurists is practiced is not applicable to shops located at Camp Crowder nor at Fort Leonard Wood in Missouri.
<u>58-53</u>	Nov 14	CIVIL DEFENSE.	Tort liability of volunteer participants in Civil Defense program.
<u>58-53</u>	Dec 29	LIQUOR CONTROL. SPECIAL CHARTER COUNTIES.	St. Louis County is not a "municipal corporation" within the meaning of Liquor Control Law.
59-53	Feb 3	PUBLIC BUILDINGS.	A contract for public works entered into, through mistake, with a party not the low bidder is void; contract may be let with low bidder notwithstanding.
<u>59-53</u>	Feb 24	PUBLIC BUILDINGS.	A contract for public work may be let to a foreign corporation not licensed to transact business in the state, such not coming within the term "Transact business."
<u>59-53</u>	Mar 25	DEFINITIONS. OLD AGE	Mausoleum not "cash or negotiable security" in determining eligibility for public assistance, under Section 208.010, RSMo 1949.

		ASSISTANCE. PUBLIC HEALTH AND WELFARE. PUBLIC ASSISTANCE.	
<u>59-53</u>	May 6	PUBLIC BUILDINGS.	Interpretation of provisions of a contract relating to the construction of a new Employment Security Office Building.
<u>59-53</u>	Dec 8	PUBLIC BUILDINGS.	Examination of Release.
62-53	Jan 31	Hon. John E. Mills	WITHDRAWN
62-53	Apr 25	TOWNSHIP ORGANIZATION. EX OFFICIO COLLECTORS.	The ex officio collector in a county under township organization is entitled to only two percent for collecting delinquent taxes returned by the township collectors.
62-53	May 15	NEPOTISM. PUBLIC OFFICERS. SCHOOLS.	Relative of Member of County School Board may be employed as school teacher.
62-53	June 19	CRIMINAL LAW. INDICTMENTS.	A plea of former jeopardy may not successfully be interposed in bar to a prosecution for manslaughter where the defendant has previously been acquitted on the charge of careless and reckless driving; it is improper to join two separate and distinct offenses of manslaughter against the same defendant in one indictment.
62-53	June 19	SCHOOLS. TAXATION.	No obligation on part of either sending or receiving district to provide free transportation for pupils attending high school in another district, but if provided, sending district liable for costs in excess of state aid, provided such obligation can be met out of revenue provided by constitutional levy. School district cannot be forced to increase levy above constitutional maximum.
62-53	July 6	Hon. Joe H. Miller	WITHDRAWN
62-53	July 9	Hon. Joe H. Miller	WITHDRAWN
62-53	Oct 30	Hon. John E. Mills	WITHDRAWN
62-53	Nov 3	UNIVERSITY OF MISSOURI.	Board of Curators of the University of Missouri authorized to construct married student apartment dormitories under Chapter 176, RSMo 1949.
62-53	Nov 6	CRIMINAL LAW. CHANGE OF VENUE. FINES.	Fines imposed in criminal cases on change of venue shall be paid into the county where the indictment was found or the prosecution originally instituted.
63-53	Jan 22	COUNTY COURTS.	A county court speaks only through its record. County not bound by oral agreements with county judges.

63-53	Feb 3	CIRCUIT CLERK. EX OFFICIO RECORDER.	Circuit clerk and ex officio recorder of a county of the fourth class within a prescribed population and assessed valuation is entitled to salary in the amount of \$3150.
63-53	Feb 4	SHERIFFS. FEES AND SALARIES. OFFICERS.	Sheriff not entitled to mileage for arresting a person in the act of committing a criminal offense several miles from county seat and bringing him to jail.
63-53	Feb 6	TAXATION. MERCHANTS TAX. COUNTY.	Liability for merchants tax of merchant selling business, and liability of purchaser of said business.
63-53	May 28	SCHOOLS. ELECTIONS.	Nomination of a member of a board of directors of a school district by principal of high school under Section 165.657, RSMo 1949, will not invalidate his election if the election is otherwise properly conducted.
63-53	Sept 9	SCHOOL DISTRICTS. ELECTIONS.	The school district reorganization law does not permit a county board of education to call an election in only one of the enlarged districts proposed by the reorganization plan, the remainder of the proposed enlarged districts not voting thereon.
63-53	Nov 24	TAXATION. MERCHANTS' TAX. COUNTY AND TOWNSHIP ASSESSORS.	Circumstances under which township assessor in Fourth Class county, entitled to compensation for taking merchants' statements.
64-53	May 1	SALES TAX ON ELECTRICITY AND GAS.	An apartment house is subject to the Missouri Sales Tax on the purchase of electricity and gas for the use of its tenants.
64-53	May 1	DIRECTOR OF REVENUE. DIVISION OF PENAL INSTITUTIONS. MOTOR VEHICLE REGISTRATION.	(1) Registration plates and signs to be supplied Director of Revenue at cost of manufacture or not to exceed open market cost, whichever is greater. (2) No accounting method for recoupment of interdepartmental overcharges.
64-53	June 19	CONSULAR OFFICIALS.	Consular officials and employees of the British Consulate are entitled to motor vehicle license and drivers' license without paying the tax or fee required therefor by statute.
64-53	June 23	SCHOOL BUS. USE OF. TYPES OF LICENSE.	A school bus license is not a proper license to be used on a bus which is used to transport children to Sunday School. A school bus license is not the proper license for the use of the bus in transportation of teenage scouts to summer camps and recreational areas.
64-53	Aug 17	FUND COMMISSIONERS.	Procedure for payment of coupons detached from state road bonds in absence of an appropriation by the Legislature. Fund under Section 30,

		APPROPRIATION. CONSTITUTION.	Article IV, Constitution of Missouri, 1949, for payment of principal and interest of any outstanding state road bonds stands appropriated without legislative action.
<u>64-53</u>	Sept 3	FEES. BOUNTIES. COUNTY CLERK. COMPENSATION.	County Clerk not entitled to retain in addition to his compensation the twenty-five cent fee for the taking of affidavits relating to bounties on wild animals.
<u>64-53</u>	Oct 9	ASSESSORS. CLERICAL HELP. DEPUTIES.	The Six Hundred Dollars provided the County Assessor in Counties of Classes 3 and 4, provided in Section 53.095, Mo. R. S., Cum. Supp. 1951, may be distributed over the year in the discretion of the County Assessor.
64-53	Nov 3	MOTOR VEHICLE OPERATORS' LICENSES.	Director of Revenue does not have authority to set aside revocation or suspension of motor vehicle operator's licenses.
64-53	Nov 6	SCHOOLS. SCHOOL DISTRICTS.	The school board may allot to the building fund such percentage of tax moneys received from direct taxation as its judgment dictates, and that, voter approval is not necessary before such moneys are placed into the building fund.
64-53	Dec 31	TAXES. INHERITANCE TAX. SENATE BILL NO. 53. HOUSE BILL NO. 62.	(1) Senate Bill No. 53 and House Bill No. 62 of the 67th General Assembly held consistent in grant of exemption. (2) Qualification in Senate Bill No. 53 construed to relate only to deaths occurring subsequent to effective date of act.
65-53	Feb 24	SPECIAL ROAD DISTRICTS.	A special road district newly organized is entitled to its portion of the funds collected and unexpended at the time the district came into existence.
65-53	Mar 24	Mr. Charles E. Murrell, Jr.	WITHDRAWN
65-53	June 5	PROSECUTING ATTORNEYS. HOUSE BILL NO. 160.	Effective date of H.B. 160 is August 29, 1953; Prosecuting Attorneys of 3rd and 4th class counties to be paid proportionately on basis of period of time remaining in 1953 after effective date; Prosecuting Attorneys entitled to be paid for three days in month of August, 1953.
66-53	Mar 17	STATE PURCHASING AGENT. PUBLIC RECORDS.	State Purchasing Agent may not sell the right to inspect and copy public records.
66-53	May 26	STATE PURCHASING AGENT.	Duty of the State Purchasing Agent to approve departmental direct purchase orders.
66-53	June 26	TAXATION. CORPORATIONS.	Columbia Broadcasting System, Inc., liable for franchise tax provided by Section 147.010, RSMo 1949.

66-53	Oct 2	STATE PURCHASING OFFICER.	When the State Purchasing Agent requests bids for an article, the article shall be described in general specification, if by so doing the State Purchasing Agent can obtain the article which he wants, but if he cannot do so by describing the article in general terms and by general specifications he may then use a brand or trade name. Whether he can describe the article in general terms and by general specification is largely a matter within his discretion.
<u>68-53</u>	May 4	SEWER DISTRICTS IN ST. LOUIS COUNTY.	The extension of a sewer district in St. Louis County can only be into a "contiguous" area, and that by "contiguous" is meant an area which is "adjacent" or lying immediately next to and adjoining.
<u>68-53</u>	June 23	INSURANCE.	Officers, of foreign insurance company operating in Missouri without proper authorization, not subject to extradition and prosecution. Sole redress is civil action against corporation for penalty prescribed by Section 375.310, RSMo 1949.
69-53	Feb 13	STATE PARK BOARD. CONSTITUTION. APPROPRIATIONS.	State Park Board has no authority to convey property of State of Missouri. Sec. 3, sub-sec. 1, proposed Senate Bill No. 8, constitutional; however, Legislature must appropriate money from fund before State Park Board can expend same.
69-53	Mar 11	OFFICERS. FEES AND SALARIES. SHERIFFS.	Fees collected by sheriff for commitment of a person to jail must be charged and collected by him on behalf of the county.
69-53	Nov 19	SHERIFFS.	WITHDRAWN
70-53	Jan 31	TAXATION. ASSESSOR'S FEES.	Assessment lists cannot be added to the Assessor's book in class three counties after his book has been turned over to the County Clerk.
70-53	Feb 9	MERIT SYSTEM. DEDUCTIONS FROM WAGES.	The Superintendent of the St. Louis State Hospital does not have the authority to deduct the sum of \$9.00 per month, for the noon meal, from the salaries of day employees, unless such deduction was made a condition of employment and unless such employees are required to take such meal at the hospital.
<u>70-53</u>	Feb 24	STATE FORESTRY LAW. TAXATION.	Owner must pay taxes carried against the land if forest cropland is removed from said classification.
70-53	May 18	LICENSES. PEDDLERS.	Bakery products such as cakes, bread, etc. are not "Agricultural and Horticultural Products" under the exception in Sec. 150.470, RSMo. 1949. The term "land carriage" used in paragraph 3 of Sec. 150.500 RSMo. 1949 would include motor vehicles.
70-53	Aug 17	Hon. Richard K. Phelps	WITHDRAWN

70-53	Sept 14	COSTS. CRIMINAL. MAGISTRATE COURT.	Costs of services rendered by reporter or stenographer in transcribing testimony in homicide case under Section 544.370, Vernon's Annotated Missouri Statutes shall be taxed as costs in the case.
<u>70-53</u>	Sept 16	CRIMINAL COSTS. STATE.	State not liable for costs of transcript, on appeal, ordered by trial court under Section 485.100, RSMo 1949, when defendant had not properly perfected an appeal.
71-53	Jan 21	APPROPRIATIONS. CONSTITUTIONAL LAW. GOVERNOR. SCHOOLS.	Appropriation for M. U. Medical and surgical school is valid and Governor's attempted partial veto of bill does not render appropriations unconstitutional.
71-53	Jan 29	COUNTY DISTRICT JUDGES OF CLASS THREE COUNTIES. COMPENSATION.	A county district judge elected at the November 4th, 1952, general election is entitled to compensation set forth in Section 49.110, Laws Mo. 1951, p. 373; the presiding judge elected on the same date to fill out the unexpired term of his predecessor not entitled to the increased compensation mentioned in Section 49.110, supra.
<u>71-53</u>	Feb 4	EMPLOYMENT SECURITY.	John L. Porter, Director of the Division of Employment Security of Missouri, is person who has authority to requisition funds from the Unemployment Trust Fund.
71-53	Mar 5	GENERAL ASSEMBLY. EXPENSES.	Under provisions of 16a, Article III of the Constitution, a member of the General Assembly is entitled to reimbursement for actual and necessary expenses as reported to the proper officers and certified to the state comptroller in an amount up to and including ten dollars per day.
<u>71-53</u>	Mar 24	QUO WARRANTO. PROSECUTING ATTORNEYS.	Prosecuting Attorney should not represent respondents in Quo Warranto.
71-53	May 1	GENERAL ASSEMBLY. HOUSE OF REPRESENTATIVES. OFFICERS. FEES, COMPENSATION AND SALARIES.	(1) House Resolution No. 30 is a directory provision and compliance is not mandatory. (2) Reimbursement to Legislator for expenses not justified by mere certification as to presence.
71-53	May 12	Hon. William Pittman	WITHDRAWN
<u>71-53</u>	June 19	AGRICULTURE. DAIRY PRODUCTS.	A field representative or field superintendent employed or acting on behalf of a dairy products manufacturing plant located in another state or for a cream station or milk route is not required to obtain a field superintendent's license under the provisions of Section 196.605,

LOCKERS. users against locker content loss, and he is not relieved of the execution by the customer of a waiver of insurance for furnish such insurance. The Commissioner may revoke or su license of the offending operator or may refuse to issue a license of the offending operator or may refuse to issue a license of the offending operator may be proceeded against by injunct the offending operator may be proceeded against by injunct the offending operator may be proceeded against by injunct the offending operator may be proceeded against by injunct the offending operator or may refuse to issue at the offending operator or may refuse to issue at the offending operator or may refuse to issue at the offending operator or may refuse to issue at the offending operator or may refuse to issue at the offending operator or may refuse to issue at the offending operator on a quality and processing to one of locker plant is not required maintain a chill room, a cutting and processing room or a q sharp freeze room; nor does the law require that the wrap processing of food be done at the locker plant. 71-53 Aug 18 LOCKER PLANTS. A license to operate a particular locker plant may, with the permission of the Commissioner of Agriculture, be transfer one person to another; but such license may not be transfer one locker plant to another. 71-53 Oct 28 Hon. W. H. Pinnell WITHDRAWN 72-53 Mar 30 CITIES. Candidates for election to offices in cities of the third class, under the mayor-council form of government, are required statements of expenditures under Section 129.110, RSMo 1 they are restricted to the expenditures limited in Section 12 RSMo 1949. 72-53 Apr 13 LIBRARIES. Negotiation of contract between county library district and district under Sec. 182.080, RSMo 1949, does not thereby or regional library district so as to qualify for equalization grar regional district under Sec. 181.060(4), RSMo 1949. 72-53 Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating				RSMo 1949.
UNINCORPORATED ASSN. AGRICULTURE. AGRICULTURE. AGRICULTURE. AGRICULTURE. AGRICULTURE. AGRICULTURE. AGRICULTURE. AGRICULTURE. AUg 18 LOCKER PLANTS. AGRICULTURE. A license to operate a particular locker plant may, with the permission of the Commissioner of Agriculture, be transfer one person to another; but such license may not be transfer one locker plant to another. T1-53 Aug 18 Cot 28 Hon. W. H. Pinnell WITHDRAWN T2-53 Jan 9 Mr. Paxton P. Price WITHDRAWN Candidates for election to offices in cities of the third class, under the mayor-council form of government, are required statements of expenditures under Section 129.110, RSMo 1949. T2-53 Apr 13 LIBRARIES. Negotiation of contract between county library district and district under Sec. 182.080, RSMo 1949, does not thereby or regional district under Sec. 181.060(4), RSMo 1949. T2-53 Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating for employees to vote, covers all elections and is not confine primary and general elections.	1	1-53		A locker plant operator is required to furnish insurance to indemnify users against locker content loss, and he is not relieved of this duty by the execution by the customer of a waiver of insurance for failure to furnish such insurance. The Commissioner may revoke or suspend the license of the offending operator or may refuse to issue a license; or the offending operator may be proceeded against by injunction.
AGRICULTURE. permission of the Commissioner of Agriculture, be transfer one person to another; but such license may not be transfer one locker plant to another. 71-53 Oct 28 Hon. W. H. Pinnell WITHDRAWN 72-53 Jan 9 Mr. Paxton P. Price WITHDRAWN 72-53 Mar 30 CITIES. Candidates for election to offices in cities of the third class, under the mayor-council form of government, are required statements of expenditures under Section 129.110, RSMo 14949. 72-53 Apr 13 LIBRARIES. Negotiation of contract between county library district and district under Sec. 182.080, RSMo 1949, does not thereby or regional library district so as to qualify for equalization gran regional district under Sec. 181.060(4), RSMo 1949. 72-53 Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating for employees to vote, covers all elections and is not confirmary and general elections.	. L	1-53	UNINCORPORATED ASSN.	A locker plant operated by an unincorporated association such as the Armstrong Lockerette described in your request is subject in every respect to the law regulating the operation of locker plants, Section 196.450, et seq., RSMo 1949. A locker plant is not required by law to maintain a chill room, a cutting and processing room or a quick or sharp freeze room; nor does the law require that the wrapping or processing of food be done at the locker plant.
72-53 Jan 9 Mr. Paxton P. Price WITHDRAWN 72-53 Mar 30 CITIES. ELECTIONS. EXPENDITURES. Apr 13 LIBRARIES. Apr 13 LIBRARIES. Negotiation of contract between county library district and district under Sec. 182.080, RSMo 1949, does not thereby or regional district under Sec. 181.060(4), RSMo 1949. 72-53 Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating for employees to vote, covers all elections and is not confire primary and general elections.	Ü	<u>'1-53</u>		A license to operate a particular locker plant may, with the written permission of the Commissioner of Agriculture, be transferred from one person to another; but such license may not be transferred from one locker plant to another.
T2-53 Mar 30 CITIES. ELECTIONS. EXPENDITURES. Candidates for election to offices in cities of the third class, under the mayor-council form of government, are required statements of expenditures under Section 129.110, RSMo 1 they are restricted to the expenditures limited in Section 12 RSMo 1949. Apr 13 LIBRARIES. Negotiation of contract between county library district and district under Sec. 182.080, RSMo 1949, does not thereby or regional library district so as to qualify for equalization grant regional district under Sec. 181.060(4), RSMo 1949. T2-53 Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating for employees to vote, covers all elections and is not confirmance primary and general elections.	Oct 28	1-53	Hon. W. H. Pinnell	WITHDRAWN
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district under Sec. 182.080, RSMo 1949, does not thereby or regional library district so as to qualify for equalization grant regional district under Sec. 181.060(4), RSMo 1949. Aug 28 ELECTIONS. Senate Bill No. 235 of the 67th General Assembly, relating for employees to vote, covers all elections and is not confine primary and general elections.	E	<u>'2-53</u>	ELECTIONS.	Candidates for election to offices in cities of the third class, operating under the mayor-council form of government, are required to file statements of expenditures under Section 129.110, RSMo 1949, and they are restricted to the expenditures limited in Section 129.100, RSMo 1949.
for employees to vote, covers all elections and is not confined primary and general elections.	Apr 13 L	<u>/2-53</u> /	LIBRARIES.	Negotiation of contract between county library district and city library district under Sec. 182.080, RSMo 1949, does not thereby create a regional library district so as to qualify for equalization grants as a regional district under Sec. 181.060(4), RSMo 1949.
72-53 Oct 7 COUNTY. Compensation provided for two clerks of Board of Election	Aug 28 E	<u>'2-53</u> ,	ELECTIONS.	Senate Bill No. 235 of the 67th General Assembly, relating to time off for employees to vote, covers all elections and is not confined to primary and general elections.
COMPENSATION. CLERKS OF BOARD OF ELECTION COMMISSIONERS.	C	<u>'2-53</u> (COMPENSATION. CLERKS OF BOARD OF ELECTION	
72-53 Oct 14 Hon. Stephen R. Pratt WITHDRAWN	Oct 14	2-53	Hon. Stephen R. Pratt	WITHDRAWN

72-53	Oct 15	Mr. Paxton P. Price	WITHDRAWN
73-53	Apr 29	FIRE PROTECTION DISTRICTS, BOUNDARIES.	A fire protection district may not extend its boundaries to include only a part of an incorporated city, town or village.
73-53	Oct 14	STATE HOSPITALS. PHYSICIANS. CONSENT.	At the time of entering a mental hospital a patient cannot, nor can anyone in his behalf, give permission to the hospital, to perform upon him surgical operations for an indefinite future time whenever it was decided by the hospital staff that surgical operations were necessary.
73-53	Oct 19	APPROPRIATIONS.	Money appropriated under Section 5.161 of House Bill No. 383, 67th General Assembly, may be expended for all purposes necessarily related to the training of professional personnel for mental hospitals of the state.
73-53	Dec 16	Hon. B. E. Ragland	WITHDRAWN
74-53	June 19	AGRICULTURE. MO. STATE PENITENTIARY. ANIMALS.	Missouri State Penitentiary is not required to cook the garbage fed to swine owned by the state and fed on the state penitentiary farms under House Bill No. 60 of the Sixty-seventh General Assembly.
75-53	Mar 5	SOCIAL SECURITY. COUNTY EMPLOYEES.	County not required to pay social security contributions on wages of former employees not employed at the time of the entry upon agreement with Federal Social Security Agency. Officers are required to pay contributions for former term although serving a subsequent term at the time county enters into agreement.
75-53	Apr 16	COUNTY TREASURERS. OFFICERS.	County treasurer would not receive compensation provided for services in connection with intangible tax if intangible tax is repealed.
75-53	May 15	NEPOTISM. PUBLIC OFFICERS. SCHOOLS.	School director causing appointment of relative within certain degree as teacher or bus driver forfeits office. Purchase contracts between school director and board of education prohibited.
75-53	May 28	SOCIAL SECURITY. COUNTY CLERK.	Effective date of additional compensation for county clerks for performing duties imposed after county elects to accept provisions of State Social Security Law.
76-53	May 26	PUBLIC RECORDS. OFFICERS.	Notice of proposed change in contract required to be filed under Section 295.100, RSMo 1949, is a public record and subject to inspection by the members of the public.
76-53	May 26	CIRCUIT CLERK. COURT REPORTER.	In criminal appeals it is the duty of the clerk and the court reporter to make out and certify to the proper appellate court a full transcript; the costs are not required to be advanced.
<u>76-53</u>	June	DITCHES.	Sections 246.200 and 246.210, RSMo 1949, prohibiting certain

	24	DRAINAGE DISTRICT.	obstructions of drainage ditches, do not apply to acts done by the State Highway Commission.
76-53	Aug 27	SCHOOLS. SCHOOL DISTRICTS.	Private individual contracting with school district for transportation of public school children in privately owned bus may also contract with parents of individual children or any other person or with a private school for transportation of such children to a private school.
77-53	June 26	AGRICULTURE. STATE VETERINARY SURGEON. PUBLIC OFFICERS.	Deputy state veterinary surgeon not required to be resident of Missouri.
<u>77-53</u>	July 16	CREDIT UNIONS.	Shareholder may not designate beneficiary to receive shares upon death.
77-53	Aug 6	BANKS.	Administrator holding shares of capital stock of bank in his official capacity as administrator does not won said stock "in his own right" so as to permit him to become a director of said bank under qualifications set forth in Section 362.245, RSMo 1949.
77-53	Aug 19	GARBAGE. AGRICULTURE. ANIMALS.	1. A college which serves food to students in substantial numbers on a commercial basis, in dining rooms of the college, and feeds the garbage from such dining rooms and kitchens to swine, are within the purview of H.B. No. 60, 67th General Assembly, and are required to cook such garbage before feeding. 2. A nursing home, which furnishes to elderly people, invalids and convalescents living quarters, nursing service and food on a commercial basis, and who feed the garbage to swine, are within the purview of H.B. No. 60, 67th General Assembly, and are required to cook garbage before feeding.
77-53	Sept 23	TRUST COMPANIES. BANKS.	Trust companies operating under Chapter 363, RSMo 1949, may refuse to offer fractional shares of stock or issue certificates of stock evidencing ownership of such fractional shares.
77-53	Oct 8	CONSTRUCTION OF STATUTES. TRUST COMPANIES.	Section 363.460, RSMo 1949, is mandatory and requires every corporation doing trust business to create and maintain a surplus fund in the manner and for the purposes provided therein. A corporation chartered for the sole purpose of engaging in trust business cannot carry on any phase of banking business. Not being authorized to accept money deposits, it does not have deposit liability within meaning of Section 363.470, RSMo 1949, and section is inapplicable to such corporation.
77-53	Oct 22	AGRICULTURE. ANIMALS. BRUCELLOSIS. ADMINISTRATIVE	1) Commissioner of Agriculture has no independent power to promulgate rule requiring testing for Brucecllosis of cattle being brought into Mo. and exclusion or other disposition of those found to be infected with such disease. Sec. 267.260, RSMo 1949, confers such

		LAW.	power upon him acting conjointly with the State Vet. and representatives of the U. S. Dept. of Agri. 2) Com. of Agri. has no independent power to promulgate rules governing transportation of animals to and from community sale barns and terminal stockyard markets but may make such rules relating only to suppression of Bang's Disease conjointly with State Vet. and representatives of the U.S. Dept. of Agri. 3) The power of quarantine extends only to diseased stock and those capable of carrying or causing the disease. The power of quarantine cannot be extended by rule or regulations. 4) State Vet. may refuse to permit cattle owner operating under Plan C of Sec. 267.292, RSMo., Cum. Supp., 1951, to move cattle of adult herd without test showing freedom from Brucellosis. 5) Sec. 267.130, RSMo 1949, covers all dangerous diseases of cattle of the contagious, infectious or spreading character.
77-53	Dec 3	TRUST COMPANIES.	Trust company subject to Chapter 363, RSMo 1949 needs only majority vote of all its stock membership to amend articles of incorporation to effect increase in rate of cash dividend on its preferred stock.
77-53	Dec 9	NEWSPAPERS. LEGAL PUBLICATIONS. NOTICES.	Proposed changes in the Nevada Daily Mail and the Nevada Herald will not change their status as legal publications and daily and weekly newspapers respectively.
78-53	Feb 4	COUNTY ASSESSOR. OFFICER. COMPENSATION. QUO WARRANTO.	County officer ousted from office by quo warranto entitled to compensation of office for official duties until his successor is elected or appointed and qualified. In performing any acts of the office subsequent to filing of an information against him in quo warranto proceedings, he is acting as a de facto officer and such acts are valid.
78-53	Mar 6	Hon. Earl L. Saunders	WITHDRAWN
78-53	Mar 11	ASSESSORS. COUNTY JUDGES. INCOMPATIBILITY.	Offices of associate county judge and deputy assessor, though not the subject of positive statutory or constitutional prohibition from being held by one person, are incompatible and it is improper for the same person to occupy both offices.
78-53	Mar 11	SHERIFFS. DEPUTIES. POWERS. OFFICERS. DEEDS OF TRUST. PARTITION SUITS. EXECUTION. TRUSTEE.	Deputy sheriffs may act for sheriffs to levy and sell real estate in satisfaction of judgment; to sell estate in satisfaction of judgment; to sell real estate pursuant to order of circuit court in partition suits; and to sell real estate in foreclosure of deeds of trust when sheriff is ordered by circuit court to sell.
78-53	Apr 4	COUNTIES.	Salary, duties and liabilities of county assessor ousted from office

		COUNTY ASSESSOR. COUNTY COURT. QUO WARRANTO.	under Judgment of Circuit Court in quo warranto proceedings and his successor appointed and qualified.
78-53	June 4	COUNTY HEALTH CENTERS. EXPENDITURES.	Counties in Missouri maintaining County Health Centers are liable for expense of providing warrants for use in paying obligations of such Health Centers, and are also liable for cost of publishing the detailed financial statement of the county for the preceding year as it relates to County Health Centers, all to be paid out of the County General Revenue Fund.
78-53	Dec 21	MINISTERS. MARRIAGE. CRIMINAL LAW. ORDINATION.	Whether a person who is ordained as a minister of the gospel by the Pentecostal Church, Inc., in 1942, remains an ordained minister of the gospel, is a matter which must be determined by the Pentecostal Church, Inc., and such fact will not be determined by this office. If a person not authorized by Section 451.100 purports to perform a marriage ceremony under the circumstances prescribed in Section 563.250, RSMo 1949, he shall be guilty of a misdemeanor.
<u>79-53</u>	Jan 5	DEPUTY COUNTY CLERK.	There are no minimum age requirements for a deputy county clerk of a fourth class Missouri county.
79-53	Apr 22	TAXATION. MANUFACTURERS.	Mining corporation not a "manufacturer" within meaning of Section 150.300, RSMo 1949. Stock-piled ore owned by mining corporation subject to tax as personal property in county where situated as provided in Sections 137.095 and 137.140, RSMo 1949.
79-53	Sept 5	SPECIAL ROAD DISTRICTS.	Commissioners of Special Road Districts organized under Secs. 233.170 to 233.315, inclusive, RSMo 1949, have the exclusive control over the property and funds of such districts. Such funds cannot be used for any purpose other than that for which such funds are collected. Prevention of deviation in the use of such funds may be invoked by owners of real estate in such district. The County Courts have no statutory authority in such matters. County Courts do have authority to dissolve Special Road Districts.
81-53	Feb 20	LOCAL COMMERCIAL MOTOR VEHICLES.	(1) That a farmer operating his truck on a local commercial motor vehicle may travel beyond the twenty-five mile limit when he has no load on his truck and is on a pleasure trip. (2) That a farmer operating on a local commercial motor vehicle license may not make a "for hire haul." (3) That a man, not a farmer, operating on a local commercial motor vehicle license, may not go beyond the twenty-five mile limit on a pleasure trip. (4) That a person, not a farmer, operating on a local commercial motor vehicle license, may not legally move from job to job in excess of the twenty-five mile limit.
81-53	Feb 25	OFFICIAL BOND.	Every person injured by the breach of the bond of a public official is

		BREACH.	entitled to share in funds recovered for the breach of such bond.
81-53	June 22	Hon. W. D. Settle	WITHDRAWN
81-53	Aug 31	EXTRADITION.	(1) Rule 21.08 of the rules of criminal procedure is valid and should be followed. (2) The sheriff, the prosecuting attorney or other officers can sign a complaint on the basis of information obtained in the course of investigation. Such complaint justifies the issuance of a warrant for the arrest of the accused. (3) An affidavit based on information and belief only is not a sufficient basis for extradition.
81-53	Sept 8	TRAINING SCHOOLS. CRIMINAL LAW. DISCHARGE.	Any person lawfully committed to the Missouri Training School for Boys may be discharged from legal custody thereof by the State Board of Training Schools.
81-53	Oct 29	Hon. W. E. Sears	WITHDRAWN
81-53	Dec 4	MISSOURI TRAINING SCHOOLS. JUVENILES, PAROLEES. SHERIFFS.	Information as to parolees from Missouri State Training Schools not to be furnished to sheriffs for posting.
82-53	Apr 29	SCHOOLS, DISSOLUTION OF REORGANIZED DISTRICTS.	The territory included in a dissolved enlarged district becomes unorganized territory and may be organized into common school districts by the method prescribed in Section 165.163, RSMo 1949. No such district can receive state aid for the first school term of its existence.
84-53	Jan 19	CRIMINAL LAW. CRIMINAL SEXUAL PSYCHOPATH MAY BE PROSECUTED; WHEN.	One found to be a criminal sexual psychopath within meaning of Sec. 202.700 RSMo 1949, of Criminal Sexual Psychopath Act and committed to State Hospital No. 1, against whom a criminal charge is pending cannot be prosecuted on said charge during probationary period or subsequent to final discharge from hospital.
85-53	Jan 26	AGRICULTURE. MILK PLANTS. LICENSE REQUIRED. WHEN.	Plants receiving milk, testing for butter-fat, paying producer on basis of test filtering, cooling and transporting milk to other plants are "milk plants" within the meaning of Par. 20, Sec. 196.520, RSMo 1949. Filtering and cooling is "processing" within meaning of law. Such plants required to secure one or more types of licenses provided by Paragraph 6, Sec. 196.605, RSMo 1949, to engage in such business.
85-53	Feb 19	COMMISSIONER OF AGRICULTURE. FOODS AND DRUGS. SKIMMED MILK CHEESE.	Product failing to conform to the definition of Par. 11, Sec. 196.525, RSMo 1949, is not cheese, and cheese labeling statutes are inapplicable to product, and product cannot be manufactured, sold, or offered for sale as "cheese" or "filled cheese". Manufacture and sale of such product not prohibited in Missouri.

Feb 9	GENERAL ASSEMBLY. HOUSE OF REPRESENTATIVES. OFFICERS. FEES, COMPENSATION AND SALARIES.	Under provisions of Section 16a, Article III of the Constitution, representative entitled only to maximum of Ten Dollars per day reimbursement for actual expenses of such day.
May 26	ROADS.	County court may establish public road under Section 228.180, RSMo 1949, and need not comply with Sections 228.010 through 228.100, RSMo 1949, if it does so.
Aug 18	MISSOURI STATE SCHOOL.	Director of Division of Mental Diseases, with approval of Director of Department of Public Health and Welfare, will determine site for erection of new building for Missouri State School.
Oct 28	DIVISION OF WELFARE. COUNTY WELFARE OFFICE. MONTHLY REPORT OF RECIPIENTS A PUBLIC RECORD.	Section 208.120 Laws of 1953 requires county welfare office to keep report of names, addresses, and amount paid each beneficiary of old age assistance, aid to dependent children and permanently and totally disabled persons during preceding month. Report is public record and open to public inspection at all times during business hours of welfare office. All information regarding applicants or recipients other than names, addresses and amount of grants whether in monthly reports or other records of welfare office is confidential and cannot be revealed to public. Employees of office who require persons to execute affidavit, that if permitted to examine monthly reports they will keep information confidential is illegal, as procedure is not provided for by any Missouri statutes.
Nov 18	Hon. George T. Sweitzer, Jr.	WITHDRAWN
Jan 26	SHERIFFS.	It is the duty of a sheriff to collect and account for all fines, penalties, forfeitures and other sums of money accruing to the state or any county in virtue of any order, judgment or decree of a court of record.
Feb 10	CRIMINAL LAW. MAGISTRATES.	Duty of magistrate to issue a warrant upon a felony complaint filed by a person other than the prosecuting attorney.
Apr 1	ELECTIONS. JUDGES AND CLERKS.	Same persons may serve as judges and clerks of special election to fill vacancy in office of representative, municipal election, and election of school directors.
May 20	COUNTY HEALTH PLAN PETITION. COUNTY COURT. ISSUANCE OF BONDS.	Mandatory upon county court to call election if 10% or more of qualified voters of county request it for the purpose of issuing bonds to establish a county health center. Sec. 205.010, Laws of Mo. 1951, does not provide for any protest period after filing of petition.
	May 26 Aug 18 Oct 28 Nov 18 Jan 26 Feb 10 Apr 1	HOUSE OF REPRESENTATIVES. OFFICERS. FEES, COMPENSATION AND SALARIES. May 26 ROADS. Aug 18 MISSOURI STATE SCHOOL. Oct 28 DIVISION OF WELFARE. COUNTY WELFARE OFFICE. MONTHLY REPORT OF RECIPIENTS A PUBLIC RECORD. Nov 18 Hon. George T. Sweitzer, Jr. Jan 26 SHERIFFS. Feb 10 CRIMINAL LAW. MAGISTRATES. Apr 1 ELECTIONS. JUDGES AND CLERKS. May 20 COUNTY HEALTH PLAN PETITION. COUNTY COURT.

88-53	July 6	CHAUFFEUR'S LICENSE.	Traveling salesmen operating company cars are not required to have chauffeur's license.
88-53	Oct 14	Hon. Stewart E. Tatum	WITHDRAWN
88-53	Dec 2	COUNTY BUDGET LAW.	1) County Court in second class county may use unexpended "emergency" fund for remodeling county buildings. 2) Surplus funds remaining after payment of current indebtedness to be included in county budget for ensuing fiscal year.
89-53	Jan 22	CORONERS. FEES.	A coroner of a third class county is not entitled to retain fees in addition to salary provided by law.
89-53	May 12	RECORDS. PUBLIC OFFICERS.	Land patents on file in the office of secretary of state may not be altered or cancelled by said officer.
89-53	Sept 3	FENCE LAW. SCHOOL DISTRICT.	A School district cannot be required to pay its proportionate share for the erection and repair of a division fence under the provisions of Section 272.060, et seq., RSMo 1949.
89-53	Sept 24	COSTS. SHERIFFS.	When a complainant filed an affidavit charging a felony, and a warrant was issued and the defendant was arrested, but before a preliminary examination was held complainant dismissed the charge, the Magistrate before whom the proceeding was instituted was entitled to a fee of \$2.50; that the arresting officer making the arrest was entitled to a fee of \$1.00; that if the sheriff rendered any other compensable services, these are costs, and that if witnesses had been subpoenaed the cost thereof would also accrue.
89-53	Oct 7	SCHOOLS. TAXATION.	An increased tax rate as authorized by a vote of the residents of a school district and certified to the county clerk after taxes have already been extended should be carried in a supplemental tax book.
89-53	Dec 10	CORPORATIONS. SECRETARY OF STATE.	Secretary of State may not refuse to issue certificate of incorporation because purpose of corporation might be used in violation of law; should refuse to issue certificate of incorporation to business corporation which uses word "benevolence" as part of corporate name.
89-53	Dec 31	COURTS. DISTRICTS. MAGISTRATE. STATUTES.	Counties having more than one magistrate judge are to be divided into districts as equal in population as may be determined by the body authorized to make such division; but that the discretion of such body is limited, and subject to review by the Courts. The division of Jackson County into magistrate districts, the smallest district having a population of 49,105, and the largest district having a population of 99,476 would be so grossly unequal in population as to constitute an abuse of discretion of the body making such division. That portion of

		magistrate districts to be done within sixty days after order of the Circuit Court is directory.
Apr 27	CHAUFFEUR'S AND OPERATOR'S LICENSE. PUBLIC RECORDS.	Records of conviction kept by Director of Revenue, of accident reports and Court records of convictions are public records and thus open to inspection by the public.
Nov 25	SCHOOLS.	Common school districts may not pay out of school funds for lunches for pupils who are residents of such common school district who are attending a town school.
Jan 29	OFFICERS. CONSTITUTIONAL LAW. INCREASED COMPENSATION DURING TERM NOT VIOLATIVE OF CONSTITUTION — WHEN.	When county changes classification from 4 to 3 on Jan. 1, 1953, incumbent officers to receive compensation allowed by statute to officers of 3rd class counties. Greater compensation not an increase during officer's term in violation of Art. VII, Sec. 13, of Constitution.
Feb 5	CAPE GIRARDEAU COURT OF COMMON PLEAS. PROBATE JUDGE OF CAPE GIRARDEAU COUNTY.	The judge of the Cape Girardeau Court of Common Pleas is required to account for and deposit the 2 ½% of the state inheritance tax as an accountable fee.
Mar 5	Hon. Curt M. Vogel	WITHDRAWN
Mar 6	MOTOR VEHICLES. MUNICIPALITIES. POLICE.	Section 301.260, RSMo 1949, providing display on side of motor vehicles, name of municipality, court or political subdivision, department thereof, and distinguishing number, does not apply to ambulances, patrol wagons and fire apparatus owned and used by a municipality.
June 26	DESTRUCTION OF DOCUMENTS.	Can official records, documents, etc. of the State Treasurer, Commissioner of Finance and the Division of Insurance be destroyed after the sine die adjournment of the General Assembly where the statute authorizing the destruction provides for destruction "during each biennial session of the General Assembly."
July 28	LOTTERY. DRIVE-IN THEATER. ATTENDANCE PRIZE.	An operation whereby a drive-in theater gives a prize to the driver of a motor vehicle which brings the most number of persons to the theater on a specified night contains the element of prize, consideration and chance, and is therefore a lottery.
_	Nov 25 Jan 29 Feb 5 Mar 5 Mar 6 June 26	OPERATOR'S LICENSE. PUBLIC RECORDS. Nov 25 SCHOOLS. Jan 29 OFFICERS. CONSTITUTIONAL LAW. INCREASED COMPENSATION DURING TERM NOT VIOLATIVE OF CONSTITUTION – WHEN. Feb 5 CAPE GIRARDEAU COURT OF COMMON PLEAS. PROBATE JUDGE OF CAPE GIRARDEAU COUNTY. Mar 5 Hon. Curt M. Vogel Mar 6 MOTOR VEHICLES. MUNICIPALITIES. POLICE. June 26 DESTRUCTION OF DOCUMENTS.

92-53	Aug 4	RECORDER.	The county is entitled to money collected by the recorder under color of office and authority.
92-53	Aug 17	OFFICERS. DEPUTY CIRCUIT CLERK. THIRD CLASS COUNTIES. MAY BE NOTARY PUBLIC.	Office of deputy circuit clerk, third class county and notary public compatible. One person can hold both offices and perform the duties of each. Deputy circuit clerk of third class county commissioned notary public can perform duties of latter office at any location in his own county he might choose, and is entitled to charge, collect and retain as his own, every fee prescribed by statute for notarial service rendered.
92-53	Sept 19	Hon. Raymond H. Vogel	WITHDRAWN
93-53	Jan 8	TAXATION. PERSONAL PROPERTY. MOTOR VEHICLES. UNITED STATES. COLLECTOR.	1) Non-resident military personnel exempted from payment of personal property tax. 2) Non-resident civilian employees living within or without boundaries of Fort Leonard Wood reservation owe personal property tax. 3) Resident military personnel owe personal property tax in county of residence. 4) Collector should certify no taxes due from non-resident military personnel.
93-53	Mar 5	TRAFFIC REGULATIONS. PENALTIES.	Penalties are provided in Section 304.570, RSMo 1949, for violations of the terms of Section 304.250 of Chapter 304, RSMo 1949.
93-53	Mar 5	JUVENILE COURTS. CHILDREN. TRAFFIC VIOLATIONS.	When children sixteen years of age are charged with traffic ordinance violations in local police courts of cities, towns, and villages of St. Louis County, said police courts lack the power to hear and determine said cases, but must certify them to the juvenile court of said county for disposition.
93-53	Mar 12	PENSIONS. COUNCILMEN.	There is no incompatibility in a retired pensioned policeman of the City of Maplewood serving as city councilman of the City of Maplewood so long as such retired pensioned policeman, in his capacity as councilman, can take no action with regard to the amount of pension that a retired policeman of Maplewood should receive.
93-53	Mar 16	CRIMINAL JURISDICTION OF FORT LEONARD WOOD.	The land area embraced by Fort Leonard Wood, including that portion of such area which is occupied by Highway No. 17, is under the exclusive jurisdiction of the United States so far as criminal jurisdiction is concerned.
93-53	Mar 20	Mr. Hugh H. Waggoner	WITHDRAWN
93-53	Apr 8	HIGHWAY PATROL.	Information complied under subsection (4), Section 43.120, RSMo 1949, available to peace officers only.
93-53	Apr 9	DEFINITIONS.	"Seating capacity" as used in Section 301.060, V.A.M.S., 1952, means

		MOTOR VEHICLE REGISTRATION.	number of persons who may be actually seated in a commercial vehicle, and does not limit number of passengers who may be carried.
93-53	May 21	MOTOR VEHICLES. DOMICILE. RESIDENCE.	Evidence that a person maintains a home and family in this state to which he returns on weekends, although he rents a room in a foreign state, carrys a notarized statement that he is a resident of such foreign state and registers his truck in the foreign state, constitutes substantial evidence from which the trier of fact could find that such person was a resident of the State of Missouri; and that the operation of his truck on the highways of this state without having registered the same with the Director of Revenue as provided in Section 301.020 would be in violation of Section 301.020.
93-53	June 13	MOTOR VEHICLES. BRAKES - SUFFICIENCY REQUIRED.	Intention of legislature in enactment of Par. 3, Section 304.560, RSMo 1949, is that all motor vehicles except motorcycles be provided at all times with two sets of brakes kept in good working order. When either set is operated independently of the other, must be sufficient to enable driver of moving vehicle to stop same within reasonable distance. Moving vehicle with two sets of brakes that cannot be stopped within reasonable distance when hand or emergency brake is operated, then driver violates said statute.
93-53	June 23	MOTOR VEHICLES. RECIPROCITY.	Reciprocity with State of Arkansas, Illinois and Kansas.
93-53	June 23	RECIPROCITY. MISSOURI. KANSAS.	As regards the registration of motor vehicles transporting passengers or property for hire, reciprocity does not exist between the state of Missouri and the state of Kansas.
93-53	July 6	HIGHWAYS. MOTOR VEHICLES. NUISANCE.	A motor vehicle may be parked or abandoned on the public roads and highways in such a manner as to constitute a public nuisance; each situation must be appraised to determine whether there is a public nuisance. Motor vehicles which are public nuisances may be summarily removed by Highway authorities. Such Highway authorities cannot incur liability on the part of the owner for the cost of towing such vehicle to a garage and storing it.
93-53	July 9	Hon. Wayne W. Waldo	WITHDRAWN
93-53	Sept 15	CRIMINAL SEXUAL PSYCHOPATHS.	Costs of proceedings alleging criminal sexual psychopathy to be paid according to rules found in Secs. 458.080 and 458.090, RSMo 1949.
93-53	Sept 24	MOTOR VEHICLES. LICENSE FEE OF LOCAL COMMERCIAL VEHICLES AND COMMERCIAL	A truck line is transporting freight long distances over state highways by tractor-trailers, and all tractors are licensed as local commercial vehicles. None of tractors driven more than 25 miles from each municipality specified; in local licenses, but trailers pulled greater distances. This is done by disconnecting each trailer from its tractor

		VEHICLES.	and connecting it to another tractor at end of each 25 miles of route, and is repeated indefinitely until trailer reaches destination. Operation is violation of terms of each local commercial license and subsections 3 and 7, Section 301.060, pages 699, 700, Laws of 1951.
93-53	Oct 30	CONSTABLES. COUNTIES UNDER SPECIAL CHARTER.	County council of St. Louis County has no authority to enact proposed ordinance (Bill No. 31-1953) relating to special deputy constables.
93-53	Dec 10	INTOXICATING LIQUOR. NON-INTOXICATING BEER.	A premise licensed to sell food, supply entertainment, and permit the consumption of intoxicating liquor on the premise, except on Sunday and between certain hours, may open on Sunday for the purpose of selling food and supplying entertainment, so long as it does not permit the consumption of intoxicating liquor. Also, that said premise may be kept open on Sunday even though 3.2 or non-intoxicating beer is permitted to be consumed on the premise on that day.
93-53	Dec 14	FIRE DISTRICTS. RAILROADS. TAX COMMISSION.	A railroad company is not required in the annual statements required by Section 151.020 to specify the amount of mileage of track within a fire district, and the failure of a railroad company to so specify will not give the Tax Commission power under Section 151.070 to make further assessment, adjustment or equalization of the railroad property, since nothing has been omitted. The State Tax Commission has no legal right to compel a railroad company under Section 151.080 to report its mileage within a fire district. The State Tax Commission cannot make an arbitrary assessment under Section 151.050 for failure of a railroad company to specify the amount of mileage of track within a fire district. The State Tax Commission does not have the power to apportion railroad company mileage to a fire district under Section 138.380; because apportionment of taxes is made under Section 151.080. It must be done in the manner therein provided.
93-53	Dec 18	RECIPROCITY. MISSOURI AND MICHIGAN.	A commercial motor vehicle owned by a resident of Michigan and licensed by the State of Michigan, operating within the State of Missouri, engaged in the transportation of persons or property for compensation for a period exceeding ten (10) days, is subject to be licensed by the State of Missouri; a resident of the State of Michigan, carrying on a business in the State of Missouri, who owns and operates in such business any commercial motor vehicle subject to registration in the State of Missouri, would, at once, be required to register each such vehicle and pay the same fee therefor as is required with reference to like vehicles owned by a resident of the State of Missouri.
94-53	Apr 25	COUNTY HEALTH CENTERS. ELECTION EXPENSES.	The several counties of Missouri are liable for all the expenses of holding a general election in this State at which County Health Center Trustees are elected.

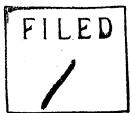
94-53	June 26	SHERIFFS. SALARY.	County Court may not pay sheriff money in lieu of living quarters.
95-53	Mar 10	WORKMEN'S COMPENSATION. SETTLEMENTS & HEARINGS.	An individual member of the Industrial Commission of this State may approve compromise settlements made by parties to a claim for compensation. He may not, however, hold a hearing on a claim after an award is made thereon by a Referee and after the claim has reached the full Commission on review, under Section 287.480, RSMo 1949.
95-53	Mar 11	PROBATE COURT.	Duty of county to furnish certain legal publications for the office of probate judge.
95-53	Mar 26	Hon. Gordon P. Weir	WITHDRAWN
<u>95-53</u>	Apr 8	UNEMPLOYMENT SECURITY.	Gordon P. Weir, Director of the Division of Employment Security of Missouri is the person who has authority to requisition funds from the Unemployment Trust Fund.
95-53	May 19	CRIMINAL PROCEDURE. TRIAL MAGISTRAATE TO AFFORD CONSULTATION TIME TO DEFENDANT, WHEN.	When defendant is arraigned on misdemeanor charge, in magistrate court magistrate must, before accepting plea afford defendant sufficient time and opportunity to consult attorney and a friend. If necessary, he must continue case until defendant is accorded such rights. Prosecuting attorney who instituted misdemeanor case before magistrate, not required by statute to be present when guilty plea made and sentence entered but he is entitled to \$5.00 statutory conviction fee whether present or absent.
95-53	July 31	DIVISION OF EMPLOYMENT SECURITY. SUPPLIES.	Purchase of all supplies for Division of Employment Security must be made through the State Purchasing Agent unless he authorizes direct purchases by the Division.
95-53	Dec 31	DIVISION OF EMPLOYMENT SECURITY. MERIT SYSTEM AND EMPLOYEES.	Director of Division of Employment Security may employ secretary for such Director without regard to provisions of Merit System.
96-53	Jan 26	Mr. Hubert Wheeler	WITHDRAWN
<u>96-53</u>	Feb 10	TAXATION.	Students at School of Mines are subject personal property tax assessment in Phelps County, only if they establish legal residence in that county.
96-53	Mar 12	COUNTY COURTS. COUNTY DEPOSITARY.	County court cannot place county funds in an account outside the county depositary; such would not be grounds for removal from office in the absence of fraud or misappropriation.

96-53	Mar 26	ABSENTEE VOTING. ELECTIONS. TOWNSHIPS. VOTING.	Absentee voting not authorized at elections wherein only township officers are elected.
<u>96-53</u>	Mar 28	TOWNSHIP ELECTIONS. FORM OF BALLOT.	It is not permissible to write or print name of any political party on ballot used in township elections of township officers to designate the political party of the candidates on the ballot.
<u>96-53</u>	Apr 3	RULES OF CRIMINAL PROCEDURE. MAGISTRATES.	A magistrate is not required to keep a record of bonds taken by him in connection with preliminary examinations in felony cases.
96-53	May 19	TOWNSHIP ASSESSOR. RESIDENCE.	Residence is dependent upon intention and when established is not changed by temporary change of place of abode if no intention to change residence is entertained.
96-53	June 6	INTOXICATING LIQUORS.	Regulation of Supervisor not basis for criminal prosecution.
<u>96-53</u>	Aug 25	SCHOOLS. SCHOOL FUNDS. CONSTITUTIONAL LAW.	Effect of decision of McVey v. Hawkins, 258 S.W.2d 927, on state aid for transportation to private schools.
96-53	Aug 27	LEGISLATION. EFFECTIVE DATE. BOUNTIES ON WOLVES.	H. B. No. 88, passed by the last General Assembly, reducing the bounty on wolves, will become effective on August 29, 1953.
96-53	Sept 2	Hon. J. Patrick Wheeler	WITHDRAWN
96-53	Sept 3	TAXATION.	Corporation organized under general business corporation statutes liable for ad valorem taxes.
<u>96-53</u>	Sept 19	COUNTY WELFARE DEPARTMENT. HOUSE BILL NO. 355.	House Bill No. 355 imposes certain duties upon the County Welfare Department in each county in the state, which duty the County Welfare Department in each county is legally obliged to discharge.
96-53	Sept 19	MOTOR VEHICLES. PUBLIC SERVICE COMMISSION. SCHOOLS. SCHOOL TRANSPORTATION.	A private bus owner who uses his bus solely for the purpose of transporting children to or from schools, whether public or private, does not need to obtain a certificate from the Public Service Commission authorizing him to do so.
96-53	Sept 19	TAXATION.	Possessory rights under a lease are to be taxed as "real property" under Missouri tax laws.

96-53	Oct 17	MOTOR VEHICLES. DRIVER'S LICENSE.	Expiration date of driver's license issued under authority of Section 302.050, RSMo 1949.
96-53	Nov 17	NONINTOXICATING BEER.	Prohibition against the selling of nonintoxicating beer to minors, contained in Section 312.400, RSMo 1949, not confined to licensees and their employees, but extends to all persons who are not specifically excepted by the statute.
96-53	Nov 20	ACCOUNTS. PUBLIC ACCOUNTANTS.	Operation of bookkeeping and tax service not the practice of public accountancy, and its operation without certificate of registration as public accountant is not a violation of law. Use by the proprietor of such service of the business name "auditing and tax service," "indicates that such person is entitled to practice as a public accountant," and is unlawful.
96-53	Dec 14	COUNTY TRUSTEE. DRAINAGE DISTRICT. TAXATION.	A drainage district is not entitled to participate in the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949. A drainage district does not have the authority to compromise delinquent drainage taxes.
97-53	Jan 29	Hon. Homer F. Williams	WITHDRAWN
<u>97-53</u>	Apr 21	CITIES, TOWNS AND VILLAGES. CIVIL PROCEDURE. MAGISTRATES.	Cities of fourth class not required to pay filing fee in magistrate court but must furnish bonds in attachment suits.
97-53	May 8	CO-OPERATIVES.	Sec. 357.150, RSMo 1949, prevents use of funds of co-operative company organized under this chapter in order to pay expenses of organizing such company.
97-53	July 6	INTOXICATING LIQUOR.	Determination of "habitual drunkenness" to be made by supervisor of liquor control or by court under appropriate circumstances.
97-53	July 16	SCHOOL DISTRICTS. TAXATION.	Last date for certification of levy increase vote.
99-53	Sept 24	Hon. A. L. Wright	WITHDRAWN

MOTOR VEHICLES: CRIMINAL LAW: PENALTY: Calculation of allowable weight per tire as provided under Sec. 304.180, Mo. RS. Cum. Supp. 1951. Lack of criminal intent no defense for violation of Toregoing statute under Sec. 304.240, Mo. RS. Cum. Supp. 1951.

JOHN M. DALTON



April 29, 1953

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Honorable A. R. Alexander Judge of Probate Court Clinton County Plattsburg, Missouri

J. C. Johnsen

Dear Sirt

This will acknowledge receipt of your request for an opinion, which reads:

"An emergency has arisen in this Magistrate Court in relation to the interpretation and application of Sec. 304.180, 304.190 and 304.240, as set out in Missouri Revised Statutes, Cumulative Supplement, 1951, at pages 312-313, under the following facts:

"The operator of a truck is summoned by a highway patrolman to appear on a day set to answer to a charge of overweight on an axle. The truck had double tires, or four tires on the axle. Under Section 304.180 should the calculation of allowable weight be made on the width of a single tire or on the double tire?

"Under Section 304.240, when the defense is that the load was lawful at the time of loading, but had slipped in the trailer to the axle complained of by reason of the road conditions, and that there was no criminal intent and therefore could be no conviction; is such defense available under this section?

"Because of the emergency suggested above we would appreciate an early opinion."

It is well established that when language of a statute is plain and unambiguous it may not be construed, but must be given effect as written. See St. Louis Amusement Company v. St. Louis County, 147 S.W. 2d. 667, 347 Mo. 456.

Also, that the primary rule of construction of statutes is to ascertain and give effect of lawmaker's intent, and this should be done from words used, if possible, considering the language honestly and faithfully. See City of St. Louis v. Senter Commission Company, 85 S.W. 2d. 21, 337 Mo. 238.

Section 304.180, Missouri Revised Statutes, Cumulative Supplement, 1951, reads in part:

We are of the opinion that it was the intent of the General Assembly in enacting the foregoing statute that the calculation of allowable weight should be made on the width of each single tire. For example in this instance we have a truck with double tires on dual wheels, that is, there are four tires on a single axle instead of two single tires. Assuming that each of the four tires have 6" tire width concentrated on the highway, then the allowable weight would be 3600 pounds for each tire or 14,400 pounds for all four tires on said axle.

Your second inquiry is whether it is a valid defense under Section 304.240, Missouri Revised Statutes Cumulative Supplement, 1951, that there was no criminal intent shown. We are assuming that you are referring to a violation of the provisions of Section 304.180, supra. Said section merely provides that no vehicle shall operate upon the highways of this state under certain conditions specified in said statute, such as when the gross weight exceeds a certain amount or having a load in excess of six hundred pounds per inch in width of a tire upon any wheel concentrated on the surface of the highway. Nowhere in said statute does it specifically require that anyone shall have knowledge or criminal intent of such violation.

In view of this fact we are of the opinion that such constitutes an act which has been referred to as malum prohibitum, that is, it is a wrong only because made so by statute. See Hatch v. Hanson, 46 Mo. App. 323, 1.c. 339.

In Section 30, page 85, Vol. 22, Corpus Juris Secundum, we find the following principle of the law:

"By the express terms of a statute guilty knowledge is sometimes made an essential ingredient of the offense, as where it requires the act to be done 'knowingly,' etc. On the other hand, the legislature may forbid the doing of or the failure to do an act and make its commission or omission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, and in such cases, the doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt; such legislation is enacted and is sustained, for the most part, on grounds of necessity, and is not violative of the federal constitution. # # #"

There are two classes of crimes under the law, malum prohibitum, which does not require criminal intent, and malum in se, which requires criminal intent be shown. In Duncan v. Commonwealth, 158 S.W. 2d. 396, 289 Ky. 231, the court in distinguishing the two classes said:

"It would appear to be scarcely necessary to say that crimes are divided into two classes, i.e., malum prohibitum and malum in se, the offense here being one of the first class. In the text in 14 Am. Jur. 784, section 24, the distinction between the two classes of offenses is clearly pointed out, and it is stated that criminal intent is not a necessary element of offenses 'which are merely malum prohibitum, or of prohibitive statutes which cover misdemeanors in aid of the police power, where no provision is made as to intention.

* * *In other words it is immaterial that the defendant acted in good faith or did not know that he was violating the law.

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"That intent and knowledge are neither elements of strictly malum prohibitum offenses or misdemeanors, in the absence of an expressed legislative intent to the contrary, is also shown by the court's opinion in the case of People v. Sybishoo, 216 Mich. 1, 184 N.W. 410, 411, 19 A.L.R. 133. In that opinion cases from other states and jurisdictions are cited to the effect that 'An act malum prohibitum is not excused by ignorance, or a mistake of fact when a specific act is made by law indictable, irrespective of the defendant's motive or intent. * * * The general rule that the criminal intention is the essence of the crime does not apply to such prohibited acts. This court in the later cases of Arnett v. Commonwealth, 261 Ky. 607, 88 S.W. 2d. 276, and Sowder v. Commonwealth, 261 Ky. 610, 88 S.W. 2d. 274, adopted the same interpretation."

See also People v. Johnson, 123 N.E. 543, 288 Ill. 442; Alex v. Richie, 53 S.E. 2d. 735, 740.

In view of the foregoing authorities we conclude that lack of criminal intent is no defense in this instance.

CONCLUSION

It is the opinion of this department that the part of Section 304.180, supra, requiring that no vehicle shall be moved or operated on the highways of this state having a load of ever six hundred pounds per inch width of tire upon any wheel should be construed so that the calculation of allowable weight should be made on the width of each single tire on the axle and not of double tires, in case of a truck having double tires or four tires on an axle. Also, that criminal intent is no defense for violation of the provisions of Section 304.180, supra, under the penalty provided in Section

304.240, supra, since the act in question is one of malum prohibitum, and that said statute does not specifically require one to have criminal intent before being subject to prosecution thereunder.

This opinion, which I hereby approve was written by my assistant, Mr. Aubrey R. Hammett, Jr..

Yours very truly,

JOHN M. DALTON Attorney General

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INTANGIBLE PERSONAL PROPERTY TAX:

Payments received by Educational Credit Bureau, Inc., a Missouri corporation, from students located outside the State of Missouri are not to be included for the purpose of determining the tax of that corporation under the provisions of Credit Institutions Act.

JOHN M. DALTON



July 9, 1953

XXXXXXX

J. C. Johnsen

Mr. T. R. Allen Supervisor, Income Tax Department of Revenue Jefferson City, Missouri

Dear Mr. Allen:

Your recent request for an opinion as to whether the Educational Credit Bureau, Inc., is taxable on that part of its income as hereinafter set out under the Credit Institutions Act of 1946, Sections 148.120-148.230, inclusive, is at hand. The pertinent facts are set out below.

The Educational Credit Bureau, Inc., is a Missouri corporation with offices exclusively in Missouri, and it has no agents, employees or property in other states. It was organized to assist the Arthur Murray Dance Studios throughout the United States in the operation of their business by providing financing as hereinafter set out. The Arthur Murray Dance Studios give dance instruction, and many students desire to purchase instruction on deferred payment plan contracts. The studios-excepting those located in the State of Missouri, which are concededly taxable under this actin other states agree to give dance instruction courses to students who agree to take a definite number of hours of instruction without the right of cancellation and to make payments therefor in accordance with installment payment contracts which they and the individual studios execute. If the individual studio desires, it may sell these installment contracts to the Educational Credit Bureau, Inc., who pays the studio an amount equal to 90% of the then unpaid balance, of which 50% is paid to the studio on receipt by the Educational Credit Bureau, Inc. of each contract, and the remaining 40% is remitted when payment of the full face amount of the contract has been made by the student. If default is made in the payment by a student, the studio re-purchases the contract involved without loss to Educational Credit Bureau, Inc., which retains 10% of the amounts collected by it from the student before defaulting. When the Educational Credit Bureau, Inc. purchases an

installment contract from a studio, it informs the student by mail that his contract is now owned by it and that the student should make his payments directly to the office of the Educational Credit Bureau, Inc. in Kansas City, Missouri. It sends an installment payment booklet to the student wherever he may live in the United States, and he is instructed to send slips from the booklet with his remittances.

The question here is as to whether the Educational Credit Bureau, Inc. is liable for payment of the tax under the Missouri Credit Institutions Tax Act of 1946, which said tax is levied according to and measured by its net income. Section 148.150 RSMo 1949, defines gross income as follows:

"*Gross income* includes all gains, profits, earnings and other income of the taxpayer derived from sources within the state of Missouri, * * *"

and net income is defined by subsection 1 of said section to mean gross income minus certain allowed deductions.

There are no decided cases in the State of Missouri which construe this definition as it applies to these facts under the Credit Institutions Act. However, the Appellate Courts of this state have construed the language of the income tax statutes dealing with corporations, Sections 143.030-143.080, RSMo. 1949, which imposes a tax on their income "from all sources within this state." This language is so directly related to Section 148.150, RSMo. 1949, previously quoted, that the construction given the income tax wording by the courts must be considered.

Union Electric Company v. Coale, Mo. Sup., 146 S.W. 2d. 631, was a case in which the plaintiff taxpayer, a Missouri corporation, owned stock in foreign corporations from which it received dividends paid from funds derived from operations carried on and capital employed in the domicile states of the corporations paying the dividends, and none of the corporations either employed or had any capital in Missouri, nor carried on any operations or engaged in any business in Missouri during the taxable period. Defendants contend these dividends were taxable under the state income tax, and this suit was brought to abate that assessment. The court considered the word "source" as follows:

"Webster's New International dictionary, 2d Ed., defines source as 'that from which anything comes forth, regarded as its cause or origin; the first cause; the beginning; origin. Also, source is defined as 'the individual, company, or corporation initiating a payment, as of dividends, interest', etc. Holmes' Federal Taxes, of income says: The word "source" conveys only one idea-that of origin. It is defined in the Standard dictionary as follows: "That from which any act, movement, or effect proceeds; a person or thing that originates, sets in motion, or is a primary agency in producing any course of action or result; an originator; creator; origin. A place where something is found or whence it is taken or derived." This is its natural, ordinary, and familiar meaning and it is particularly true that terms used in statutes describing objects of taxation should be construed according to their popular signification. ""

The court then stated that the stock certificates belonging to the plaintiff in the foreign companies were nothing more than evidence of ownership "and neither the stock certificates nor the shares could be the source of the dividend income." In re Kansas City Star Company, Mo. Sup., 1h2 S.W. 2d 1029, was quoted: "The source of * * * income is the place where it was produced" and that "taxing statutes should be construed strictly against the taxing authority unless a contrary legislative intent appears." The court concluded that it could not say that this income was produced in this state, and consequently it was held not to be taxable under the state income tax law.

Petition of Union Electric Company of Missouri, Mo. Sup. 161 S.W. 2d 968, involved the question of whether dividend and interest payments to a Missouri corporation by foreign corporations operating entirely outside the State of Missouri were income received by the taxpayer from sources within this state under the income tax statutes. The court at l.c. 970, 971, stated as follows:

"Income consists of an increase in the economic wealth of the taxpayer. The sources from which it is derived are said to be three: (A) labor; (B) the use of capital, in which term we include for

convenience land; and (C) profits derived from the sale or exchange of capital assets. These latter represent an accretion in the value of the assets while they are in the hands of the taxpayer. Eisner v. Macomber, 252 U.S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570; Holmes, Federal Taxes, 6th Ed., pp. 396 to 398. It is said that the locus of the source of income is determined as follows: In the case of income derived from labor, it is the place where the labor is performed: in the case of income derived from use of capital, it is the place where the capital is employed; and in the case of profits from the sale or exchange of capital assets, it is the place where the sale occurs. In re Kansas City Star Co., 346 Mo. 658, 142 S.W. 2d 1029; Holmes, Federal Taxes(6th Ed.) pp. 396 to 398, supra.

"It is also true that for many purposes the situs of personal property is considered to be at the domicile of its owner. This latter proposition, however, is purely fictitious and is now limited in its application to a few cases, principally those regarding the devolution of estates of decedents and bankrupts. Eidman v. Martinez, 184 U.S. 578, 22 S. Ct. 515, 46 L. Ed 697; Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613; Ann. 13 L.R.A. 741; 57 L.R.A. 523. The Income Tax Act, like all other tax statutes, must be construed as favorably as possible to the taxpayer and strictly against the taxing authority. Artphone Corporation v. Coale, 345 Mc. 344, 133 S.W. 2d 343; F. Burkhart Manufacturing Co. v. Coale, 345 Mo. 1131, 139 S.W. 2d 502. In the field of income taxation in particular it is important to penetrate beyond legal fictions and academic jurisprudence to the economic realities of the cases. It is conceded that the actual expenditure of labor and the actual use of capital which gave rise to the income represented by these dividends

took place outside the state of Missouri. We are forced to the conclusion therefore that the source of this income was outside the state and the dividends received by the taxpayer should not be included in its gross income for the purpose of computing its Missouri income tax. We believe that Division No. 1 of this court in the case of Union Electric Co. v. Coale, 347 Mo. 175. 146 S.W. 2d 631, supra, reached a proper conclusion. That conclusion is, we think, in complete harmony with the other recent decisions of this court and In re Kansas City Star Co., 346 Mo. 658, 142 S.W. 2d 1029, supra; Artophone Corporation v. Coale, 345 Mo. 344, 133 S.W. 2d 343, supra; and F. Burkhart Manufacturing Co. v. Coale, 345 Mo. 1131, 139 S.W. 2d 502, supra.

Further, in considering the interest payments on bonds of a foreign corporation held by the taxpayer in Missouri, the court, in the above case at 1.c. 971 said:

" * * The nature and characteristics of interest payments cannot be changed by the fact that the debt upon which such interest is paid is evidenced by a bond. The character of the debt remains the same whether the fact of indebtedness is recorded in an instrument called a bond or in a promissory note or a mere open account. Nor is it of importance that the debtor is a corporation rather than an individual. The basic facts are these: That the taxpayer lent money to a person in another state which was used by that person in the other state and that the taxpayer, as an incident to such loan, was paid interest. It may be contended here that the interest was payable in Missouri because unless the parties to a contract otherwise agree all payments are to be made at the domicile or business place of the creditor. But an examination of the decisions previously cited shows that the actual place where income payments are turned over to the taxpayer is not determinative of the source of the income. For example, in the case of In re Kansas City Star Co., 346 Mo. 658, 142 S.W. 2d 1029, supra, the taxpayer's income consisted largely of the price of subscriptions to its

newspapers and money paid to it by advertisers. Most of these items would finally reach the hands of the taxpayer at its office in Missouri. Yet this court held that such portion of this income as was derived from transactions outside the state, that is from a sale of its publications outside of Missouri, was not taxable. Again a similar holding was made by the Board of Tax Appeals in the case of Appeal of Standard Marine Insurance Company, Limited, 4 B.T.A. 853, supra. These decisions and others like them make it plain that the mere point where payment reaches the hands of the taxpayer is not determinative of the source of the income. In the case of State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111, 152 N.W. 848, supra, the Supreme Court of Wisconsin held that income paid in the form of interest by a Wisconsin corporation to bondholders in other states was not taxable in Wisconsin. We are unable to agree with the reasoning of this case, however. We think that the source of the income is the person paying the interest and not the mere bond itself, which is only an evidence of the indebtedness. It therefore follows that the interest payments must be treated in the same manner as the dividend payments, and what we have said in regard to dividends will largely apply also to interest."

In the request at hand the dance instruction is given entirely by the studios located in other states to students who reside in states other than Missouri. The students pay for the lessons with funds made in their individual callings in foreign states. obligation is on the studios to furnish the dance instruction, and Educational Credit Bureau, Inc. assumes no responsibility therefor. The installment payments are made by the students through the mails. and if default is made the studio which entered into the contract with the student repurchases it. It is true that the Educational Credit Bureau, Inc. operates a going business based on the foregoing facts and that its places of business are located exclusively in Missouri. However, the determinative issue hinges on the wording of applicable statutes and the construction given them by the decided cases and the income tax statute and the construction placed on it by the cases quoted herein would seem to be determinative of the issue here involved. Probably the closest relationship between the decided cases and the situation involving the Educational Credit Bureau, Inc. was found in the case of Petition of Union Electric Company of Missouri, infra, concerning interest on bonds of a foreign corporation held in Missouri by this Missouri

corporation. The interest is payable on the bonds, irrespective of earnings, as are the payments on these installment contracts. The source of the income in that case was held to be the person paying the interest and not the bond itself, which the court said was only an evidence of the indebtedness. The source by analogy in the present situation is the person contracting with the Arthur Murray Dance Studios for the dancing lessons, who agree to pay therefor by installments without right of cancellation.

CONCLUSION

It is the opinion of this office that the installment payments received by Educational Credit Bureau, Inc., a Missouri corporation, from students located outside the State of Missouri for dancing lessons given by Arthur Murray Dance Studios in states other than Missouri are not to be included as income for the purpose of determining the tax of that corporation under the provisions of the Credit Institutions Act of 1946, since those payments do not constitute income "derived from sources within the State of Missouri," as provided by that act.

This opinion which I hereby approve was written by my assistant Mr. J. Robert Tull.

Yours very truly,

JOHN M. DALTON Attorney General

JRT:mw

ELECTIONS:

ELECTION COMMISSIONERS:

Members of boards of election commissioners provided for in Senate Bill No. 5 of 67th General Assembly, applicable to counties containing city or part of city of more than 400,000, do not have to be confirmed by Senate.



October 2, 1953

Honorable Glayton W. Allen State Senator Rock Port, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this office and reading as follows:

"At the last session of the legislature, the legislature enacted Senate Bill No. 5, which provided for permanent registration in Clay County and also for board of election commissioners for Clay County.

"The bill did not provide that such commissioners, should be appointed by the Governor, with the advice and consent of the Senate.

"Section 12 of Article 4 of the Missouri Constitution defines the 'executive department', Section 17 of Article 4 of the Missouri Constitution-provides that the heads of the executive departments shall be appointed by the Governor, with the advice and consent of the Senate.

"On June 29th, 1946, Governor Phil M. Donnelly, by virtue of Section 12 of Article 4, of the Constitution of Missouri, assigned to the Governor of Missouri, the following boards, commissions and agencies of the State,

exercising administrative or executive authority: the Missouri State Highway Patrol, Liquor Control Department, Boards of Election Commissioners and Foards of Police Commissioners.

"I would like your opinion, whether or not, under the two sections of the Constitution and under the provisions of Senate Bill No. 4, which is now Section 119.070, the board of election commissioners appointed under said act must be appointed with the advice and consent of the Senate."

The executive order dated June 29, 1946, referred to in your letter, assigned to the Governor the boards of election commissioners of St. Louis City, St. Louis County, Jackson County and Kansas City. The election board appointed under provisions of Senate Bill No. 5 of the 67th General Assembly has not as yet been assigned to any department. However, it undoubtedly will be assigned to the Governor as have been other boards of election commissioners.

Section 12, Article IV of the Constitution of Missouri, provides as follows:

"The executive department shall consist of all state elective and appointive officials and employees except the officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general, a state treasurer and a department of revenue, department of education, department of highways, department of conservation, department of agriculture and such additional departments, not exceeding five in number, as may hereafter be established by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane."

Section 17 of Article IV of the Constitution provides as follows:

"The governor, lieutenant governor, secretary of state, state treasurer and attorney general shall be elected at the presidential elections for terms of four years eac. The state auditor shall be elected for a term of two years at the general election in the year 1948, and his successors shall be elected for terms of four years. The governor and state treasurer shall not be eligible for election as their own successors. The heads of all the executive departments shall be appointed by the governor, by and with the advice and consent of the senate. All appointive officers may be removed by the governor and shall possess the qualifications required by this Constitution or by law.

In addition to the executive departments listed in Section 12 of Article IV of the Constitution, the General Assembly has provided for the creation of a department of labor and industrial relations, a department of corrections, a department of public health and welfare and a department of business and administration.

We believe it to be clear that the provision in the last sentence of Section 12 of Article IV, providing for the assigning of boards, bureaus, commissions and other agencies to the various departments, shows that such boards, bureaus, commissions and other agencies are not themselves departments of the state.

Therefore, the provision of Section 17, Article IV, requiring that the heads of all the executive departments shall be appointed by the Governor by and with the advice and consent of the Senate, is not applicable to members of election boards.

Section 41 of Senate Bill No. 5, which provides for the creation of a board of election commissioners for each county governed by the provisions of such bill, provides that the members of such board shall be appointed by the Governor. Such section contains no reference to the advice or consent of the Senate. There is no constitutional provision requiring the advice and consent of the Senate regarding members of boards

Honorable Clayton W. Allen

of election commissioners.

CONCLUSION

It is, therefore, the opinion of this office that there is no constitutional requirement that members of boards of election commissioners be appointed by the Governor by and with the advice and consent of the Senate.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

CBB:1rt

HEALTH, DEPARTMENT OF: ADULTERATED FOODS:

The offering for sale of a meat product designated as "tenderette," the advertisement of which states the ingredients contained therein, none of which ingredients are injurious to health in the proportion used in such product and mone of which ingredients are prohibited by Missouri law, is not in violation of the laws of Missouri.

1-29-53

XXXXXXXX

January 29, 1953



Honorable James R. Amos Director, Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request.

> "For a number of years the Division of Health has considered that ground beef, commonly known as hamburger, must contain only pure ground beef with only salt, or other spices added.

"A number of concerns have been in the practice of adding preservatives such as sulfites or nitrites to maintain a pleasing red color, and have also added certain cereals such as flour, poteto starch, soya flour, and other materials which has increased its bulk or weight,

"We have, therefore, taken action against these ground meat products advertised as hamburger which contained any preservatives as added materials which increase its bulk or weight, and used as our authority Chapter 196, Section 196.070, Revised Statutes of Missouri, 1949 Edition, paragraph No. 10.

"Recently at the Cape Girardeau Fair we were confronted with a product manufactured by Miller & Fischer of Cape Girardeau in which they claim they are not violating the State Food and Drug Laws because they are advertising their product not as hamburger but as 'Tenderette'. They further claim that they are not violating the law because their sign lists the ingredients; namely, 'Pure ground beef, pork, suet, cereal, salt, sugar, spices and enough water to insure proper processing, and .018 of 1% sodium sulfite added'.

"I would like to call your attention to the fact that the U.S. Department of Agriculture, Bureau of Animal Industry, permits the use of artificial color and preservatives such as sodium nitrite and sodium nitrate in such products as frankfurters, bologna, and other processed meats, but they do require that these products be labeled properly and that the label contain the list of ingredients used.

"All of these products are also processed or cooked so that they may be eaten without further cooking, while the ground meat which we refer to above is still in the raw state and must be cooked before it can be eaten.

"We are attaching herewith one of the placards used with the product known as 'Tenderette'."

We will first observe that no allegation is made by you that any ingredient of "Tenderette" is harmful, or that the use of any ingredient, in the proportion used, is prohibited by Missouri law.

Rather, you rest your case upon paragraph 10 of Section 196.070, RSMo. 1949, which paragraph reads:

"A food shall be deemed to be adulterated if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is."

For a definition of the word "adulterated" we turn to the case of City of St. Louis v. Jud. 236 Mo. 1. At 1.c. 6, the court said:

"* * *'Adulterate,' means to corrupt, debase, or make impure by an admixture

of a foreign or baser substance. * * * articles are adulterated 'to improve or change their appearance or flavor in imitation of an article of higher grade or of a different kind. Adulteration is an 'artificial concealment of defects. !"

In the light of the above definition we are unable to see that the product advertised as "Tenderette" comes within the purview of paragraph 10 of Section 196.070, supra. There is no similarity whatever between the word "Tenderette" and the word "hamburger" to which, presumably, it is most nearly akin. The advertisement plainly, and we presume correctly, states what ingredients "Tenderette" contains. Certainly nobody who read the advertisement which was displayed at the place of sale would be led into believing that when he bought "Tenderette" he was buying "hamburger" or anything but "Tenderette." Not only was there no attempt to deceive the public, but apparently every effort was made to inform the public as to just what it was getting when and if "Tenderette" was purchased.

We have examined Section 196.075, RSMo. 1949, which section is entitled, "Food, when deemed misbranded," and we fail to see that "Tenderette" violates any of the provisions of that section. We shall, however, later in this opinion refer to paragraph 3 of the above section. Neither do we see that "Tenderette" violates any of the provisions of Section 196.070, RSMo. 1949, including paragraph 10 to which you call attention and which we have discussed above.

In order to sustain our position as given in the preceding paragraph, we call attention to the case of United States v. 62 Cases More or Less, Six Jars of Jam, etc., 183 Fed. 2nd 1014.

In this case it was held that the jam in question which failed to comply with certain provisions of the Federal Food, Drug and Cosmetic Act, defining fruit jam, could not be legally represented to be, or to be used, as fruit jam, nor could it be legally sold as fruit jam. At l.c. 1017-1018, the court said:

"It is significant that Congress in Section 343(g), in dealing with misbranding by failure to conform to the definition and standard of identity, did not permit departure from the standard, if the label disclosed that the food did not conform to the standard, whereas in

Section 343(h) (1) (2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

"Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.

"We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated; that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of Section 341 and Section 343(g) by labeling them imitations of jams and by truthfully setting

Hon. James R. Amos:

forth on the label the proportions of sugar, fruit and other ingredients contained therein.

"It is urged that the effect of our discussion will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of Section 343(g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name of fruit jam and in such a manner that it purports to be, or is represented to be fruit jam." (Emphasis ours.)

Again in this connection, we call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. 2d 34. From the statement of facts given in this case it was sought by the Department of Agriculture to stop the sale of a semi-frozen food product similar to ice cream but containing less butter fat than ice cream, on the ground that the public needed to be protected. The product was a healthful nutritive food and was not offered for sale as ice cream, and the court held that the public needed no protection under such circumstances and that the sale of the product could not be stopped. At 1.c. 37 the court said:

"It is contended that Dairy Queen is an imitation ice cream in that it resembles ice cream in taste, texture and consistency. Appellant does not concede this, but even if it were so, a resemblance to ice cream does not make the product an imitation. There is no artificiality employed in producing Dairy Queen. Its ingredients are the same natural ingredients contained in ice cream, but in different proportions. We can see where imitation and adulteration may be present and fraud perpetrated upon the public where,

as in Carolene Products Co. v. United States, 1944, 323 U.S. 18, 65 S. Ct. 1, 89 L. Ed. 15, abstracted butter fat is replaced with vegetable oil; and where, as in Day-Bergwall Co. v. State, 1926, 190 Wis. 8, 207 N.W. 959, the product was admittedly an artificial vanilla. * * *

"According to the stipulation, Dairy Queen will not be sold as ice cream. Whatever resemblance it may have to ice cream, therefore, cannot mislead the public in buying it.

"Respondent argues that in removing some of the butter fat, which is the more expensive ingredient, and adding more of the cheaper non-fat solids, the appellant manufactures an inexpensive product which would tempt retailers to pass it of f as ice cream. This so-called substitution has no effect upon the wholesomeness or nutritious properties of the product, and is not sufficient reason to bar it, especially in view of the authority granted to the respondent by ch. 93, Stats., to regulate its manufacture and sale.

"Under ch. 93, Stats., the department of agriculture has the power to establish standards for food products and to prescribe regulations governing marks and tags upon such products. Those standards shall not affect the right of any person to dispose of a food sec. 93.09(h), Stats., but such person may be required to mark or tag such product, in such a manner as the department may direct, to indicate that it is not intended to be marketed as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required under this section. The purpose is clear. The legislature does not intend to deny any person the right to make and sell a food product so long as its consumption does not endanger public health and welfare. It does intend, however, to so regulate its sale that the public is not subjected to the injury of buying a product different from that

which is intended to be bought. See City of New Orleans v. Toca, 1917, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761.

* * * * * * * * * * *

"It is our conclusion that the general welfare does not require prohibition of the manufacture and sale of the product here in question, the power of regulation being sufficient to prevent any fraud upon the consuming public." (Emphasis ours.)

We again refer to paragraph 3 of Section 196.075, RSMo. 1949, which paragraph reads:

"If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word, 'imitation,' and, immediately thereafter, the name of the food imitated."

In the light of the two cases discussed above we do not believe that paragraph 3 of Section 196.075, supra, is applicable in the instant case.

CONCLUSION

It is the opinion of this department that the offering for sale of a meat product designated as "tenderette," the advertisement of which states the ingredients contained therein, none of which ingredients are injurious to health in the proportion used in such product and none of which ingredients are prohibited by Missouri law, is not in violation of the laws of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General DIVISION C HEALTH:

It is the duty of the Director of the Division of Health to enforce Section 315.080, RSMo 1949, throughout the State of Missouri, in all cities, including those under special constitutional charter, except as to hotels of fire-proof construction of more than three stories in height situated in cities now having fire and building ordinance regulations and which are erected and maintained in compliance with such fire and building ordinances.



January 31, 1953

1-31-53

Honorable James R. Amos Director Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

"We would like to call your attention to the fact that the Bureau of Food and Drugs, Division of Health, who has been enforcing the State Hotel Laws, has obtained a certification from the various cities, that they are inspecting such hotels under their city building code or city fire ordinances and when the Bureau of Food and Drugs has received such a written certification, has in accordance with the Statutes accepted this as complying with Section 315.080 Revised Statutes of Missouri 1949.

"In discussing the certification of hotels under this Section with the personnel of Kansas City, Missouri, we were advised that the City Attorney has examined the laws in regard to this matter and the attached opinion has been submitted to us.

"We would like to request that you examine this opinion and advise us whether you concur with the attached interpretation. If, after examining said opinion, you differ in regard to this matter, would you please give us an official opinion concerning our legal responsibilities under Section 315.080."

Honorable James R. Amos:

The opinion of the City Attorney of Kansas City, to which reference is made above, is also received.

At this point we take note of the fact that the City of Kansas City is operating under a special constitutional charter.

You inquire particularly regarding the responsibilities of the Director of the Division of Public Health regarding enforcement of Section 315.080, RSMo 1949. The above section applies to hotels more than three stories high, provides that such hotels shall be built in a particular manner in some respects, and sets forth in detail the manner of construction of fire escapes in such hotels. The section concludes with the statement:

"* * provided, however, that none of the provisions of this section shall apply to and be binding on hotels of fireproof construction situated in cities now having fire and building ordinance regulations, and which are erected and maintained in compliance with such fire and building ordinances."

This latter clause clearly excepts from the provisions of Section 315.080, supra, hotels of fireproof construction located in cities which have fire and building ordinance regulations. The City of Kansas City, which has such regulations, would therefore be an exception from the provisions of Section 315.080, supra. Thus far the situation seems to be clear.

We now turn to Section 315.030, RSMo 1949. That section reads:

- "1. The director of the division of health shall enforce the provisions of sections 315.010 to 315.230 and all inspection statutes and valid municipal ordinances or regulations properly construed as applying to hotels.
- "2. The director shall keep a complete set of books for public use and inspection, showing the condition of each hotel inspected, together with the name of the owner, proprietor and manager thereof, and showing its sanitary condition, the condition of its fire escapes, and any

other information for the betterment of the public service."

Since Section 315.080 is embraced in the sections enumerated above (315.010 to 315.230) it is clear that it is the duty of the Director of the Division of Health to enforce Section 315.080, supra, in all places in the state and as to all hotels in the state except as to "hotels of fireproof construction situated in cities now having fire and building ordinance regulations, and which are erected and maintained in compliance with such fire and building ordinance."

Thus far the situation is also clear, since no one would question the right of the state to make certain exceptions to the provisions of a general law.

We now turn to Sections 320.020 and 320.030, RSMo 1949. Section 320.020, RSMo 1949, reads as follows:

"When fire escapes are to be attached to buildings within a city, they shall be constructed under the supervision of and subject to the approval of the commissioner or superintendent of public buildings within such city, and if there be no such office within such city, they shall be subject to the approval of the chief of the fire department of such city. Whenever a fire escape attached to any building located within a city shall, upon inspection by the commissioner or superintendent of public buildings, or chief of the fire department of such city, be found in an unsafe and dangerous condition, the owner, lessee, proprietor or keeper of said building shall forthwith rebuild or repair same or replace same in safe condition. upon written notice of such commissioner or superintendent. When fire escapes are to be attached to buildings not within the limits of any city, they shall be subject to the approval of the sheriff of the county in which such building is located. And should such fire escape, through age or otherwise, be or become unsafe or dangerous, the same shall be repaired and placed in safe condition, upon written notice by said sheriff to the person in charge of such building.

All fire escapes shall have proper and safe balconies for each story thereof, surrounded on the sides with wire bank and pipe rail not less than three feet in height, with openings from the building to said balconies. Whenever a stair fire escape is to be constructed, the stairway shall, where practicable, be of an angle of not more than fifty-five degrees and constructed so as to be placed on a blank wall. The stair fire escape shall be provided with one or more landings in each story, and enclosed on the sides with wire bank and pipe rail not less than three feet in height and running on the same angle as the stairs."

Section 320.030, RSMo 1949, reads as follows:

"The number of fire escapes to be attached to any one building, as required in this chapter, shall, when the building is located within a city, be determined by the commissioner or superintendent of public buildings within such city, and if there be no such officer in such city, then by the chief of the fire department of such city; provided, however, that all buildings of non-fireproof construction three or more stories in height, used for manufacturing purposes, hotels, dormitories, schools, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons or fraction thereof, for whom working, sleeping or living accommodations are provided above the second story, and all public halls which provide seating room above the first or ground story, shall have such number of fire escapes as shall not be less than one fire escape for every one hundred persons, calculated on the seating capacity of the hall, unless a different number is authorized in writing by the commissioner. or superintendent of buildings, or the chief of the fire department, or the sheriff of the county, as the case may be."

Honorable James R. Amos:

It is plain that the above two sections do, in some particulars, fix the powers and duties of some municipal offices, to-wit, the commissioner or superintendent of public buildings or if there be no such offices, then the chief of the fire department, in respect to the construction of buildings within the municipality.

Section 22 of Article VI, of the 1945 Missouri State Constitution, reads as follows:

"No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous Constitution, and all such offices or employments heretofore created shall cease at the end of the terms of any present incumbents."

It would appear that Sections 320.020 and 320.030, supra, do what Section 22 of Article VI of the Missouri State Constitution, supra, says cannot be done, insofar as special constitutional charter cities are concerned. Of course, when the statute is in conflict with the Constitution the statute must give way and becomes null and void.

CONCLUSION.

It is the conclusion of this department that it is the duty of the Director of the Division of Health to enforce Section 315.080, RSMo 1949, throughout the State of Missouri, in all cities, including those under special constitutional charter, except as to hotels of fireproof construction of more than three stories in height situated in cities now having fire and building ordinance regulations and which are erected and maintained in compliance with such fire and building ordinances.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General HEALTH; DIVISION OF: REGULATIONS; EFFECT OF:



State Milk Regulations of Division of Health promulgated under authority of Sections 196.045 and 196.050 RSMo 1949, of food and drug laws, and coming within narrow limits of subject matter and scope of operation, and have the force and effect of statutory laws.

February 17, 1953

Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"St. Louis County Health Department has for the past few years been operating under our State Milk Regulations, a copy of which is attached.

"These regulations were adopted by the Division of Health and duly filed with the Secretary of State in accordance with the powers granted the Division of Health for the promulgation of rules and regulations governing the health and welfare of the people of the State.

"St. Louis County Health Department has asked the St. Louis Prosecuting Attorney's office to assist them in enforcing these regulations, and have been advised that the only statutory authority on milk authorizes the Commissioner of Agriculture to enforce certain requirements.

"The Prosecuting Attorney's office for St. Louis County has requested that we obtain an official opinion from your office concerning the legality of the said Milk Regulations, and whether such

regulations have the full force and effect of statutory law.

"We would be pleased to have such an opinion from you at your earliest convenience."

It is the duty and responsibility of the division of health to safeguard the health of the people of the state under the provisions of Chapter 192, RSMo 1949, entitled "Division of Health." Among the various duties prescribed by this chapter to be performed by the division of health is the administration of the laws relating to foods and drugs, as provided by Section 192.080, which reads as follows:

"All powers and duties pertaining to administration of laws relating to food and drugs shall be exercised by the division of health. The director of health may appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, and particularly to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to cause to be arrested and prosecuted. any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. The director shall make orders and findings for carrying out the provisions of this chapter and such orders and findings shall conform as nearly as practicable to the orders and findings at present established or which may hereafter be established for the enforcement of the act of congress, approved and known as 'The Food and Drug Act,' together with any amendments thereto."

Sections 196.045 and 196.050, RSMo 1949, authorizes the division of health to promulgate regulations for the efficient enforcement of the food and drug laws.

Section 196.045, RSMo 1949, reads as follows:

- "1. The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act.
- "2. Hearings authorized or required by sections 196.010 to 196.120 shall be conducted by the division of health or such officer, agent, or employee as the division may designate for the purpose.
- "3. Before promulgating any regulations contemplated by sections 196.050, 196.075 (10), 196.080, 196.085, 196.100 (4), (6), (7), (8), the division shall give appropriate notice of the proposal and of the time and place for a hearing. The regulation so promulgated shall become effective on a date fixed by the division which date shall not be prior to sixty days after its promulgation. Such regulation may be amended or repealed in the same manner as is provided for its adoption, except that in the case of a regulation amending or repealing any such regulation the division, to such an extent as it deems necessary in order to prevent undue hardship, may disregard the foregoing provision regarding notice, hearing, or effective date.

Section 196.050, RSMo 1949, reads as follows:

"In no event shall the said division of health prescribe or promulgate any regulation fixing or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by sections 196.010 to 196.120 and if any product or commodity covered by said sections shall comply with the definitions and standards prescribed by the federal act for such product or commodity, such product or commodity shall be deemed in all respects to comply with sections 196.010 to 196.120."

From the provisions of the preceding sections, the powers of the division of health to make regulations appears to be limited in

scope to regulations of definitions and those establishing standards of quality of foods and drugs covered by Sections 196.010 to 196.120. The standards thus set cannot be more stringent than those prescribed by the federal food and drug statutes for any commodities covered by above statutes.

While various sections of the Missouri food and drug statutes provide that the violation of certain sections are offenses for which the violator may be criminally prosecuted and punished, it appears that the violations of any regulations of the division of health made under authority of Sections 196.045 and 196.050, supra, are not criminal offenses. This does not mean that any person who violates any such regulations cannot be punished, since the violation is not a crime, but rather that the violator must be proceeded against in a method other than a criminal prosecution.

When regulations defining food products or those establishing standards of quality for same, have been violated, in either instance the statute provides that such food products may be seized under condemnation proceedings and held by the officers pending the further orders of the court in which said proceedings were instituted.

In the event food products have been found to be adulterated, misbranded, or contain poisonous or deleterious substances in excess of specified quantities, within the meaning of Section 196.070, 196.075 and 196.085, respectively, they may also be seized under condemnation proceedings.

Under such conditions, it shall be the duty of the prosecuting attorney of any county or city, when called upon to render legal assistance to the division of health in the enforcement of the food and drug statutes, or any regulations made by said division of health as provided by Section 196.035. Said section reads as follows:

"It shall be the duty of the prosecuting attorney in any county or city in the state, when called upon by the division of health. or any of its assistants, to render any legal assistance in his power to execute the laws and to prosecute cases rising under the provision of sections 196.010 to 196.120. Before any violation of sections 196,010 to 196,120 is reported to any such attorney for the institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views before the division of health or its designated agent, either orally or in writing, in person, or by attorney, with regard to such contemplated proceeding. The court at any time after seizure up to a resonable time before trial,

shall, by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruit or vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyses were obtained."

The general rule prevailing in most jurisdictions is that the police power of the state may be exercised within a limited scope if such activities are to be in conformity with the constitution and statutes of the state in which the police power is exercised, and that any act done thereby must be essential to the safety, health, peace or morals of the people of the state.

It is believed that the general rule in this respect has been briefly stated in Vol. 11, Am. Jur., page 1006, as follows:

"Although constitutional guaranties cannot be transgressed, it is settled that the possession and enjoyment of all rights are subject to the police power which includes such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Consequently, both persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, welfare, and prosperity of the people of the state, everything contrary to public policy or inimical to the public interest is the subject of the exercise of the power. * * *"

(Underscoring ours.)

It appears that the power to make regulations delegated to a board or department of government by the legislative department, for the purpose of protecting the public safety, health, peace or good morals, is not an unconstitutional delegation of power by the legislative department.

In the case of United States v. Grimaud, 220 U.S. 506, 55 L. Ed. 563, it was held that the legislative power of congress was not unconstitutionally delegated to the Secretary of Agriculture by the provisions of the forest reserve act of June 4, 1897, and February 1, 1905, which made violations of the Secretary of Agriculture's regulations, promulgated under authority of the acts criminal offenses. At 55 L. Ed., 1. c. 569, the court said:

"That 'Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.' * * * But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

"It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering said forest reservation.' The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, * * * was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. * * **

Again, in discussing the legality of a statute of Vermont, in the case of State v. Peet, 68 Atl. 661, the court said at l.c. 663:

"It is argued that the state has power to prohibit the exportation to another state of anything which is not an article of commerce, as, in this case, the flesh of calves which were less than four weeks old, or which weighed less than 50 pounds, dressed weight, when killed, because unwholesome for human food. The question then arises whether such meat, for the purpose named, is an article of interstate commerce, and whether it is within the power of a state Legislature to declare it otherwise. On July 25, 1906, for the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, under the authority conferred upon him by Act Cong. June 30, 1906, c. 3913, 34 Stat. 674, the Secretary of Agriculture issued regulations 'for the inspection, reinspection, examination, supervision, disposition, and method and manner of handling of live cattle, sheep, swine, and goats,

and the carcasses and meat food products of cattle, sheep, swine, and goats * * *.' Under regulation 15 it is provided '(X) Carcasses of animals too immature to produce wholesome meat, all unborn and stillborn animals, also carcasses of calves, pigs, kids, and lambs, under three weeks of age, shall be condemned.' Since these regulations were prescribed by the Secretary of Agriculture under authority of the act of Congress before referred to, and are not inconsistent with the provisions of that act, they have the force of law. Nye v. Daniels, 75 Vt. 81, 53 Atl. 150."

(Underscoring ours.)

In the typical Missouri decision of City of St. Louis v. Grafemand Dairy Co., 190 Mo. 492, regarding the exercise of police power by a city, the court upheld the legality of an ordinance for inspection and sale of milk within the corporate lines, and at 1. c. 506, said:

"* * *Section 26, article 3, of the charter of St. Louis, expressly provides: 'That the Mayor and Assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of this State, or of this charter, to make provision for the inspection of butter, cheese, milk, lard and other provisions, and to license, tax and regulate occupations and secure the general health.' No more definite and adequate provision and authority could have well been given to the city to enable it to provide all reasonable regulations for the inspection of milk, and to exact a reasonable inspection fee therefor, and we have already ruled that, as to the inspection fee in this case, it is not a tax within the meaning of that term as understood in our Constitution and general statute. That the State, and this city under this specific grant of power, may make any business requiring police legislation pay the expense of regulating and controlling it, and that this may be done by exacting inspection fees from those engaged in the business, is no longer an open question in this country. * * **

(Underscoring ours.)

In view of the holding in the above mentioned decisions, it is our thought that the power to promulgate regulations for the efficient

enforcement of the food and drug laws, as provided by Sections 196.045 and 196.050, supra, granted to the division of health by the legislature, was not an unauthorized delegation of legislative authority in violation of the Constitution or any Missouri statutes, but that said statutes, along with other sections of said food and drug laws, were police measures enacted for the purpose of protecting the public health and preventing the perpretation of fraud upon the public by unscrupulous manufacturers and vendors of commodities covered by the act. Consequently, the promulgation of the State Milk Regulations and their enforcement by the division of health under authority of said statutes, were valid and proper exercises of the police power which has been delegated to that department of the state government.

Since said regulations are limited to the subject matter and scope provided by Sections 196.045 and 196.050, supra, they have the same force and effect as if they had been enacted into statutory laws.

CONCLUSION

It is therefore the opinion of this department that the State Milk Regulations promulgated by the division of health under the authority granted to said department by Sections 196.045 and 196.050, RSMo 1949, are within the narrow limits as to subject matter and scope of operation provided by said sections, and have the force and effect of statutory law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General

PNC:hr

DIVISION OF HEALTH:

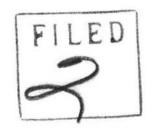
BIRTH CERTIFICATES:

The Division of Health may accept for filing, after the time prescribed for filing, the birth certificate of one whose birth certificate is on file in another state, upon the submission of proof by such person sufficient to convince the Division of Health that he was born in this state.

XXXXXXXXXX

JOHN M. DALTON

March 26, 1953



XXXXXXX

J.C. Johnsen

Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request.

"We would like to have an opinion from your office as to whether we can file a birth certificate for a person who claims he was actually born in Missouri, yet who actually has on file for him a birth certificate in a neighboring state. The specific case in question involves a person living in Missouri with an Arkansas postoffice address. An Arkansas physician attended the birth and filed the certificate with the State Board of Health, Little Rock, Arkansas."

We note that the person in question claims to have been born in Missouri, but that his birth certificate is on file in Arkansas. A photostatic copy of this birth certificate, which you have forwarded to us, shows the birth to have occurred in Leachville, Arkansas.

We would now direct attention to Section 193.100, RSMo 1949, which reads:

"Within the time prescribed by the division a certificate of every birth shall be filed with the local registrar of the district in which the birth occurred, by the physician, midwife, or other legally authorized person

Hon. James R. Amos, M.D.

in attendance at the birth; or if not so attended, by one of the parents."

Also, to Section 193.200, RSMo 1949, which reads:

"A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court."

Also, to Section 193.210, RSMo 1949, which reads:

"I. Certificates accepted subsequent to six months after the time prescribed for filing and certificates which have been altered after being filed with the state registrar shall contain the date of the delayed filing and the date of the alteration and be marked 'delayed' or 'altered.'

"2. A summary statement of the evidence submitted in support of the acceptance for delayed filing or alteration shall be endorsed on the certificate."

Section 193.100, supra, provides that within a certain time after a birth a certificate of such birth shall be filed, with the local registrar. That was not done in the instant case. However, Section 193.210, supra, permits the filing of such delayed certificate after the prescribed time upon the submission of evidence sufficient to satisfy the Division of Health that such certificate should be accepted for filing.

Under the provisions of Section 193.200, supra, a person born in this state, but whose birth, for some reason, has not been recorded in this state, but who submits to the Division of Health proof sufficient to satisfy the Division that such person was born in this state, should have his

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birth certificate filed by the division.

CONCLUSION

It is the opinion of this department that the Division of Health may accept for filing, after the time prescribed for filing, the birth certificate of one whose birth certificate is on file in another state, upon the submission of proof by such person sufficient to convince the Division of Health that he was born in this state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW:mm

DIVISION OF HEALTH BIRTH CERTIFICATES: Livision of Health may not amend or alter a birth certificate except at request of person whose birth certificate it is sought to have altered or amended, then only upon submission of such proof as required by Div. or court.

XXXXXXXXXX

April 21, 1953

JOHN M. DALTEN LED

J.C. Johnsen

Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"We desire an opinion relating to whether or not we can change an original birth certificate by deleting information relating to the alleged father and declaring the child not legitimate. The case in question arises from the fact that the mother gave the information, stating that her husband was the father of her child and that certain personal particulars relating to the husband were added to the record. The husband appeared in court and secured a divorce by default. The judgment accepted the petition that there were no children born of the said marriage. This man has requested us by affidavit and divorce decree to remove all facts relating to him and to render the child illegitimate."

The law of this state relating to vital statistics, which includes birth certificates, is found in Chapter 193, RSMo 1949. The only provisions in that chapter which relate to the amendment or alteration of a birth certificate which has been previously filed, are found in Sections 193.200 and 193.210, RSMo 1949, which sections read:

"193.200. -- A person born in this state, or a resident of Missouri born outside of this state whose birth is not recorded in any other state, may file, or amend a certificate after the time herein prescribed, upon submitting such proof as shall be required by the division, or by any court."

"193.210. -- 1. Certificates accepted subsequent to six months after the time prescribed for filing and certificates which have been altered after being filed with the state registrar shall contain the date of the delayed filing and the date of the alteration and be marked 'delayed' or 'altered.'

"2. A summary statement of the evidence submitted in support of the acceptance for delayed filing or alteration shall be endorsed on the certificate."

For a number of reasons we believe that these two sections must be read together, and that Section 193.210 modifies and explains Section 193.200. Both sections were enacted in 1947 as part of House Bill No. 65; what is now Section 193.200 was Section 20 of said bill, and what is now Section 193.210 was Section 21; both sections state, by their titles, that they relate to the same matter, and a reading of the sections seems to make this fact clear.

Section 193.200 was amplified by the Laws of Missouri, 1949, but was not changed in substance. We do not, therefore, believe that Section 193.210 can be read except in the light of the preceding Section 193.200.

It will be noted that Section 193.200 provides that the Division of Health may permit the filing of a birth certificate after the prescribed time by the person who desires to have his birth certificate filed, or may, upon the submission of satisfactory proof, allow a person to have his birth certificate amended.

The significant thing about Section 193.200, as we view

it, is that amendment of a birth certificate can be made only when movant in the matter is the person whose birth certificate is sought to have amended. Section 193.200 certainly does not indicate that anybody else can do this. For this position there would appear to be good reason. If anybody could go before the Division of Health and have changed the birth certificate of anybody else, numerous people, unknown to themselves, might become officially illegitimate. In the instant case, the movant was not the one whose birth certificate was to be amended and we do not believe that the Division of Health can make the requested amendment.

CONCLUSION

It is the opinion of this department that the Division of Health may not amend or alter a birth certificate except at the request of the person whose birth certificate it is sought to have altered or amended, and then only upon the submission of such proof as shall be required by the division or by any court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW: MM

SEWER DISTRICTS: It is illegal for city, town, village or sewer district to place a rental charge on its sewer system for maintenance thereof or for building up construction reserve, unless revenue bonds are first voted and issued.

April 22, 1953

James R. Amos, M.D. Director, Division of Health Jefferson City, Missouri

Dear Sir:

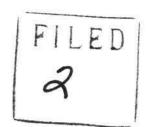
This will acknowledge the receipt of your opinion request of July 29, 1952, which request reads as follows:

"Is it legal for a city, town, village, or sewer district to place a rental charge upon the use of a sewer system owned by the said city, town, village or sewer district, for the purpose of maintaining the same, or for the purpose of building up a construction reserve, without first voting and issuing revenue bonds."

For the purposes of this opinion we will assume that where you ask if it is legal to place a "rental" charge upon the use of a sewer system, that you mean whether the owner thereof has a right to charge a rate for its use.

Your request calls for an interpretation of House Bill No. 45, passed by the 66th General Assembly of Missouri, and which is now a part of the Revised Statutes of Missouri, 1949, beginning at Section 250.010 thereof and ending at Section 250.250.

Section 250.040, Cumulative Supplement 1951 of the Missouri 1949 Revised Statutes, provides the manner in which a city, town or village may pay for the cost of acquiring, constructing, improving or extending a sewage system or a combined waterworks and sewerage system. Subsection 5 thereof provides as follows:



"(5) From the proceeds of revenue bonds of such city, town or village, payable solely from the revenues to be derived from the operation of such sewerage system or combined waterworks and sewerage system or from any combination of any or all such methods of providing funds."

The following section of the statutes, 250.250, RSMo. 1949, Cumulative Supplement 1951, in referring to the cost of such improvement to a sewer district provides that the cost can be met in four (4) different ways, the last of which is as follows:

"(4) From the proceeds of revenue bonds of such sewer district, payable solely from the revenues to be derived from the operation of such sewerage system or from any combination or all such methods of providing funds."

From the foregoing provisions of the statutes, it is apparent that when the election to issue revenue bonds as required by Section 250.070, RSMo. 1949, has been held and a favorable vote cast, and when an ordinance adopted by the governing body of the city, town or village or a resolution adopted by the board of trustees of a sewer district as provided for in Section 250.080, RSMo. 1949, authorizes the issuance thereof, a city, town, village or sewer district has the authority to issue revenue bonds for the purpose of acquiring, constructing, improving or extending of a sewerage and/or water system. Section 250.120, RSMo. 1949, Cumulative Supplement 1951, makes it the duty of any city, town, village or sewer district which issues bonds for the purpose aforesaid, to fix and maintain rates and make and collect charges for the use and service of the system, sufficient to pay the costs, maintenance and operation thereof. So, a city, town, village or sewer district is authorized to charge a rate for the use or "rental" of its sewer system where revenue bonds are issued. Now, the question is, do they have a right to do so if the revenue bonds are not voted and issued?

The Legislature specified in the instant group of statutes that the cost of acquiring, constructing, improving or extending a sewer system could be paid in four ways, one of which was by the issuance of revenue bonds. It further provided that if and when such revenue bonds were properly issued it became the mandatory duty of the city, town, village or sewer district to obtain funds for the cost of maintenance and operation thereof and the retirement of said revenue bonds, and to fix and charge rates for the use or "rental" of said sewers could be set up and that was after revenue bonds had been issued. We have the express mention of one

manner in which to proceed which implies the exclusion of any other. This is embodied in the maxim, "Expressio Unius est exclusio alterius."

In the case of Keane vs. Strodtman, 18 S.W. (2d) 896, 1.c. 898, this court said:

"The familiar maxim of "expressio unius est exclusio alterius" may also be invoked, for the maxim is never more applicable than in the construction of statutes. Whitehead vs. Cape Henry Syndicate, 105 Va. 463, 54 S.E. 306; Hackett vs. Amsden, 56 Vt. 201, 206; Matter of Attorney General, 2 N.M. 49. Certainly where, as at bar, the statute (Section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim."

In the case of Kansas City Court of Appeals in Dougherty vs. Excelsior Springs, 110 Mo.App. 623, 626, 85 S.W. 112, 113, the following statement was made by the Court:

"The law is well settled that when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power, this brings the exercise of such power within the proivisions of the maxim expressio unius, etc., and by necessary implication forbids and renders nugatory the doing of the thing specified except in the particular way pointed out."

In Peatman vs. Worthington Drainage District, 176 S.W.(2d) 539, l.c. 545, in speaking of the foregoin citation, the Kansas City Court of Appeals said:

"The foregoing expressions are clearly applicable to the exercise of powers granted to a drainage district, which under the laws of Missouri is a public governmental corporation."

Another expression on this question was made by the St. Louis Court of Appeals in City of Hannibal vs. Minor, 224 S.W.(2d) 598, 1.c. 605:

"A careful reading of the statute itself, Section 7451, supra, shows that the Legislature gave to the municipalities named therein authority to tax a large number of occupations and callings and 'specially' named them separately. Among those named was 'auto wrecking shops.' When we consider that the Legislature specially named 'machine shops' and 'auto wrecking shops' but did not mention 'automobile repair shops,' the intention to exclude the last mentioned becomes clear. There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim; 'Expressio Unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of the other. The application of this principle to the question before us merely serves to emphasize the fact that the City in this case was without authority to include in its ordinance 'automobile repair shops.'"

Applying the above principle to our present question, we must come to the conclusion that the city, town, village, or sewer district can only fix and charge a rate, or "rental," on its sewer system as provided in Chapter 250, RSMo. 1949, after revenue bonds have been legally authorized and issued.

CONCLUSION

It is, therefore, the opinion of this department that it is not legal for a city, town, village or sewer district to place a rental charge upon the use of its sewer system for the purpose of maintaining same or building up a construction reserve, unless revenue bonds are first legally authorized as provided in Chapter 250, RSMo. 1949.

This opinion which I hereby approve was written by my assistant, Mr. John S. Phillips.

Very truly yours,

JOHN M. DALTON Attorney General DIVISION OF HEALTH:

BIRTH CERTIFICATES:

XXXXXXXXXX

JOHN M. DALTON

The information required in a birth certificate is very largely a matter of discretion resting ILLEGITIMATE CHILDREN: in the Department of Health of the State of Missouri; that mothers may assign names to their children in those cases where paternity is doubtful or in which the child is illegitimate; that birth records, based upon information furnished by the mother of the child, which records supply personal particulars relating to the father, but not the name of the father, should not have the name of the child removed nor the information relating to the father, prior to the filing of the birth certificate.

May 1, 1953

J.C. Johnsen

Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Under date of March 22, 1935, your office rendered an opinion relative to the surname to be assigned to an illegitimate child. Since that date a new State Constitution and a new birth registration law have become effective. The birth registration law is included in Chapter 193, Missouri Revised Statutes, 1949. Is the opinion of 1935 still in effect?

"For convenience in filing records in this office we recommend that the name of the child and all information relating to the father be omitted on birth records where the paternity is doubtful. We also recommend that the mother sign the birth record in the space where the informant's signature is to be shown. We usually file such a record here under the legal name of the mother for convenience in subsequent identification of the original record. Further, we assume as a matter of convenience that the addition of a surname to the child's record can be made through an affidavit of the natural mother or the legal guardian and through the presentation of some document identifying the child. This leads to a second question. Is this procedure

still satisfactory in view of the fact that the legitimacy status of the child no longer appears on the portion of the record provided for certified copies?

"Many mothers assign names to the children even in those cases where paternity is doubtful. Some mothers also supply personal particulars relating to the father, but not the name. Should such records have the name of the child removed and information relating to the father removed prior to the filing?"

Your first inquiry is in regard to an opinion rendered by this department on March 22, 1935, to Doctor E. T. McGaugh, State Health Commissioner.

We do not believe that the McGaugh opinion, which passes upon the right of an illegitimate child to assume a name, is upon the same issue as the opinion in the instant case, which is upon the right of the mother of an illegitimate child to give such child a name. Since there is no point of conflict, we shall not review the McGaugh opinion except to state that it yet is an official opinion of this department upon the issue with which it deals.

We have carefully noted the general procedure which you out lined in the second paragraph of your letter, in regard to the handling of cases such as you describe, and believe that the procedure which you follow to be proper.

We here direct attention to Section 193.160, RSMo 1949, which section reads:

"The forms of certificates shall include as a minimum the items required by the respective standard certificates as recommended by the national office of vital statistics subject to approval of and modification by the division. The form and use of such certificate shall be subject to the provisions of section 193.240."

As we interpret the above section, it gives to the Department of Health practically unrestricted authority in its requirements as to the contents of the certificates filed with the Department of Health. It will be noted that the section states that "the forms of certificates shall include as a minimum the items required by the respective standard certificates as recommended by the national office of vital statistics." However, this requirement is very largely amended by the words which follow, which words are "subject to approval of and modification by the division." It will be observed that there is no restriction as to the degree of modification, which, as we stated above, in our opinion, makes the form of these certificates almost wholly a matter within the discretion of the Department of Health.

In your letter of inquiry you further state that "Many mother assign names to the children even in those cases where paternity is doubtful.", and ask whether this is proper. We believe that it is. We are unable to find any Missouri law which serves as a directive in this matter, but we are also unable to find any Missouri law which would prohibit that practice. Upon the parents of a child there is placed the responsibility and the unrestricted right to bestow upon their child whatever name they wish. We find nothing which would restrict the mother of an illegitimate child, or a child of doubtful paternity, from doing the same thing.

You further state that some mothers supply personal particulars relating to the father, but not the name of the father. You then ask whether, under such circumstances, your records should have the name of the child removed and the information relating to the father removed. We believe not because of the obvious fact of the desirability of having as much recorded information as possible (within the limits of reason) in regard to an illegitimate child or one of doubtful paternity, inasmuch as information would be of possible use and interest to the child later, and would no doubt be of advantage in adoption proceedings.

CONCLUSION

It is the opinion of this department that the information required in a birth certificate is very largely a matter of discretion resting in the Department of Health of the State of Missouri; that mothers may assign names to their children in those cases where paternity is doubtful or in which the child is illegitimate; that birth records, based upon infor-

mation furnished by the mother of the child, which records supply personal particulars relating to the father, but not the name of the father, should not have the name of the child removed nor the information relating to the father, prior to the filing of the birth certificate.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh F. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm

COUNTY HEALTH CENTERS: TRUSTEES'
LIABILITY FOR MEDICAL AND NURSING
MALPRACTICE:

NURSING Center, or members, when performing statutory duties, act officially.

Not legally liable for medical or nursing malpractice allegedly committed by board, or members during performance of official acts. But if board directs, participates in, or subsequently ratifies acts of malpractice of its personnel, or knowingly employes doctors and nurses lacking necessary professional qualifications, experience and fitness to perform assigned duties, then board, or members engaging in such activities would be personally liable to patient injured by malpractice of said personnel.

Board of Trustees of County health



May 7, 1953

Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"Attached herewith is a letter which is self-explanatory. There are several other health units in the state where the responsibility is vested in the Boards of Trustees. It is expected that this number will increase. For that reason we believe that an opinion from your office concerning the extent of the liability of a Board of Trustees or individual members for the acts of the health personnel would be very helpful."

Subsequently to the date of your letter requesting our opinion on the above-stated subject-matter, you have clarified your inquiry both by letter, and orally in conference with personnel of this department in charge of writing said opinion.

From such clarification it appears that the specific inquiry originally intended, is whether or not the Board of Trustees of a County Health Center, or the individual members thereof, are legally liable for acts of medical or nursing malpractice allegedly committed by said Board, or its individual members, when performing the duties

imposed upon them by law, and also the liability of the Board of Trustees or its individual members for acts of medical malpractice which might be committed by employees of the health center appointed by said Board of Trustees.

The term "malpractice", has been defined in Words and Phrases, Volume 26, page 248, as follows:

"'Malpractice' means any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct. Gregory v. McInnis, 134 S. E. 527, 529, 140 S.C. 52."

Since the inquiry was meant to refer to acts of malpractice of the Foard or individual members as it relates solely to medical and nursing malpractice, our further discussion will be limited to that type of professional misconduct.

With reference to acts of malpractice committed by members of the medical profession, in the case of Isenstein vs. Malcomson, 234 N.Y.S. 52, at l. c. 53, in defining the meaning of malpractice, the court said:

"Malpractice signifies bad practice on the part of certain individuals who treat injuries to the human body, either through lack of skill or neglect to apply it. Here are some of the definitions recognized by the medical profession: 'Negligent acts on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or (unnecessary) injury,' Witthaus & Becker Med. Juris, (1894) 73, 76; 'mistreatment of a disease or injury through ignorance, carelessness, or criminal intent, Stedman's Med. Dict. (8th Ed. 1924) 589; 'improper treatment through carelessness, or ignorance, or intentionally, Gould's Med. Dict. (2d Ed. 1928) 757. Though these are medical works, it is noticeable that the two later definitions do not confine the acts to physicians and surgeons. In Monohan v. Divinny, supra, the learned justice (Staley, J.) stated that, 'in relation to the medical profession, it has been applied, not only to duly licensed physicians and surgeons, but to

irregular practitioners as well, and also to nurses, midwives, and apothecaries.' He then proceeded to extend it, under the very statute we are now considering to chiropractors in an action for injuries 'unskillfully, negligently, and willfully' caused."

Again, in the case of Grainger vs. Still, 187 Mo. 197, medical malpractice was defined at 1. c. 213, as follows:

"'Malpractice is the bad professional treatment of disease, pregnancy, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent.'"

Within the meaning of the law, a trustee is one who occupies a fiduciary position and holds the legal title of property for the benefit of another. The same general idea, with some modifications, prevails with reference to the Board of Trustees of a County Health Center, but it must be remembered that the qualifications, powers, and duties of such trustees have been set out by statutes, particularly Sections of the 1951 Laws of Missouri, as follows:

Sections 205.030; 205.045; 205.046; 205;060; 205;070; 205.080 and 205.090, pages 779 to 784.

Section 205.030, reads as follows:

"1. The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of the trustees to be residents of the city, town or village in which the county health center is to be located, who shall constitute a board of trustees for said county health center.

"2. The trustees shall hold their offices until the next following general election, when five health center trustees shall be elected who shall hold their offices, three for two years and two for four years. The county court shall by order of record specify the terms of said trustees.

- "3. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of health center trustees who each shall serve for a term of four years.
- "4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor.
- "5. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for the health center, unless the same are purchased by competitive bidding."

Section 205.045, reads as follows:

- "1. The trustees, within ten days after their appointment or election, shall qualify by taking the oath of civil officers and organize as a board of health center trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officers as they may deem necessary, but no bond shall be required of them.
- "2. The county treasurer of the county in which such county health center is located shall be treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the board, upon its order as provided in this act, but shall receive no compensation from such board.
- "3. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such

trustee, and an itemized statement of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all of the trustees present at a meeting of the board.

- The board of health center trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the county health center as may be deemed expedient for the economic and equitable conduct thereof. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, and of the purchase of site or sites, the purchase or construction of any county health center buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees.
- "5. The board of health center trustees may appoint and remove such personnel as may be necessary and fix their compensation; and shall in general carry out the spirit and intent of this chapter pertaining to establishing and maintaining a county health center.
- "6. The board of health center trustees shall hold meetings at least once each month, and shall keep a complete record of all its proceedings. Three members of the board shall constitute a quorum for the transaction of business.
- "7. One of the trustees shall visit and examine the county health center at least twice each month.
- "8. When the county health center is established, all personnel and all persons approaching or coming within the limits of same, and

all furniture and other articles used or brought there shall be subject to rules and regulations as the board may prescribe.

"9. The board of health center trustees may enter into contracts and agreements with federal, state, county, school and municipal governments and with private individuals, partnerships, firms, associations and corporations for the furtherance of health activities, except as hereafter prohibited."

Section 205.046 reads as follows:

"In those counties of the state now operating county health centers, pursuant to the provisions of this chapter, the county court of each such county shall immediately appoint a board of trustees as provided in section 205.030, who shall hold office until the next following general election, at which election trustees shall be elected as provided in said section 205.030. All funds and property of any health center now operating shall be turned over to the board of trustees hereby created upon the effective date of this act and all contracts, gifts and obligations by or to such health center may be enforced by or against said board of trustees after this act becomes effective."

Section 205.060 reads as follows:

"The board of county health center trustees shall not enter into contracts for the private practice of medicine, nor shall any of its personnel practice medicine nor dispense drugs, vaccines or serums for personal gain, nor shall its facilities be used for such purpose in any way except as it may be necessary and agreed upon between the board and county court or courts for the care of the indigent for whom the court or courts may be responsible, or except in furtherance of diagnostic and communicable disease control programs."

Section 205.070 reads as follows:

"Any person, firm, organization, society or corporation desiring to make donations of money, personal property or real estate for the benefit of such health center, shall have the right to vest title of such property so donated, in the county or counties, to be controlled when so accepted by the board of health center trustees according to the terms of deed, gift, devise or bequest of such property."

Section 205.080 reads as follows:

"All buildings that may be erected or constructed under sections 205.010 to 205.130 shall have the plans and specifications approved by the board of health center trustees and bids advertised for according to law for other county public buildings."

Section 205.090 reads as follows:

"1. On or before the seventh day of January in each year, the board of health center trustees shall file with the county court a report of their proceedings with reference to the county health center and a sworn statement of all receipts and expenditures during the preceding calendar year.

"2. The board of health center trustees shall prepare and submit to the county budget officer a budget for the ensuing year at the time and in the manner provided by the county budget law applicable to such county."

Section 205.030, supra, giving the qualifications of members of the Board of Trustees does not provide that such prospective members must be licensed medical doctors, or registered nurses. In fact, this section nor any others of the Missouri Statutes makes no reference or requirements to board members being engaged in any particular profession.

Therefore, in the absence of any statutory provisions, in the enactment of the statutes pertaining to County Health Centers, it appears to have been the legislative intent that membership on such boards of trustees was not to be limited to persons of any certain profession, trade or business, but that anyone possessing the general qualifications provided by the applicable statutes, particularly Section 205.030, supra, would be eligible for election or appointment to said boards.

The statutory duties of the board and its members are of an administrative or supervisory nature and have nothing to do with the care and treatment of those suffering from physical or mental ailments. Such duties call for the exercise of executive ability and skill in managing the affairs of the health center, especially in handling its finances, and other matters essentially of a business nature.

It appears that the board members are chosen because of their fitness to perform their duties as trustees, and not because they are doctors or nurses. It further appears that a board composed of laymen, who have the necessary statutory qualifications would function as well, and could perform all the duties required of it as a board composed entirely of medical doctors, or medical doctors and nurses. Consequently, it is immaterial whether board members are medical doctors or registered nurses, if they possess the required qualifications.

The functions of a Board of Trustees are essentially of a public nature, and are for the benefit of the general public, and the question arises as to whether the actions of the board are official acts, and whether the members occupy the status of public officials.

No exact rules or definitions can be given by which to determine whether one is or is not a public officer, and which would be applicable under every possible situation in which the inquiry might arise, but certain fundamental principles and tests to serve as a guide in determining whether one is or is not an officer under a given situation are helpful. It is believed that such principles have been embodied in some of the definitions of a public officer given in C.J.S., Vol. 67, P. 101, and which reads as follows:

"* * * 'Public officer' has been defined as an incumbent of a public office; an individual who has been appointed or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises the functions concerning the public assigned to him by law; * * * one who performs a public function, whose authority is derived directly from the state by legislative enactment, and whose duties, powers, and authority are prescribed by law; * * *."

Bearing in mind the principles embodied in the above definitions, and also the apparent legislative intent in the enactment of the statutes quoted above, it is obvious that the members of a Board of Trustees of a County Health Center have the title and status of public officials, and have been required to perform the duties of such public officials. Paragraph 1, Section 205.045, supra, gives further confirmation to this idea, since said section requires the trustees ten days after their appointment or election to qualify "by taking the oath of civil officers", which seems to imply that trustees are to be regarded as civil or public officers, and it is our thought that such board members are "public officers", within the commonly accepted meaning of the term.

When a Board of Trustees of a County Health Center, or its individual members are performing the duties imposed upon them by the above-quoted statutes, they are acting in the capacity of public officials and not as private citizens, and this is true only as long as they stay within the scope of authority delegated to them by statute. However, when they go beyond the scope of authority delegated to them, they cease to act officially and their actions are those of private citizens.

For reasons already stated, the board or its members are not required to be doctors or nurses, nor are they required as board members to perform any duties commonly required of those who are members of either profession. Consequently, when the board or its members are performing their statutory duties as public officers in the manner aforesaid, they are not engaging in the practice of medicine or of nursing malpractice, nor are they legally liable to any person or persons injured as a direct result

of the official acts of said Board of Trustees or of its individual members.

We next take up for consideration the phase of your inquiry regarding the liability of the Board of Trustees of a County Health Center or the individual members thereof, for acts of medical or nursing malpractice committed by personnel of the Health Center.

Subsection 5, Section 205.45, supra, authorizes the Board of Trustees to appoint, remove, and fix the compensation of such personnel, as the board in its discretion believes to be necessary for efficiently carrying out the spirit and intent of the County Health Center statutes. One of the primary purposes for establishing a health center is to provide proper facilities for the medical treatment and care of the indigent persons of the county, and, under the present statutes this is to be accomplished by public officials elected or appointed for that purpose. While the Board of Trustees are the public officials in charge of the health center, they are not required to be physicians or nurses for reasons given above, but physicians and nurses appointed by the board would occupy the status of deputy officials or assistants of the board.

Within the scope of the duties required of such employees they would be directly responsible for the performance of such duties to the board, and within such narrow limits the board would not be responsible to the public for the acts of its subordinates.

While we are unable to find any Missouri decisions so holding, we are of the opinion that the general principle of law that a public official is not liable to the public for the acts of his assistants within the scope of the latter's authority, since such acts are considered to be official.

In this connection it is believed that said general rule is fully applicable to the situation referred to in the opinion request and that it has been given in 43 AM. JUR., Officers, Section 281, and reads as follows:

"It is settled, subject, however, to a number of exceptions, that in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising his assistants, an officer

is not liable for the default or misfeasance of subordinates and assistants, whether appointed by him or not, providing the subordinates or assistants, by virtue of the law and of the appointment, become in a sense officers themselves, or servants of the public, as distinguished from servants of the officer, and providing the officer does not direct the act complained of, or personally co-operate in the negligence from which the injury results. An administrative officer is, however, liable for the misconduct or negligence in the scope of the employment of those employed by or under him voluntarily or privately. and paid by or responsible to him. And public officers having the custody of public funds or property are generally held liable for losses due to the negligence or misconduct of their subordinates. Of course, liability may be expressly provided for by statute. And where an officer fails in a duty to take action, liability may be predicated on nonaction after knowledge of the negligence of subordinates has come to his attention.

"The exemption of public officers from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties is allowed in a great measure from considerations of public policy. From this consideration it has been extended to the case of persons, acting in the capacity of public agents engaged in the service of the public, and acting solely for the public benefit, although not strictly filling the character of officers or agents of the government."

If medical or nursing personnel were guilty of acts of malpractice against patients at the health center, such misconduct would not be within the scope of their official duties and unless the board had authorized, directed, participated in, or had subsequently ratified mid acts, the board, or its individual members would not be personally liable to any patients injured by its personnel.

Honorable John R. Amos, M.D.

The board or its members might become personally liable to a patient injured through acts of malpractice of the board's employees in one instance even though the board did not direct, authorize, participate in, or subsequently ratify the acts of its employees.

The instance to which we refer is in the employment of physicians and nurses for the health center, and which we believe to be an official duty of the board. The general rule last quoted above, and the one to be presently quoted, require a public officer to exercise good faith and due care in the performance of his duties, and for an omission of which he may be personally liable to anyone injured by his negligent acts. We quote from 25 Am. Jur., Health, Section 17, as follows:

"In accordance with established principles governing the liability of public officers for injuries inflicted in connection with the performance of their official duties, the general rule is that members of boards of health and health officers are not personally liable for injuries resulting from an erroneous exercise of their judgment or discretion where they act in good faith, within the limits of their authority. The rules exempting them when they act without the scope of their authority or act with negligence amounting to malice. * * *"

In the event the board should fail to carefully select personnel upon the basis of professional qualifications, experience, and ability to perform the duties required of physicians and nurses at the health center, and should employ persons not possessing the necessary qualifications experience or ability required, and personnel known to have a long record of malpractice cases behind them, and a patient would thereafter be injured through acts of malpractice committed upon him by said employees of the board, then the board would be guilty of gross negligence, bad faith and a total lack of reasonable care in the employment of its personnel. The improper conduct of the board in that respect would not be an official act, in fact they would be far beyond the scope of their official duty, and, under the principles given in the last quoted portion from American Jurisprudence it is our thought that the members of the board who employed said persons would be personally liable to a patient injured by acts of malpractice committed by its medical and nursing personnel under above mentioned circumstances.

Honorable John R. Amos, M.D.

CONCLUSION

It is, therefore, the opinion of this department that, when a Board of Trustees of a County Health Center, or its individual members are performing duties required of them by statute, they act officially and are not legally liable to any person for medical or nursing malpractice allegedly committed by said board or its individual members during the performance of said official acts.

It is the further opinion of this department that the Board of Trustees of a County Health Center, or its individual members are not liable to a patient injured through acts of malpractice of its medical and nursing personnel unless the board, or its individual members directed, participated in, or subsequently ratified the misconduct of said personnel, or unless the board was guilty of gross negligence and lack of reasonable care in selecting personnel upon the basis of their professional qualification, past experience and fitness to perform duties assigned to them at the health center. In either instance all members of the board who participated in the employment of professionally inferior personnel or who directed, participated in, or subsequently ratified said acts of malpractice of said personnel after their employment would be personally liable to the person injured by the misconduct of the said personnel.

The foregoing opinion, which I hereby approve, was preapred by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

ADOPTION:

DIVISION OF HEALTH: Birth certificate of illegitimate child adopted by husband of child's mother in BIRTH CERTIFICATES: adoption proceeding in which natural mother did not join should contain information regarding adopting father and information

contained in original birth certificate

regarding the natural mother.

May 11, 1953



Honorable James R. Amos, M.D. Director Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your opinion request:

> "The natural mother of an illegitimate child subsequently married. The husband of the child's mother has adopted the child, but the natural mother did not enter into the adoption. The child happens to be of legal age at the present time and her consent was obtained. The question is, in amending the birth certificate for the adopted child, does the natural mother's information appear on the amended certificate along with the adopting father, even though she did not enter her consent or otherwise enter into the adoption?

"We need the opinion so that we will know how to prepare the amended certificate. This is the first instance that we have where the natural mother has not agreed in writing to the adoption of her child by her husband."

We would first call your attention to Section 193.100, RSMo 1949, which section reads:

> "Within the time prescribed by the division a certificate of every birth shall be filed with the local registrar of the district in which the

birth occurred, by the physician, midwife, or other legally authorized person in attendance at the birth; or if not so attended, by one of the parents."

The certificate of birth which is provided for by the above section contains certain information regarding the parents of the child, if the parents, or either of them, are known, whether they are married or unmarried. In this instance the unmarried mether of the person in question was known. We assume that a birth certificate was made out, giving information regarding the natural mother, soon after the birth of the child, since you inquire whether the natural mother's information should appear on the amended birth certificate.

Section 453.100, RSMo 1949, states:

"After the entry of the decree of adoption the clerk of the court shall immediately send to the division of health of the state department of public health and welfare a certified copy of the adoption decree and upon the request of the petitioner or petitioners in the adoption proceeding, or of the adopted person, the division of health shall change the birth records to conform to said decree."

Section 193.250, RSMo 1949, provides as follows:

"In cases of adoption the state registrar upon receipt of a certified copy of an order or decree of adoption shall prepare a supplementary certificate for children born in this state in the new name of the adopted person, and seal and file the original certificate of birth with said certified copy attached thereto. Such sealed documents may be opened by the state registrar only upon the demand of the adopted person if of legal age or by an order of court. Upon receipt of a certified copy of a court order of annulment of adoption the state registrar shall restore

the original certificate to its original place in the files."

The changing of the birth records to conform to the adoption decree can be accomplished in this case only by the showing on the new birth certificate of information regarding the adopting father and the showing on the new certificate of the information regarding the natural mother, since such information is officially on file in the Division of Health.

CONCLUSION

It is the opinion of this office that a birth certificate amended subsequent to the adoption of an illegitimate child by the husband of the child's mother, in which adoption the child's mother did not join, should contain in addition to the information regarding the adopting father the information contained in the original birth certificate regarding the natural mother.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm:lrt

DIVISION OF HEALTH:

JOHN M. DALTON

A soft drink consisting of orange juice, water, stabilizer and preservatives, in a container labeled "Orange Blend" is not misbranded under the Missouri Food, Drug and Cosmetic Law. Definitions: "drink" "mix" and "blend."



September 3, 1953

XXXXXXX

Honorable James R. Amos, M.D. Division of Health Jefferson City, Missouri

J. C. Johnsen

Dear Dr. Amos:

This will acknowledge receipt of your request for an official opinion of this department, which request reads as follows:

"We would like to have an official opinion concerning the following matter: Section 196.365, through 196.445, Revised Statutes of Missouri 1949, pertains to the laws regulating the manufacture of soft drinks and beverages. We have approached several firms in regard to the proper labeling of various drinks. Section 196.410 specifically discusses the various types of labeling which shall be used. We have contended in the past that a fruit drink or still drink manufactured by taking the fruit juices, adding water, sugar, stabilizers, color or flavor. should be labeled a drink. If the juice was orange juice, then the product would be labeled 'Orange Drink.' If the juice was grape juice, it would be labeled 'Grape Drink,' etc.

"One firm has recently requested that they be permitted to label such a product 'Orange Blend.' It is our feeling that since water has been added to the fruit juice, as well as stabilizers and a small amount of preservatives, that this is not a true Orange Blend, but is, in fact, an Orange Drink.

"In order to clarify this matter, it would be appreciated if you would give us a legal opinion or definition of the words 'Blend,' 'Mix', and 'Drink,' as used in connection with this Act."

The sections of the Food, Drug and Cosmetic Law, to which reference has been made, deal with "soft" drinks and they are defined in Section 196.365, RSMo. 1949, as follows:

"1. * * * * * ***** * * * * * * *

"2. The term 'soft drinks' as used in sections 196.365 to 196.445 shall be held to mean and include all beverages of every kind manufactured or sold in this state, which shall be understood to include those containing less than one-half of one per cent of or no alcohol, including carbonated beverages, still drinks, seltzer water, artificial or natural mineral waters and all other waters used and sold for beverage purposes."

*3. ************

The common and ordinary meaning of the noun, "mix" is defined in Webster's Collegiate Dictionary, Fifth Edition, as "1. Act or result of mixing; also state of being mixed or confused." "2. A mixture." The definition of the verb is stated as: "1. To unite or blend into one mass or compound, as by stirring together; mingle." A more extensive explanation of the word is set out in 5 Words & Phrases 539:

"Word 'mix' means to cause a promiscuous interpenetration of the parts of, as of two or more substances with each other, or of one substance with others; to unite or blend into one mass or compound, as by stirring together; hence, to combine (any material or immaterial things); to mingle; blend; as to mix flour and salt; to mix wines; to form by mingling; to produce or prepare by the stirring together of ingredients; to compound; to cause to unite promiscuously into one mass, assemblage, or body; incorporate closely and indiscriminately together; mingle so as to render separately indistinguishable; as, to mix breeds of animals; to mix water with whiskey; to produce by incorporating different ingredients; make by mingling; as, to mix dough; to become promiscuously united or blended; become incorporated together into one body; as, gases, mix. 'Blend' means to unite intimately. 'Admixture' means the act of mixing, or the compound formed by mixing, different substances together; mixture. Term 'intimately mixing' is included within the dictionary definitions of the term 'mix.' James v. Clayton, Cust. & Pat. App. 90 F.2d. 337, 343."

The common and ordinary meaning of the noun, "blend" is defined in Webster's Collegiate Dictionary, Fifth Edition, as "A thorough mixture; blending; also a product, as a tobacco or coffee, prepared by blending." The verb is there defined as "l. To mix or mingle; now, to combine or associate so that the separate things mixed, or the line of demarcation, cannot be distinguished. 2. To prepare by mingling different varieties or grades; --of wine coffee, tobacco, etc.--v.i. To unite intimately; pass or shade insensibly into each other, as colors; merge; harmonize."

While it appears from the above that "mix" and "blend" are synonymous, technically, the difference seems to be that the term "blend" denotes the mixture of like substances or the misture of substances, two or more of which are alike. This is the statutory definition under the state and federal food and drug acts, and Section 196.140(5)(b), RSMo. 1949, provides, in part, as follows:

"* * *provided, that the term 'blend, as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients not prohibited by sections 196.125 to 196.145, and used for the purpose of coloring or flavoring only."

See also the now repealed section of the Federal Food and Drug Act, where, in 21 U.S.C.A. 10, it was stated as follows:

"* * *The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only * * *."

While there appears to be no judicial construction of the above Missouri provision, the portion of the above quoted section of the federal statute has been followed by the courts without addition or subtraction therefrom. Thus, in Frank v. U.S., 192 Fed. 864, it is stated that the term "blend" is used to denote a mixture of like substances, and the term "compound" to denote a mixture of substances whether like or unlike. See also U.S. v. Sixty-Eight Cases of Syrup, 172 Fed. 781 and 26 Op. Atty. Gen. 262(1907). As to what constitutes "like substances" a liberal view has been taken in U.S. v. Sixty-Eight Cases of Syrup, supra. In that case refined canesugar and extract of maple wood were found to be like substance because both contained saccharin. The word "substance" has been defined as "Chem. Any particular kind of matter, whether element, compound, or mixture; any chemical material of which bodies are composed. "(Webster's Collegiate Dictionary, Fifth Edition.)

However, as to the question of the required or permissible label on the drink in question, we do not believe the answer can be found merely in the definition of a word; and that, for the reasons hereinafter stated, the answer does not necessarily depend upon

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whether or not the drink being considered is a "blend."

The statute to which the attention of this office has been directed and under which provision it is suggested that the soft drink in question should be labeled "Orange Drink" rather than "Orange Blend," is Section 196.410 RSMo. 1949, which provided as follows:

"Artifical coloring or flavoring shall be noted on label .-- Whenever artificial colors or artificial flavors are used in the manufacture of soft drinks to imitate a natural product, the bottle or other container shall be distinctly labeled 'artificially colored and flavored' by a printed label upon the side thereof, or said words may be placed upon the metal crown or cap thereof. All other nonalcoholic ciders, fruitades, fruit juices or other similar drinks that are made in imitation of the natural product shall be properly and distinctly labeled in the manner above provided with the word 'imitation' followed by the name of the beverage. If soft drinks or beverages containing artificial coloring or artificial flavoring are sold in bulk, a label or sign containing the words 'artificially colored, artificially flavored' or 'artificially colored, imitation flavor, ' and printed or painted in letters not less than one inch long and of appropriate comparative width shall be displayed in a conspicuous place on the counters or shelves, or on all stands, booths or other places where such drinks or beverages are sold and dispensed. When such drinks and beverages contain artificial color and natural fruit flavor. it shall be sufficient to label the same 'artificial color. When they contain artificial flavors and no artificial color, they shall be labeled 'artificially flavored' or 'imitation flavor. " (Emphasis ours.)

It will be noted that the above provision does not purport to prescribe a specific label for every conceivable soft drink and that neither the word "drink" or "blend" is incorporated in any of the labels specifically named. The regulation divides the soft drinks with which it deals, into two general classes, i.e. bottled (or other container) drinks and those sold in bulk. Not all bottle or bulk drinks are covered, but only those further classified according to their contents. Now, as to the soft drinks to which this particular provision is applicable, the following specific labels are required, and these labels only, to wit:(1) "artifificially colored and flavored," (2) "imitation," (3) "artifically colored, artificially flavored," (4) "artificially colored,

imitation flavor," (5) "artificial color," (6) "artificially flavored," and (7) "imitation flavor." It is significant that the label "blend" or "drink" is nowhere mentioned; and we conclude that neither is prescribed or prohibited by this particular section. Consequently, while the drink in question may or may not require one of the labels specified in the statute, depending upon the ingredients, etc., this particular statute has no application so far as the labels (or additional labels), "orange drink" or "orange blend" are concerned.

Obviously, the subsequent section (196.415, RSMo. 1949) which deals with misuse of the label of another manufacturer also has no application and nowhere else in the statutes to which our attention has been invited (Sections 106.365 through 196.445, RSMo. 1949) is there any mention whatsoever of the subject of labels or misbranding.

Therefore, if it be determined that the label "orange blend" should be denied or the label "orange drink" should be required, such conclusion must find its basis in some other enactment of the Legislature. There appears to be no question of adulteration or attempt to perpetrate actual fraud; and we assume that the firm in question stands ready, willing and able to abide with all requirements of the law and all regulations of the Division of Health, except that it insists on using the words "Orange blend" on its product and refuses to use the words "Orange drink."

Therefore, with the sole question of labels and brands in mind, we turn to a statute originally enacted in 1911, now appearing as Section 196.140, RSMo. 1949, and entitled "Nonalcoholic drink misbranded, when." The pertinent part of said section declares a soft drink to be misbranded and reads as follows:

"(2) If it is labeled or branded or tagged so as to deceive or mislead the purchaser;

"(5) If the bottle or receptacle containing it, or its label, shall bear any statement, design or device, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular; provided, that any nonalcoholic drink which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded under the following conditions:

"(b) In the case of nonalcoholic beverages which are labeled, branded or tagged so as to plainly indicate that they are compounds imitations or blends, and the word 'compound,' 'imitation,' or 'blends,' as the case may be, is plainly stated on the container in which it is offered for sale; provided, that the term 'blend,' as used herein, shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients not prohibited by sections 196.125 to 196.145, and used for the purpose of coloring or flavoring only."

A federal statute (21 U.S.C.A. 10, now repealed), in almost identical language, provided that food (which, by Section 7, was construed to include soft drinks) was to be deemed misbranded, is as follows:

"Second. If it be labeled or branded so as to deceive or mislead the purchaser. . . .

"Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular. An article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

* * * * * * * * * * * * * * *

"Second. In the case of articles labeled, branded or tagged so as to plainly indicate, that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale. The term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only * * *. (June 30, 1906 c. 3915, Sec. 8, 34 Stat. 771; Aug. 23, 1912, c. 352, 37 Stat. 416; Mar. 3, 1913, c. 117, 37 Stat. 732; July 24, 1919, c. 26, 41 Stat. 271.) (Repealed, June 25, 1938 c. 675, Sec. 902(a), 52 Stat. 1059, eff. Jan. 1, 1940.)"

The legislative intent underlying the enactment of these statutes, which are the same in substance, was to protect the consuming public from misrepresentation as to the ingredients or contents of a soft drink offered for sale, by means of false or misleading labels and other means and devices of deception appearing on the container. Hebe Co. v. Shaw, 248 U.S. 297, 39 S. Ct. 125, 63 L. ed. 255; State v. Bockstruck, 38 S.W. 317, 322; State v. Murphy, 147 S.W. 520, 521.

In 26 C.J. Sec. 18, p. 762, it is stated:

"For the purpose of preventing fraud and imposition upon the public, statutes have been enacted forbidding the manufacture or sale of any article of food which is an imitation of, or is sold under the name of, another article, or which is branded or labeled falsely, or in a manner naturally to mislead the purchaser into a belief that it is something it is not. * * * * " (Emphasis ours.)

The article need not be adulterated or deleterious to health to come within such statutes, People v. Butler, 134 App. Div. 151, 118 NYS 849. The deception sought to be prevented may result from statements not literally false and statements liable to mislead should be read favorably to the accomplishment of the purposes of the statute; Taylor v. U.S. 80 Fed. 2d. 604. On the other hand, where words in every day use are found on the label of a food product they are to be given their ordinary and popular meaning, U.S. v. 150 Cases Fruit Pudding, 211 Fed. 360, or the meaning ordinarily conveyed by them to those to whom they are addressed, Hall v. U.S. 267 Fed. 795; and so long as the words on the label are not likely to actually mislead the purchaser, there is no violation of the statute. In regard to the purpose of such statutes the following language from 26 C.J. "Food" Sec. 18, Page 762, is pertinent:

"* * *The object, however, is not to prevent the manufacture or sale of wholesome or harmless substitutes for more expensive articles of food so long as no fraud is practiced, * * *"

As to whether or not the drink in question, with the label "Orange Blend," would be a misbrand, the ingredients thereof must be considered in the lifht of Section 196.140, above quoted. Subsections 1,2,3,4, and 5, thereof, are all inclusive and cover every type of misbrand. If the label does not fit into any of those subsections, it cannot be deemed a misbrand. Subsections (5a) and (5b)

of that statute mention certain beverages bearing certain labels that are expressly stated not to be misbrands. However, subsections (5a) and (5b) are not all inclusive: they do not attempt to cover every conceivable drink and label that is not a misbrand. These subsections are only provisos to subsection (5). In other words they state exceptions to the general rule expressed in subsection (5). Therefore, if a particular drink and label does not come within the provisions of subsection (5a) or (5b) -- the expressly excepted cases, it does not necessarily follow that such drink and label does come within the prohibition of subsections (1), (2), (3), (4) or (5). Or to state it another way, even though the drink in question may or may not be a true "blend" within the meaning of subsection 5b(a mixture of like substances also permissibly including certain harmless coloring and flavoring) it does not necessarily follow that the word "blend" on the label thereof, is prohibited by the preceding subsections. While technically it may not be a true blend, it nevertheless cannot be deemed a misbrand unless the label "blend" comes within the prohibition provisions of the statute, that is to say, even though it may not be a blend in the strict sense of the word, it is not misbranded unless the label is such as "to deceive or mislead the purchaser" (subsection two) or unless it can be deemed as a "statement, design or devise, regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particular" (subsection five). These are the tests to be applied to the drink in question, regardless of what the strict and technical definition of "blend" may be.

The use of the word "blend" or "blended" following or preceeding the name of the base substance or ingredient, would clearly be misleading as applied to a label on certain products. For purposes of illustration, take the case of tobacco. It is commonly understood that blended tobacco has reference to a product consisting of two or more like substances, that is, two or more types, grades, brands, etc. (such as Turkish and Domestic) tobaccos. Now certainly the consumer would be misled by a label "blended tobacco" applied to a product consisting of only one type of tobacco mixed with a foreign and wholly different substance such as straw. Likewise, one might expect a mixture of like substances by the label "blend" as applied to tea, coffee, whiskey, etc. But what does the consumer expect by the label "orange blend" as applied to a beverage? Does he immediately think of the strict definition of the word "blend" and expect a "mixture of like substances not excluding harmless coloring and flavoring?" If so what are the like substances that his mind dwells upon? Now certainly the consumer does not expect pure orange unmixed with any other ingredient -- let us give him credit for being of average intelligence (and he is probably above average if he understands the strict, technical definition of "blend"). He, therefore, knows that he is not paying the price for pure orange juice

and that if the drink were such, the label would proudly announce the fact in no unmistakable terms. We repeat a portion of the above quotation from 26 C.J. page 762 and apply it to the drink in question because we believe it sums up the legislative intent underlying the misbrand statute and is a concise wording of the tests set out in that enactment. Is the drink in question labeled "Orange Blend" branded "in a manner naturally to mislead the purchaser into a belief that it is something it is not." As a practical matter does not the consumer get what he expects -- a portion of orange juice mixed with other harmless ingredients? If he is actually led by the label to believe that the drink consists of harmless flavoring and coloring (which is included in the strict statutory definition of "blend") mixed with substances like unto orange, what does he expect -- a portion of the juice of oranges mixed with the flavor of the orange peel together with other permissible ingredients? Does he expect the juice from California oranges mixed with the juice from Florida oranges together with other permissible ingredients? Does he expect the juice from bergamot oranges mixed or blended with the juice from mandarin oranges, compounded with other permissible ingredients? Does he expect the "like substances" to be juices from oranges of different orchards, varying types, grades, stages of ripeness, etc.? Does he really care? In reality, it would seem that the consumer would expect a wholesome and unadulterated drink of the flavor of oranges that is satisfying to his taste, and we deem the presumption warranted that such is what he would get. If the consumer, by the word "blend," does expect such "like substances" as mentioned above, possibly the drink in question does actually contain them or if it doesn't, it would seem that the manufacturer could very easily convert the present drink into an orange "blend," within the strict and technical meaning of that term; and after such conversion or addition of a few drops of something not presently contained in the drink, what would be accomplished? How would the public be benefited? Would the consumer know the difference? Would there be any different effect upon his health, etc.?

In concluding that the particular mixture in question would not be misbranded if labeled "Orange Blend," we rely in part on Section 196.010(13) 2, RSMo. 1949, where the above stated intention of the Legislature is indicated in the following language:

* * * * * * * * *

"2. If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device,

the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual; (Emphasis ours.)

We also find support in U.S. v. Sixty-Eight Cases of Syrup, (D.C. 111, 1909) 172 Fed. 781, construing the provisions of the Federal Food, Drug and Cosmetic Act, quoted above, and where it was held that syrup consisting of refined cane sugar flavored with an extract of maple wood and sold under a label describing it as "Western Reserve Ohio Blended Maple Syrup," was not misbranded, since the word "blend" indicated that the article was a mixture and imitation.

A noteworthy case is U.S. v. Nesbitt Fruit Products, 96 Fed.2d. 972, where it was held that the evidence authorized a finding that an orange juice preparation containing over 50% added sugar was not misbranded, so as to authorize condemnation and forfeiture, by being labeled "orange juice sweetened" as against the contention that such label indicated a smaller sugar content. The Court said that the natural meaning of "sweetened" contained no implication of any particular percentage of sugar. It would seem that such drinks so labeled would be as much apt to mislead as "Orange Blend" applied to the drink in question.

We deem the label "Orange Blend" would not be as apt to mislead the consumer as to the ingredients of the drink in question as much so as would the label "Fruit Wild Cherry Compound" used to describe a product containing no "fruit wild cherry" nor any added poisonous or deleterious ingredients, and which was held not to be misbranded in Weeks v. U.S. 22h Fed. 6h, certiorari granted 36 S.Ct. 452, 2h1 U.S. 66h, 60 L. Ed. 1227 and affirmed 39 S.Ct. 219, 245 U.S. 618, 62 L. Ed. 513.

On the other hand, an examination of the cases in which articles were held to be misbranded, will disclose an element of deceit or some matter on the label or container apt to actually mislead, which does not appear to exist in this case. See for instance, U.S. v. Ninety-Five Barrels of Vinegar, 265 U.S. 438, 44 S.Ct. 529, 68 L.Ed. 1094; W.B. Wood Mfg. Co. v. U.S., 286 Fed. 84; U.S. v. Two Hundred Cases, More or Less, of Canned Salmon, 289 Fed. 157; U.S. v. Seventy-five Boxes of Alleged Pepper, 198 Fed. 934; U.S. v. Five Cases of

Champagne, 205 Fed. 817; U.S. v. Schider, 38 S.Ct. 369, 246 U.S. 519, 62 L.Ed. 863; People v. Treichler, 165 N.Y.S. 453, 178 App. Div. 718; U.S. v. One Hundred and Fifty Cases of Fruit Pudding, 211 Fed. 360; U.S. v. Ten Barrels of Vinegar, 186 Fed. 399; State v. Intoxicating Liquors, 106 Me. 135, 76 A. 268.

A regulation of the Secretary of Agriculture requiring canned peas prepared from mature, soaked dry peas to bear the legend, "Below U. S. Standard. Low Quality But Not Illegal. Soaked Dry Peas," was held unreasonable in Nolan v. Morgan (C.C.A. Ind. 1934) 69 Fed. 2d. 471. Cannot the same be said of a denial of an "Orange Blend" label on the drink in question or the requirements of "Orange Drink." Is not the word "drink" as applied to the present "orange" drink more apt to mislead than the word "blend?"

We cannot say, as a matter of law, that this drink would be misbranded if labeled "Orange Blend;" and as a matter of fact, such finding by court or jury seems unlikely. Nor can we conceive of a conviction under the statute in question solely on these facts.

It logically follows that if the label, "Orange Blend" would not be in violation of Section 196.140, supra, then there rests no authority in the Division of Health to prohibit it; the power conferred upon the Division to make mles and regulations is not that broad.

CONCLUSION

We conclude, therefore, from the facts presented, that the words "orange bland" are permissible on the label of the drink in question; and that if all other statutes, rules and regulations have been complied with, the manufacturer in question, is entitled to the license contemplated by Section 196.370, RSMo. 1949.

This opinion which I hereby approve, was written by my assistant, Mr. James A. Vickrey.

Yours very truly,

JOHN M. DALTON Attorney General CONSTRUCTION OF STATUTES: FOOD AND DRUGS: NONALCOHOLIC DRINKS:

Sections 196.125, 196.130 and 196.135, RSMo 1949, to be read and construed along with other sections of RSMo 1949, particularly Sections 196.010, 196.045, and 196.050. Nonalcoholic drink a food within meaning of Section 196.010. Manu-

facturer of such drink containing fluoride compound, who makes, sells, offers or exposes to sale, or has same in his possession with intention to sell, when drink is adulterated, is subject to criminal prosecution for violating Sections 196.130 and 196.135, unless satisfactory evidence offered to State Division of Health as provided by Section 196.085, that fluoride compound in drink was required or could not be avoided in manufacturing process. Division of Health to promulgate regulations limiting fluoride compounds, and allow production to continue. Product not deemed adulterated, and manufacturer cannot be criminally prosecuted under Sections 196.130 and 196.135, RSMo 1949.

FILED 2 9-17-53

September 17, 1953

Honorable James R. Amos, M. D. Director of Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads in part as follows:

"We respectfully request your opinion on the interpretation of sections 196.125 196.130, 196.135 and 196.400 of the state statutes with section 196.135 in reference to fluoride compounds being most pertinent.

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"It has been our policy to construe section 196.135 as pertaining to the control of the manufacturer with reference to the ingredients used in the manufacture of his product and that it was not intended to include the materials within a public water supply which he uses in the manufacture of the product. Since the fluoridation process is considered a sound public health measure we do not feel that the addition of fluorides to public water as recommended in this process is violating the intent of section 196.135.

"There is ample evidence to prove that fluoridation of public waters is well adapted to its purpose which is the reduction of the incidence of dental caries.

The Division of Health considers the incidence of dental caries to be serious enough in the state to make the utilization of every means of controlling it desirable. Accordingly, on February 1, 1952 the Division created a policy favorable to the fluoridation process.

"It is interesting to note that 17 municipalities in Missouri have public waters with near the optimum amount of 1 part per million of fluorides in them. Two municipal water supplies have more than 3 parts per million of fluorides. Investigations carried out in town with a water supply taken from the Missouri River (Jefferson City, Boonville) indicate that the concentration of fluorides in the water supply at St. Joseph will range between 0.3 p.p.m. and 0.5 p.p.m. Fluorides, then are already being supplied in the water used by St. Joseph food and beverage manufacturers.

"On February 17, 1952 the acting Federal Security Administrator issued a statement to the general effect that the Federal Food and Drug Administration would not regard fluoridation of local water supplies or use of fluoridated water in food manufacturing as actionable under the Federal Food, Drug and Cosmetic Act. In connection with this and with reference to sections 196,010 to 196,120, section 196.050 of the Revised Statutes of Missouri 1949 states that the Division of Health shall not prescribe more stringent regulations than prescribed by the federal act. With special reference to section 196.135 we feel that we should concur with the federal attitude."

From the opinion request and attached correspondence it appears that the inquiry is for a construction of above mentioned statutes, and, under the provisions of same whether the manufacturer of a nonalcoholic drink who uses water in his product containing a fluorine compound would be subject to criminal prosecution for the manufacture and sale of said product, or for the commission of any other acts specifically mentioned in Section 196.130, RSMo 1949, which are declared to be unlawful. It appears that the manufacturer in the particular instance referred to in the opinion request has not added the fluorine compound during the manufacturing process but that the fluorine compound was added by the water company which furnished water to said manufacturer.

Section 196.125, RSMo 1949, defines the term nonalcoholic drink and reads as follows:

"That the term 'nonalcoholic drink,' as used herein, shall include carbonated beverages of all flavors, sarsaparilla, ginger ale, soda water of all flavors, lemonade, orangeade, root beer, grape juice, and all other nonintoxicating drinks."

Section 196.130 RSMo 1949, provides that nonalcoholic drinks shall not be adulterated and reads as follows:

"That it shall be unlawful for any person, firm or corporate body, by himself, herself, itself or themselves, or by his, her, its or their agents, servants or employees, to manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell, any article of nonalcoholic drink which is adulterated or misbranded, within the meaning of sections 196.125 to 196.145."

Section 196.135, RSMo 1949, provides when nonalcoholic drinks shall be deemed to be adulterated, and reads as follows:

"A nonalcoholic drink shall be deemed to be adulterated, within the meaning of sections 196.125 to 196.145, if it contains any added boric acid or borates, salicylic acid or salicyates, formaldehyde, sulphuorous acid or sulphides, hydrofluoric acid or fluorides, fluoborates, fluosilicates, or other fluorine compounds, dulcin, glucin, betanaphthol, hydronaphthol, abrastrol, asaprol, oxides of nitrogen, nitrous acid or nitrates, compounds of copper, pyroligneous acid, or other added substance deleterious to health."

Section 196.145, states that the violation of Sections 196.125 to 196.145, is a misdemeanor and fixes the penalty to be imposed upon those convicted of such offenses. Said section reads as follows:

"Any person who shall violate any of the provisions of section 196.125

to 196.145 shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than one hundred dollars, or not more than six months in jail, or both."

Upon first thought it would appear that one who manufactured, sold or did any one or more of the prohibited acts relating to the adulteration of nonalcoholic drinks would be subject to criminal prosecution and punishment therefor. However, for the reasons to be noticed hereafter it is our contention that the mere fact that nonalcoholic drinks containing any of the prohibited substances mentioned in Section 196.135, supra, would not of itself be sufficient grounds upon which to base a criminal prosecution against the manufacturer of such drinks under the provisions of 196.130, supra.

If the sections referred to in the opinion request were taken out of Chapter 196 of the Revised Statutes of 1949, and construed separately and without any reference to the remainder of said sections, then the literal construction and application of said sections to the facts before us would be that any manufacturer of any nonalcoholic drinks who manufactured, sold, offered or exposed same for sale, or had said drinks in his possession with the intention of selling them when such drinks had been adulterated within the meaning of Section 196.135, supra, would be subject to criminal presecution and punishment and it would be immaterial, in so far as the prosecution was concerned whether the manufacturer, his employees, or the water company had added the fluorine compound to any of the ingredients used in the manufacture of said nonalcoholic drinks so long as the finished product contained such fluorine compound.

It is our further contention that the sections of the statute referred to in the opinion request cannot be given their proper construction without reading and construing them along with other applicable statutes, particularly those of Chapter 196, RSMo 1949, entitled "Food and Drugs." By a proper construction of said statute we refer to the one which would give the meaning and effect intended to be given to them by the General Assembly at the time of enactment of same.

In this connection we first direct your attention to Section 192.080, RSMo 1949, which provides that all powers and duties pertaining to the administration of the laws related to the food and drug statutes shall be exercised by the Division of Health, and reads in part as follows:

"All powers and duties pertaining to administration of laws relating to food and drugs shall be exercised by the division of health. director of health may appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, and particularly to enforce all laws that now exist or that may hereafter be enacted regarding the production, manufacture or sale of any food products, or any ingredients that are used in the preparation of foodstuffs, or the misbranding of the same; and personally, or by his assistants, inspect any article of food or drug made or offered for sale in this state which he may, through himself or his assistants, suspect or have reason to believe is impure, unhealthful, adulterated or misbranded, and shall have power to cause to be arrested and prosecuted, any person or persons engaged in the manufacture or sale of foods or drugs or any food ingredients contrary to the laws of this state. The director shall make orders and findings for carrying out the provisions of this chapter and such orders and findings shall conform as nearly as practicable to the orders and findings at present established for the enforcement of the act of congress, approved, and known as 'The Food and Drug Act,' together with any amendments thereto."

Section 196.045, authorizes the Division of Health to promulgate for the enforcement of Sections 196.010 to 196.120 and reads in part as follows:

"(1) The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act."

Section 196.050 provides that the regulations promulgated by the Division of Health shall not be more stringent than those provided by the federal act and reads as follows:

"In no event shall the said division of health prescribe or promulgate any regulation fixing or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by sections 196.010 to 196.120 and if any product or commodity covered by said sections shall comply with the definitions and standards prescribed by the federal act for such product or commodity, such product or commodity shall be deemed in all respects to comply with sections 196.010 to 196.120."

Subsection 7 of Section 196.010 defines the term "food" and reads as follows:

"(7) The term 'food' means articles used for food or drink for man or other animals, chewing gum, and articles used for components of any such article; * * *."

From the definition of food given by the subsection, it appears that nonalcoholic drinks would be included within the definition and that whenever the term food is used in Chapter 196, supra, it is also meant to refer to nonalcoholic drinks and that this is true when the term is mentioned in Section 196.085. Said section reads as follows:

"Any poisonous or deleterious substance added to any food except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice, shall be deemed to be unsafe for purposes of the application of subdivision (2) of section 196.070; but when such substance is so required or cannot be so avoided, the division of health shall promulgate regulations limiting the quantity therein or thereon to such extent as the division finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes

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of the application of subdivision (2) of section 196.070. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not. by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of subdivision (1) of section 196.070. In determining the quantity of such added substance to be tolerated in or on different articles of food, the division shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances."

From the provisions of this section it is believed that a manufacturer is not authorized or justified in adding certain substances poisonous or deleterious to the health of human beings to his products during the course of the manufacturing process except under the conditions specifically provided by Section 196.085, and if it appears that the product does contain such substances, and in the present instance, if a nonalcoholic drink contains a fluorine compound as an adulteration, in violation of Section 196.130, supra, the mere presence of such substance will not be grounds for a criminal prosecution if the manufacturer can show that he is exempt from same and that his product is not to be deemed adulterated under the provisions of Section 196.085, supra.

As we read Section 196.085, in those instances when the manufacturer adds poisonous or deleterious substances to his product or when the substance, regardless of whether it was added by him or others, is necessary, or that its presence cannot be avoided, and the method of production followed by such manufacturer is deemed to be in accordance with good manufacturing practices, the manufacturer is not subject to criminal prosecution, and his product is not deemed to be adulterated, provided that he follows any regulations promulgated by the Division of Health limiting the quantity of the poisonous or deleterious substance present in the finished product.

Applying the provisions of Section 196.085, supra, and the principles of law involved within the sections stated above, it is our thought that where the manufacturer of a nonalcoholic drink added water containing a fluorine compound during the manufacturing process, which water was supplied by the water

company which had actually placed the objectionable substance in the water before supplying manufacturer with same, is a question of fact, but that is immaterial as to what persons added the fluorine compound so long as the finished product sold or offered for sale contains same and the product is adulterated within the meaning of Sections 196.130 and 196.135. RSMo 1949. Such manufacturer would, under these conditions be subject to criminal prosecution for one or more unlawful acts under the provisions of said sections unless he can offer evidence satisfactory to the Division of Health that he is not subject to prosecution for the reasons that he is exempt from same under the provisions of Section 196.085, supra. In the event the Division of Health is satisfied that the manufacturer is entitled to the exemption provided by said section, then it shall promulgate appropriate regulations limiting the quantity of fluorine compound which may be allowed in said nonalcoholic drink and permit the manufacturer to continue the production of his product under such restrictions but the regulations thus promulgated shall not be more stringent than any similar regulations under the federal food and drug act then in effect. Under these conditions only can said nonalcoholic drink be produced and offered for sale, and the manufacturer not be subject to criminal prosecution, or his product be deemed adulterated within the meaning of Section 196.135, supra.

CONCLUSION

It is therefore the opinion of this department that in construing the provisions of Section 196.125, 196.130 and 196.135, RSMo 1949, according to the apparent intention of the General Assembly as expressed in said statutes, and in applying them to the above mentioned facts, said sections must be read and construed along with other applicable provisions of the Missouri Revised Statutes of 1949, particularly Sections 196.010 196.045, 196.050 and 196.085. Consequently, a nonalcoholic drink as defined by Section 196.125 would be a food within the meaning of paragraph 7 of Section 196.010 and a manufacturer of such drink, who manufactured, sold, offered or exposed for sale or had the product in his possession with intent to sell as provided by Section 196.130, supra, when it had been adulterated by the addition of a fluorine compound, prohibited by Section 196.135, supra, would be subject to criminal prosecution for violation of said section, and upon conviction to the punishment provided by Section 196.145, RSMo 1949. However, in the event said manufacturer offers satisfactory evidence to the State Division of Health (the administrators of the Missouri food and drug laws) that the added fluorine compound in his product was either required in the production or that it could not be avoided, even though good manufacturing practices had been followed by him. Then under the provisions of Section 196.085, supra, the Division

of Health shall promulgate regulations limiting the quantity of the fluorine compound which may be permitted, and may allow the manufacturer to continue the production of the nonalcoholic drink, and to sell same. That under these conditions only said drink shall not be considered to be adulterated, and the manufacturer of same will not be subject to criminal prosecution under the provisions of Sections 196.130 or 196.135, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General NARCOTIC DRUGS: HOUSE BILL 185: DIVISION OF HEALTH:



Division of Health should issue a license for the sale of narcotic drugs by wholesale to such applicants as give satisfactory proof of the matters set forth in paragraphs 1 and 2 of Section 195.040, RSMo. 1949; Division of Health is not justified in withholding such a license until such applicant furnishes proof that he is a licensed pharmacist or has a licensed pharmacist in his employ.

September 21, 1953

Honorable James R. Amos, M.D. Director, Division of Health Department of Public Health and Welfare Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"We would like to have an official opinion concerning the requirements and duties of the Division of Health, Bureau of Food and Drugs, in regard to issuing Narcotic License to wholesale dealers who are handling and distributing narcotics.

"For background information concerning this matter, we are attaching a letter dated October 1, 1952, from Mr. T. J. Walker, Treasury Department, Bureau of Narcotics, calling our attention to the fact that the 66th General Assembly passed House Bill No. 185, which is a revision of Chapter 338 of the Revised Statutes of Missouri-1949, known as the State Pharmacy Law. This change in the Pharmacy Laws was to become effective August 1, 1952.

"We are also sending a copy of House Bill 185, which is the Amended Pharmacy Law. You will note that Mr. Walker points out that Section 338.010 provides that wholesale dealers must be licensed as a pharmacist or employ a licensed pharmacist before they are legally entitled to engage in the drug business in the State of Missouri.

"We are also attaching a copy of a letter dated October 3, 1952, which Mr. John H. McCutchen, Director, Bureau of Food and Drugs, sent to Mr. Walker in reply to his original letter. You will note that we have called to the attention of Mr. Walker the fact that since no change had occurred in the Narcotic Law that we felt this change in the Pharmacy Law did not effect the issuing of Narcotic License.

"We are attaching a copy of a letter dated October 18, 1952 from Mr. Walker, Bureau of Narcotics. I would like to call your attention to the third paragraph in this letter and to the fifth paragraph in this letter.

"We are also including a letter from the Mallinckrodt Chemical Works, dated July 22, 1953, and you will note that they contest the legality of our requiring that a wholesale dealer have a registered pharmacist as a member of the firm or an employee of the firm.

"In order to clarify this matter it will be appreciated if you will review the Narcotic Laws which are found in Chapter 195 of the Missouri Revised Statutes-1949, and the Amended Pharmacy Laws, and advise us if we shall require that wholesale drug firms or wholesale dealers comply with the Revised Pharmacy Law; that is, have a registered pharmacist as a member of the firm or as an employee of the firm before we should issue them a State Narcotic License."

The issue appears to be whether the Division of Health should issue a license to a person to sell narcotics at wholesale absent a showing by the person applying for such license that he is a licensed pharmacist or that he has in his employ a licensed pharmacist.

This issue appears to have arisen because of the passage by the 66th General Assembly of Missouri of House Bill 185, which repeals and re-enacts certain sections of Chapter 338, RSMo. 1949, which chapter is entitled "Pharmacists."

Among the sections repealed by House Bill 185 is Section 338.010, which is re-enacted in Section 338.010, of House Bill 185.

Hon. James R. Amos

We note however, that upon the issue which is the subject of your inquiry, which issue is stated above, the repealed Section 338.010, supra, and the reenacted Section 338.010 of House Bill 185 are identical.

"* * *Provided, however, that nothing in this section shall be construed to interfere with any legally registered practitioner of medicine or dentistry in the compounding or dispensing of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist. * * *"

Thus, so far as the particular matter of your inquiry is concerned, House Bill 185 makes no change in a law of many years standing. We point out this matter for the purpose of showing that in this particular, which is the matter of your inquiry, House Bill 185 makes no change in the law.

We now direct attention to Chapter 195, RSMo 1949, which is entitled "Narcotic Drug Act."

Section 195.190, supra, states:

"It is hereby made the duty of the division of health, its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of all county attorneys to enforce all provisions of this chapter, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states, relating to narcotic drugs."

By the above section is is made the duty of the Division of Health to enforce the provision of Chapter 195. It should be noted that the Division of Health, so far as narcotics are concerned, is not charged with the enforcement of any other law pertaining to narcotics, and this includes the Pharmacy Law as set forth in Chapter 338, supra. We further note that there is no mention made in Chapter 195, supra, of any requirement that a person engaged in the sale of narcotic drugs at wholesale either be a licensed pharmacist or have a licensed pharmacist in his employ. Therefore, since the Division of health is, so far as narcotic drugs are concerned, charged only with the enforcement of the provisions of Chapter 195, supra, and since Chapter 195 makes no mention of the fact that a person who sells narcotic drugs at wholesale must be a licensed pharmacist or must employ a

Hon. James R. Amos

licensed pharmacist, the Division of Health is not charged with the enforcement of such a law.

We now call attention to Section 195.030, RSMo. 1949, which states:

"No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the division of health."

We now direct attention to paragraphs 1 and 2 of Section 195.040, RSMo. 1949, which set forth the things that an applicant for a license to sell narcotic drugs at wholesale must do before the Division of Health shall issue him a license. These things are:

"License issued by division of health-revocation-appeal

- "1. No license shall be issued under Section 195.030 unless and until the applicant therefor has furnished proof satisfactory to the division of health:
 - "(1) That the applicant is of good moral character or, if the applicant be an association or corporation that the managing officers are of good moral character.
 - "(2) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.
- "2. No license shall be granted to any person who has within five years been convicted of a willful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict. The division of health may suspend or revoke any license for cause."

We now direct attention to paragraph 3 of the above section, which paragraph reads:

"3. If the division of health shall refuse any person, persons, or corporation, a license under this chapter, or shall revoke a license already issued under this chapter, the person, persons, or corporation shall have the right to appeal to the circuit court of the county in this state in which said appellant resides, or if the appellant be a corporation, then to the circuit court of the county in this state in which said corporation has its principal office."

It is our belief that if a person applies to the Division of Health for a license to sell narcotic drugs at wholesale, and furnishes to the Division of Health satisfactory proof of the matters set forth in paragraphs1 and 2 of Section 195.040, supra, that the Division of Health should issue the license. It is our further opinion that if the Division of Health refuses to do so it can be forced to do so under paragraph 3, supra.

If a person selling narcotic drugs at wholesale fails to abide by all of the laws pertaining to such sale, he may be prosecuted for the violation of whatever law or laws he violates, but that fact as we see it, has no bearing upon the duty imposed upon the Division of Health to issue such a license upon compliance by an applicant with the provisions of paragraphs 1 and 2 of Section 195.040, supra.

CONCLUSION

It is the opinion of this department that the Division of Health should issue a license for the sale of narcotic drugs by wholesale to such applicants as give satisfactory proof of the matters set forth in paragraphs1 and 2 of Section 195.040, RSMo. 1949; and that the Division of Health is not justified in withholding such a license until such applicant furnishes proof that he is a licensed pharmacist or has a licensed pharmacist in his employ.

This opinion, which I hereby approve, was written by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General APPROPRIATIONS:

No disbursements to be made under Section 10.380, Laws of Mo., 1951, page 235, in absence of valid contract for work.

XXXXXXXXXX

JOHN M. DALTON



March 11, 1953

XXXXXXXX

J. C. Johnsen

Honorable Newton Atterbury State Comptroller and Director of the Budget Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"I am attaching hereto a copy of a letter from E. J. McKee, Business Manager of State Hospital No. 1, Fulton, Missouri.

"In view of the facts as mentioned by Mr. McKee, should encumbrances and payments be made in favor of The Taylor Construction Company or the City of Fulton? Also, advise us if partial payments can be made as the work progresses on this contract, that is the 85% of the completed work, as provided on contracts made directly by the State."

The letter attached to your inquiry is quite lengthy and contains matters not pertinent to the present question. It may be summarized, however, by stating that the information therein contained discloses that the City of Fulton has entered into a contract for repairing, replacing and improving the city sewer and sewage disposal system for that city. It further appears that work is progressing under such contract, and that demand will shortly be made for a disbursement of state funds chargeable to the appropriation made under Section 10.380, Laws of Mo., 1951, p. 235.

The appropriation referred to reads as follows:

"State Hospital No. 1 -- repairing, replacing and improving the present sewerage and disposal system . -- There is hereby appropriated out of the State Treasury, chargeable to the Postwar Peserve Fund, the sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500.00), for the use of State Hospital No. 1, in taking care of the State's share for repairing, replacing and improving the present sewerage system and sewage disposal plant now being used cooperatively by Hospital No. 1 and the City of Fulton, Missouri, for the period beginning July 1, 1951, and ending June 30, 1953."

It appears from the terms of the appropriation that thereunder was appropriated the sum of Thirty-seven Thousand Five Hundred (\$37,500.00) Dollars to be used in paying a portion of the cost for repairing, replacing and improving the existent sewerage system and sewage disposal plant, which is used cooperatively by State Hospital No. 1 and the City of Fulton, Missouri. The appropriation covers the period beginning July 1, 1951, and ending June 30, 1953.

We are advised by the Director of Public Buildings that no contract is found in the files of that division relating to the contemplated work to be done upon the cooperatively used sewerage system and sewage disposal plant mentioned in the foregoing appropriation act. It, therefore, becomes of concern to the present inquiry to determine whether or not any disbursements may be made out of such appropriation in the absence of such a contract.

We direct your attention to the following portion of Section 22, Article IV, Constitution of 1945:

"* * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

Also, Section 28 of Article IV, Constitution of 1945,

reading as follows:

"Withdrawals from treasury -- limitations on authority to incur obligations -- certifications by comptroller and auditor -- expiration of appropriations . -- No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

The foregoing constitutional provisions place the direct duty upon the Comptroller of determining the validity of any claim presented for approval and payment out of the state treasury. In making such determination the Comptroller must necessarily avail himself of all facts bearing upon the contractural obligation or other demand sought to be enforced.

It is true that Section 191.120, RSMo 1949, vests the naked legal title to the real property owned by the state for the various institutions under the administrative control of such department in the Director of the Department of Public Health and Welfare. However, this does not preclude the necessity that such director comply with applicable statutory requirements with respect to repairing, rehabilitating or improving such real property.

We direct your attention to Section 8.070, RSMo 1949, relating to the duties of the Director of Public Buildings, reading as follows:

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"To serve as consultant to department heads on construction and maintenance of buildings .-- The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilitation, or construction of buildings, without approval of the director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director; provided, that there is excepted herefrom the design, architectural services, construction, repair, alteration or rehabilitation of all laboratories, libraries, classrooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit built wholly or in part from funds other than state appropriations."

(Underscoring ours)

The facts as indicated in your letter of inquiry, in the letter attached thereto from the business manager of State Hospital No. 1 and the information supplied this department by the Director of Public Buildings indicate a complete failure to comply with the cited statutory requirements relating to the expenditure of public moneys under an appropriation for the repair, rehabilitation or improvement of public building.

CONCLUSION.

In the premises we are of the opinion that until such time as compliance be had with the various statutory require-

ments relating to the expenditure of public moneys for the repair, rehabilitation or improvement of public buildings owned by the state and a valid contract pursuant to such statutory requirements be entered into, no expenditure out of the state treasury can properly be made under the appropriation provided in Section 10.380, found Laws of Missouri, 1951, page 235.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

WFB:mm

APPROPRIATIONS:

Comptroller should not certify any disbursements under H.S.H.R. No. 13 until termination of pending litigation.



March 11, 1953

Honorable Newton Atterbury State Comptroller and Director of the Budget Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department dated February 26, 1953, reading as follows:

"We have noted in yesterday's Post
Tribune Judge Blair had made a decision
in the above mentioned case. We noted
in the same newspaper article that
Representative Hamlin, acting as
attorney for Austin Hill, stated that
he 'planned to file whatever motion
was necessary to keep the case alive.'

"We assumed the Comptroller's Office should still refuse to certify for payment any requisitions on the two accounts involved. Your advice in this connection, however, will be appreciated."

The office of Comptroller was established by the adoption of the Constitution of Missouri, 1945, particularly Section 22, Article IV, reading in part as follows:

"The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection.

budget and comptroller, and other divisions as provided by law. * * * The comptroller shall be director of the budget, and shall preapprove all claims and accounts and certify them to the state auditor for payment."

(Emphasis ours.)

The General Assembly, pursuant to the constitutional directive set forth, subsequently enacted what now appears as Chapter 33, RSMo 1949. With respect to the office of Comptroller the following appears as a part of Section 33.010, RSMo 1949:

"The governor, by and with the advice and consent of the senate, shall appoint a comptroller, who shall head the division of budget and comptroller and who shall be the director of the budget, and who shall be under the supervision and direction of the director of revenue, and shall serve as such without additional compensation. * * # He shall also deposit with the director of revenue a bond, with sureties to be approved by the director of revenue, in the amount determined by the director of revenue payable to the state of Missouri, conditioned on the faithful performance of the duties of his office. * * *"

Among the enumerated powers and duties of the division of the budget and comptroller, the following appears as Section (3) of Section 33.030, RSMo 1949:

"To preapprove all claims and accounts and certify them to the state auditor for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that such claims and accounts are regular and correct. Each such certification

from the comptroller to the state auditor shall be accompanied by a copy of the invoice."

Penalty for failure to properly discharge the duties of his office, in addition to any action which might be brought upon his official bond, includes Section 33.200, RSMo 1949, reading as follows:

"If the comptroller shall knowingly certify any claims or accounts for payment by the auditor, not authorized by law, he shall, upon conviction thereof, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

We now advert to the matters contained in your letter of inquiry. You have designated the case as No. 13173; however, the ruling to which you have referred and which was entered by the Circuit Court for Cole County, Missouri, on February 25, 1953, was in case No. 13170. However, with certain exceptions the subject matter of the two actions were and are much the same. The only real difference is that a different resolution has been attacked in the different suits.

State of Missouri ex rel. Austin Hill v. Lester A. Vonderschmidt et al., No. 13170, in the Circuit Court for Cole County, Missouri, was and is an action brought to obtain a declaration as to the constitutionality of H.S.H.R. No. 13, adopted by the current General Assembly. In substance the resolution authorized certain investigations to be conducted by the House Appropriations Committee, the employment of personnel to aid and assist such committee in the investigations and purported to appropriate the sum of not to exceed Ten Thousand Dollars for the payment of necessary expenses incurred by such committee in the discharge of its duties in this regard.

The records of the Circuit Court for Cole County, Missouri, indicate that the entry made by the judge of such court on February 25, 1953, does not amount to a

final appealable order or judgment terminating the litigation, and an amended petition has since been filed. Therefore, the constitutionality of the purported appropriation made under H.S.H.R. No. 13 remains a live question for judicial determination and one which will not be finally resolved until the termination of such litigation.

In the event that such resolution ultimately be held unconstitutional the appropriation purportedly made thereunder would, of course, be void and of no effect. Should this be the result, then the purported appropriation could not supply funds for the payment of the expenses incurred by the House Appropriations Committee in the discharge of the duties imposed upon it under the resolution. Without a valid appropriation, which as has been pointed out neretofore may not be finally determined until the pending litigation is ended, you, of course, as comptroller, would be unauthorized to certify any claim for payment of expenses incurred by the House Appropriations Committee and chargeable thereto. Your certification in these circumstances would amount to a breach of the conditions of your official bond rendering you liable for any claims so improperly certified for payment out of the treasury of the State of Missouri. In addition your action in this regard could possibly amount to such an act as would subject you to the criminal penalty provided in Section 33.200, RSMo 1949, cited supra.

CONCLUSION

In the premises we are of the opinion that the Comptroller should not preapprove and certify for payment out of the state treasury any account for necessary expenses incurred by the House Appropriations Committee under the provisions of H.S.H.R. No. 13 during such time as the constitutionality of the purported appropriation made in such resolution is subject to judicial inquiry.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB, JR./fh

APPROPLIATIONS: COMPTROLLER: CONSTITUTIONAL LAW: BOUNTIES: Attempted limitation of reimbursement to Gounties for payment of bounties by Perfected H.B. 224, Sec. 8, and Perfected H.B. 325, Sec. 3.160, unconstitutional and void.



April 16, 1953

Honorable Newton Atterbury State Comptroller and Director of the Budget Jefferson City, Missouri

Dear Mr. Atterbury:

In your letter of March 27, 1953, you requested an opinion on the following:

"We would very much appreciate a verbal opinion in regard to payment out of appropriations made in Perfected House Bills 224, Section 8 and 325, Section 3.160.

"We question this emergency appropriation and regular appropriation due to the wording in line 6 and 7 of House Bill 22h and line 6 and 7 of House Bill 325, which reads in part: 'to the extent of one-half the bounties paid', which conflicts with Section 279.030, Revised Statutes of Missouri, 1951, which reads in part: 'shall refund to the treasurer of such county two-thirds of all bounties so paid by such county.'

"Could the Comptroller and the State Auditor make certification as set forth in the two house bills mentioned, and, if so, in what proportion should certification be made?"

Provision for reimbursement to Counties to the extent of two-thirds of the amount paid by them as bounty for coyote, wildcats and wolf scalps is made by Section 279.030, 1951 Supplement, RSMo 1949:

"279.030. Payment of bounties -- disposition of scalps .-- The clerk shall preserve all such scalps until the next regular term of the county court, when he shall produce such scalps to the county court and the court shall cause warrants to be made for the amount of bounty due to such claimant and shall forthwith order all such scalps to be destroyed by burning in the presence of the county court. The clerk shall thereupon certify to the state comptroller the name and address of the claimant for such bounty and the amount of bounty paid by the county, which shall be audited by the state comptroller, and upon approval by the state comptroller and the state auditor, the state treasurer shall refund to the treasurer of such county two-thirds of all bounties so paid by such county.

(Underscoring ours.)

Perfected House Bill 22h, an Appropriation Bill, in Section 8, appropriates Fifty Thousand (\$50,000.00) Dollars for payment to Counties to one-half of the amount paid out by such Counties as bounties for destruction of the animals listed in Section 279.010, 1951 Supplement, RSMo 1949.

"Section 8. There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund, the sum of Fifty Thousand Dollars (\$50,000.00), or so much thereof as may be necessary to pay the several counties of Missouri bounties for the destruction of any wolf, coyote or wild-cat, or any wolf or coyote pup or wildcat kitten, to the extent of one-half the bounties paid for the destruction of any or all of the aforementioned by any county of the state; for the period beginning January 7, 1953 and ending June 30, 1953.

"The foregoing amount is in addition to the amount appropriated for the same purpose for the 1951-1953 biennial period as set out in section 3.160 of House Bill No. 4, an act of the Sixty-sixth General Assembly."

(Underscoring ours.)

House Bill 325, Section 3.160, makes similar provision:

"Section 3.160. There is hereby appropriated out of the state treasury, charge-able to the General Revenue Fund, the sum of Eighty Thousand Dollars (\$80,000.00), or so much thereof as may be necessary to pay the several counties of Missouri bounties for the destruction of any wolf, coyote, or wildcat, or any wolf or coyote pup, or wildcat kitten, to the extent of one-half the bounties paid for the destruction of any or all of the aforementioned by any county of the state; for the period beginning July 1, 1953 and ending June 30, 1955."

(Underscoring ours.)

In effect, the Legislature is attempting in an Appropriation Bill to lower the amount of reimbursement to Counties from two-thirds of the money expended by the Counties to one-half. This attempt is unconstitutional as repugnant to Missouri Constitution, 1945, Article III, Section 23:

"Sec. 23. Limitation of Scope of Bills--Contents of Titles--Exceptions.--No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The case of State ex rel. Gaines vs. Canada, et al., 342 Mo. 121, 113 S.W. (2d) 783, decided by the Supreme Court in 1937, decides the question of whether an Appropriation Bill can amend a general law. Negro relator sought and was denied admission to the University of Missouri Law School. He asked for Writ of Mandamus to

compel the Registrar and Curators of the University of Missouri to admit him, complaining of discrimination. One of the grounds upon which he based his claim of discrimination was that, of course, he could not attend the University of Missouri under existing statutes, and that provision was made by statute to pay tuition fees at another State University only in excess of what would be charged to him were he a student at the University of Missouri. Section 9622, R.S. Mo. 1929, authorized the Board of Curators of Lincoln University to pay the reasonable tuition fees of Negro residents of Missouri for attendance at the University of any adjacent State. However, the Appropriation Act of 1935 provided, in part, as follows:

"There is hereby appropriated out of the State Treasury chargeable to the general revenue fund for the years 1935 and 1936, the sum of Ten Thousand Dollars (\$10,000.00) to be used in paying the tuition of negro college students to some standard college or university not located in Missouri, * * * provided that the total amount paid shall not exceed the difference between the registration and incidental fees charged by the University of Missouri to resident students and the school attended for similar courses."

(Underscoring ours.)

The Supreme Court disposed of that contention in the following manner, 1.c. 790:

"Appellant contends that Missouri would not pay his full tuition in an adjacent State, but only the difference between the tuition charged by the University of Missouri and that charged by the adjacent States, as provided in the appropriation act of 1935. The proviso in the 1935 act which attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent States is unconstitutional and void. A general statute (section 9622, R.S. 1929 (Mo. St. Ann. § 9622, p. 7328)) authorizes the

board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent State. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of 10,000 for the purposes therein named. Had appellant applied for the benefits of this appropriation, it would have been the duty of the board of curators of Lincoln University to pay his full tuition in the law department of the university of an adjacent State. * * *."

(Underscoring ours.)

The Supreme Court of Missouri in State ex rel. Davis vs. Smith, 75 S.W. (2d) 828, 335 Mo. 1069, declared that an Act appropriating \$3,000.00 from the General Revenue Fund to the Board of Barber Examiners' Fund was not sufficient to amend a statute requiring that salaries and expenses of the Board be paid solely from the fund created from fees collected by said Board and commented on the validity of general legislation appearing in Appropriation Bills, 1.c. 830:

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated

section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S.W. 338.

The two House Appropriation Bills in question attempt to indirectly lower the percent of reimbursement to Counties provided by Section 279.030. This clearly is legislation of a general character and the view of State vs. Canada and State vs. Smith, supra, are applicable. However, the valid and invalid sections are severable, and the portion appropriating the money will stand. (State vs. Canada, supra.)

CONCLUSION

It is, therefore, the opinion of this office that the Legislature cannot in an Appropriation Bill amend Section 279.030, 1951 Supplement, RSMo 1949, to lower the percentage of reimbursement to Counties, since that would be general legislation in an Appropriation Bill, and thus repugnant to Article III, Section 23, Missouri Constitution of 1945. The valid and invalid sections are severable, and the appropriation itself would stand.

If either of the two subject Bills are passed, and if there is no general legislation otherwise on this subject, the Comptroller and Auditor should certify a two-thirds reimbursement.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:IRK



COUNTY COURTS: County Court cannot pay hospital and doctor bill of injured employee from public funds. Whether PUBLIC FUNDS: such employee may receive salary while hospitalized is matter within discretion of County Court. Unused balance of special fund, purpose for which raised having been accomplished, may be transferred to General Revenue Fund, or such other fund as may be in need of such fund.

April 25, 1953

Honorable Roderic R. Ashby Prosecuting Attorney Mississippi County Charleston, Missouri

Dear Mr. Ashby:

In your letter of April 7, 1953, you requested an official opinion of this office as follows:

> "In 1952 A County had a DDT Spray program. B was employed to spray by A County. B, while so employed was seriously injured. Frankly the County Court of A County is desirous of paying B's doctor and hospital bills. A County has \$500.00 left in the DDT Spray fund.

"Would it be possible to use this \$500.00 to pay B's hospital and doctor bill or,

"Would it be possible to use this \$500.00 to pay B a salary while he was hospitalized, or,

"In case this \$500.00 cannot be used in either way above, what should this \$500.00 be transferred to?"

A County Court is not the general agent of either the county or the state, and as such, has only those powers expressly granted to them and such implied powers as are necessary to effectuate the express authority given to them. The Supreme Court of Missouri in King vs. Maries County, 249 S.W. 418, 292 Mo. 488, 1.c. 420, expressed the powers of the County Court as follows:

> "It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They

Honorable Roderic R. Ashby:

have only such authority as is expressly granted them by statute. Butler v. Sullivan County, 108 Mo. 630, 18 S.W. 1142; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492, 158 S.W. 590; Steines v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. Sheidley v. Lynch, 95 Mo. 487, 8 S.W. 434; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 S.W. 64."

(Underscoring ours.)

After diligent search we have been unable to locate any statute authorizing payment from public funds of hospital or doctor bills of injured employees of a county.

Your second question, as to whether an injured employee may receive a salary while hospitalized, is one which cannot be answered specifically on the facts which you gave us. The County Court has, of course, certain discretion to determine, in the absence of statutory provision otherwise, the salary of employees which it is authorized to Within such discretion it can determine the amount of salary and the length of employment. To be considered by the Court is the length of time which an employee is unable to perform the services for which he is hired, whether such employment is a continuing one or is for only a special purpose, the feasibility of hiring a new employee to perform the services for which the injured employee was hired to perform, and the desirability of retaining an experienced employee, even though he may be temporarily absent from his work.

However, the Court should be exceedingly cautious not to authorize a mere gratuity to an injured employee under the guise of paying him a salary.

The Legislature has seen fit to prescribe severe criminal penalties for County Courts who wrongfully disburse public funds as follows:

"558.250. Claims corruptly allowed by county courts and other officers .-- Any

member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member -- such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

"558.260. Fraudulent disbursement of money .-- If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for

which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; but if the same be not effected, then such person so voting, advising or promoting the said il. legal appropriation, disbursement or disposition of said money or property, as aforesaid, shall be deemed and taken to have feloniously attempted to embezzle and convert the same to his own use, and, upon conviction of either or any such offense, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not exceeding fourfold the value of such money or property; provided, however, that in any case when any money has been or shall have been collected by any city, town or county for any specific use or purpose, and it is or shall have become impossible to use such money for that specific purpose, either by reason of the abandonment or failure of such use or purpose, or the satisfaction of such use or purpose, then the members of any such town or city council, and the proper officers of such city, town, county or board herein mentioned, may appropriate such money to any other legitimate use or purpose without becoming liable to any of the aforesaid penalties.

The Supreme Court of Missouri in State ex rel. Heaven, Relator, vs. Ziegenhein, et al., 45 S.W. 1099, 44 Mo. 283, 1.c. 291, in denying a pension to a retiring St. Louis policeman, made this comment on remuneration to public employees for past services:

Honorable Roderic R. Ashby:

"The courts should not search for plausible reasons and specious pretexts to evade and set aside constitutional prohibitions against the improper use of public funds, and thereby unnecessarily increase the burdens of taxation. Upon the contrary, all such provisions in the organic law of the State should be enforced and made effectual according to their plain meaning and intent.

"We are not unmindful of the important services rendered by the officers of the police force and of the benefits derived from their faithfulness in protecting and guarding the lives and property of the citizens. They are officers of the State, however, and the Constitution has declared, that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city can not, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have no power to require it to be done. * * *."

The Legislature has made provision for the disbursement of the balance of any special fund which is no longer needed for the purpose for which it was raised, by Section 50.020, RSMo 1949:

"50.020. Transfer of county funds.--Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

This section indicates that the excess funds to which you refer, may be transferred to the General Revenue Fund of the county, or any other such fund as may be in need of such balance.

Honorable Roderic R. Ashby:

CONCLUSION

It is, therefore, the opinion of this office that:

- 1) A County Court cannot use public funds to pay hospital or doctor bills of an injured county employee;
- 2) Whether such injured employee may receive salary while hospitalized must be determined by the County Court on the particular facts of each case, and,
- 3) An unneeded balance in any special fund may be transferred to the General Revenue Fund of the county, or any other fund in need of such balance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

PMcG:irk

JOHN M. DALTON Attorney General

COMPTROLLER: MOTOR VEHICLES:

SOCIAL SECURITY: Persons selling vehicle and driver's licenses and collecting of other taxes for the State Department of Revenue under the provisions of Laws of Mo. 1951, page 863, are not covered under the provisions of the Old Age and Survivor's Insurance, page 788, Laws Mo. 1951.

JOHN M. DALTON



May 5, 1953

XXXXXXXX

J. C. Johnsen

Mr. Newton Atterbury State Comptroller and Director of the Budget Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

> "The question has been presented as to the status of persons selling license plates, titles, etc.

"Are persons selling license plates, titles, etc. for the State Department of Revenue, who receive no salary from the Department of Revenue, and who make a charge to the purchaser a fee for his services, subject to Social Security as a state employee?

"I respectfully request your official opinion on this question."

It is understood from the context of your letter and the material which you have submitted with it that the statute with which we are here concerned is the new provision for agents of the Department of Revenue to collect motor vehicle licenses and taxes as provided in Laws of Mo. 1951, Section 1, page 863, as follows:

> "Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provision of section 144.450, RSMo. 1949, and who receives

Mr. Newton Atterbury

no salary from the department of revenue shall be authorized to collect from the party requiring such services additional fees as compensation in full for all services rendered on the following basis:

- "(1) For each motor vehicle or trailer license sold, renewed or transferred -- twenty-five cents;
- "(2) For each application or transfer of title-twenty-five cents;
- "(3) For each chauffeur, operator or driver's license--twenty-five cents;
- "(4) No notary fee or other fee or additional charge shall be paid or collected."

It will be noted that the fee to be paid is to be paid by the party requiring the service. On these occasions the party, or parties, requiring the service are applicants for various kinds of motor vehicle licenses, as provided in the section. It will be noted further that no provision whatsoever is made for the payment of any of the so-called agents by the State of Missouri.

It has been declared to be the law in this state that public officers are not entitled to compensation unless they can specifically point out the statute authorizing such compensation.

In Nodaway County v. Kidder, 129 S.W. (2d) 857, 1.c. 860, it was stated by our Supreme Court as follows:

"(8) It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackman, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

In the above quoted section, Laws Mo. 1951, page 863, it may be seen that there is no compensation provided for by the state for the service as outlined. The tenor of the statutory language is to the opposite effect. The fee is to be paid by the party requiring the service. Unless the statute so provides there can be in accordance with the Nodaway County case no consideration of fees, salary, or compensation of any kind moving from the State of Missouri to

Mr. Newton Atterbury

the agent as described in the above quoted section of the law.

It was held in one of the earliest cases decided since the participation of the states in old age and survivor's benefits under the Federal Social Security Act, which was Shamburger v. Commonwealth, 240 S.W.(2d) 636, l.c. 637, as follows:

"The fundamental point, it seems to us, is the fact that contributions (or excise taxes) required by the law to be paid by both employers and employees, is a percentage of wages or compensation paid and received. 26 U.S.C.A. Secs. 1400, 1410. Therefore, so far as liability for payment is concerned, the controlling point is the source of the compensation, i.e., who pays the salaries."

In a closely related question involving Federal Social Security, the United States Circuit Court in Magruder v. Yellow Cab Company of D.C. Inc., 141 Fed.(2d) 324, 1.c. 325-326, held as follows:

"(1) It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied: (1) There must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee. * * *We proceed to a brief consideration of the two problems: (1) The relationship; (2) wages.

"(2) Wages.

"(4) We think too, that Judge Chestnut was eminently correct in his finding of fact: 'Plaintiff(Yellow Cab) paid no money to the drivers for wages or otherwise.' Yellow Cab paid nothing to the drivers, that is conceded.

"The only money passing between Yellow Cab and the driver was paid by the drivers to Yellow Cab as rent for the taxicabs. We are asked to hold, though, that the fares received by the drivers from passengers constitute wages paid by the Yellow Cab to the drivers. Our imaginations are not quite so lively. It is true that the term 'wages' is given a broad meaning by the Regulations, but we might point

out that Social Security Tax Regulations 106, Sections 402.228(e) and 403.228
expressly exclude from the denotation of wages:
'Tips or gratuties paid directly to an employee
by a customer of an employer and not accounted
for by the employee to the employer.' In the
instant case, Yellow Cab had no title or interest
in, no power to make the drivers account for,
the money received by the drivers from passengers.
Yellow Cab was entitled to receive and did receive,
only the rent paid by the drivers.

"There can, of course, arise the relation of employer and employee without the payment of wages. A young doctor, for example, might become an employee of a distinugished physician without any pecuniary compensation. The youthful medico might feel that he is amply compensated by the knowledge and experience he acquires, and the prestige he derives, from association with an eminent colleague. Hardly could it be said here that the budding disciple of Aesculapius is the recipient of 'wages,' as that term is used in the instant tax statutes."

In consideration of the foregoing authorities, it must be concluded that this is a tax based upon a percentage of money paid for service and the conditions as outlined in the Magruder and Shamburger cases, supra, are not met.

CONCLUSION

Therefore, it is the opinion of this office that persons selling vehicle and driver's licenses and the collecting of other taxes for the State Department of Revenue under the provisions of Laws of Mo. 1951, page 863, are not subject to withholding tax or benefits under the provisions of the State Old Age and Survivor's Insurance, page 788, Laws Mo. 1951.

The foregoing opinion, which I hereby approve, was written by my assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General MISSOURI DENTAL BOARD:

Missouri Dental Board may employ legal counsel.



May 29, 1953

3

Honorable Newton Atterbury
State Comptroller and
Director of the Budget
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an opinion of this office which request reads as follows:

"We have received from the Missouri State Dental Board a requisition requesting payment of various items.

"One particular item which we question is the certification of a requested payment in the amount of \$553.10 for attorney fees for William Icenogle. We are attaching hereto a copy of Icenogle's statement of account. We question this payment first on the basis of the appropriation (see section 7.350, Appropriation Laws 1951 - 53) under heading "operations". This might be construed as payable under "other necessary expense".

"We particularly question this payment, however, due to the fact we feel probably your office should have either handled this work or at least made recommendations in regard to its handling.

"We are holding up this payment and request you give us a legal opinion as to the propriety of our paying the legal fee above mentioned."

We will first consider your second inquiry which we understand to be whether or not the Missouri Dental Board has the authority to retain legal counsel to assist the board in carrying out their duties, such counsel being other than the Office of Attorney General. In other words, may the board contract the services of a private practicing attorney?

The provisions relating to the authority and duties of the Missouri Dental Board are found in Chapter 332, RSMo 1949, Section 332.290 provides for the creation of the board and authorizing the board to sue and be sued in its official name. Section 332.300 provides for the organization of the board once created. Section 332.310 specifically authorizes the board to employ legal counsel and reads in part as follows:

"* * *The Board shall be authorized and empowered to employ and pay all necessary legal and clerical services whenever, in its opinion, the same is necessary; all necessary and reasonable traveling expenses of its counsel may be paid by the Missouri dental board when its counsel is absent from his office at the request of the board. * * *"

We note from the fee bill attached to your opinion request that the legal services contracted in this instance were in relation to an injunction proceeding. Section 332.250 authorizes an injunction proceeding to bar a person from the unauthorized practice of dentistry and provides that such action may be commenced, filed and maintained by the attorney general or by any prosecuting attorney or by the circuit attorney of the City of St. Louis in the name of the State of Missouri or "by the Missouri dental board in its own name." Since such a proceeding may be maintained by the board and by virtue of specific authority there can be no doubt of the power of the Missouri Dental Board to employ counsel as is in their opinion necessary to enable them to perform the duties imposed by statute.

You next inquire whether such services may be paid for under "operations" as contained in Section 7.350, Appropriation Laws 1951. Section 7.350 relating to the State Dental Board reads as follows:

"State Dental Board.-There is hereby appropriated out of the State Treasury, chargeable to the State Dental Board

Fund, the sum of Twenty-four Thousand Six Hundred Dollars (\$24,600.00), for the use of the State Bental Board, for the payment of salaries, wages and per diem of the members, officers and employees; and for the general operating and other expenses; for the biennial period beginning July 1, 1951 and ending June 30, 1953, as follows:

"Personal Service:

Salary of Secretary \$3,600.00

"Operation:

General expenses including per diem of Board members, extra stenographic help, assistant secretary, communications, printing, binding, postage, travel within the state, insurance and premiums on bonds, stationery and office supplies, other necessary expense and Federal Old-Age and Survivors Insurance

\$21,000.00

"Total from State Dental Fund

\$24.600.00"

We are of the opinion that legal services such as here considered would fall within the term "other necessary expense" and would be properly payable out of operations as contained in the above provision.

CONCLUSION

Therefore it is the opinion of this office that the Missouri Dental Board may employ legal counsel as is, in their opinion, necessary to enable them to perform the duties imposed by statute and that the expenses incurred by such employment

would be properly payable out of "operations" as that term is contained in Section 7.350, Appropriations, Laws, 1951.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

APPROPRIATIONS: Kansas City not entitled to reimbursement from state for mental patients in hospital maintained by public funds in absence of appropriation therefor.



June 5, 1953

Honorable Newton Atterbury State Comptroller & Budget Director Jefferson City, Missouri

Dear Sir:

This will acknowledge the receipt of your letter of May 25, 1953, in which you request an opinion of this department. Such request, omitting caption and signatures, is as follows:

> "We have received a requisition from the Department of Health of Kansas City, Missouri, which reads in part as follows:

"'TO THE STATE AUDITOR OF MISSOURI:

"'By authority of an order of the Director of Health of Kansas City, Missouri, made on the 9th day of April, 1953, requisition is hereby made on you accompanied by original accounts properly approved by said Director, for a warrant on the State Treasury in favor of said institution for the sum of ONE THOUSAND FOUR HUNDRED SIXTY EIGHT DOLLARS AND THIRTY CENTS (\$1,468.30) to pay for the State's obligation at \$8.00 per month for maintenance of psychiatric patients in facilities of the Department of Health of Kansas City, Missouri.

"The above statement is correct.

"'Witness our hands and the Seal of our said Institution hereto affixed this 8th day of May, 1953.

> Hugh L. Dwyer Director of Health, Kansas City, Mo. 1

"This requisition is supported by certification and records by the business manager of the Kansas City Department of Health. Please refer to Section 202.670, Revised Statutes of 1949 and Section 5200 of the Appropriation Laws of 1951, as well as Section 12, House Bill No. 224 of the 67th General Assembly. Section 202.670 seems to cover an institution such as maintained by the Department of Health of Kansas City, but the two appropriation laws seem to eliminate payments to Kansas City.

"It is our understanding both appropriations mentioned were requested by the hospital which is maintained by the City of St. Louis. We further understand the amount of money left in the appropriation will not cover payment to St. Louis.

"We will appreciate your advice as to what should be done in this matter."

There are three provisions of the statutes which must be examined in order to arrive at a solution to this problem. The first provision which we must study is Section 202.670, RSMo 1949, which provides as follows:

"Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to eight dollars per month per patient, upon proper report filed and sworn to by the superintendent of such hospital for the insane, when such report is filed with the state department of public health and welfare. Such reports shall be filed quarterly and shall show name, address and other necessary data so as to properly identify and authenticate the patients of such insane institution."

Under the above statute, there can be no question but that the Department of Health of Kansas City, Missouri, would be entitled to be paid by the State of Missouri, the sum of eight dollars (\$8.00) per month per patient, who is treated for mental disorders in a hospital maintained by the city from public funds for the treatment of such patients. However, in order that the State can pay such sum, there must be some money or fund from which it can be paid. To have available such funds, there must be an appropriation passed by the legislature. Therefore, we must determine if there has been an appropriation made for this purpose.

The first appropriation act which we wish to cite is Section 5.200, Laws of Missouri, 1951, p. 129, and which provides the following:

"Charity patients of county mental hospitals. -- There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of One Hundred Thirty Thousand Dollars (\$130,000.00), or so much thereof as may be necessary, for the use of the Division of Mental Diseases for the purpose of paying the mental hospitals, established and maintained by any county or city not within a county in this state, the sum of Eight Dollars (\$8.00) per month, for each indigent insane person, detained and treated in such hospital, pursuant to the provisions of Section 9360, Revised Statutes of Missouri. 1939; for the biennial period beginning July 1. 1951 and ending June 30. 1953.

"Approved June 29, 1951."

It will be noted that the above sum of money was appropriated for the purpose of "paying the mental hospitals, established and maintained by any county or city not within a county in this state." A mental hospital, established and maintained by Kansas City, would not be established and maintained by a county nor by a city not within a county since Kansas City is in Jackson County. Therefore, it is our opinion that the Kansas City Health Department could not obtain payment from the fund created by the above appropriation.

The only other appropriation act pertaining to mental hospitals is found in House Bill #224, passed by the 67th General Assembly, and approved by the Governor May 18, 1953.

Section 12 of said enactment prescribes as follows:

"There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund, the sum of Seventeen Thousand Dollars (\$17,000.00), or so much thereof as may be necessary for the use of the division of mental diseases for the purpose of paying the mental hospitals, established and maintained by any county or city not within a county in this state, the sum of Eight Dollars (\$8.00) per month for each indigent insane person, detained and treated in such hospital, pursuant to the provisions of section 202.670, RSMe 1949; for the period beginning January 7, 1953 and ending June 30, 1953.

"The foregoing amount is in addition to the amount appropriated for the same purpose for the 1951-1953 biennial period as set out in section 5.200 of House Bill No. 6, an act of the Sixty-sixth General Assembly."

Again it will be noted that that sum of money was appropriated "for the purpose of paying the mental hospitals, established and maintained by any county or city not within a county in this state." As in the case of the first appropriation bill cited, Kansas City cannot qualify for such funds.

The Kansas City Health Department is in a situation where it is entitled to a certain sum of money but due to a failure to have the legislature appropriate funds from which the payment could be made, the Comptroller and Budget Director of Missouri is not authorized to honor the requisition as presented by the Department of Health of Kansas City, Missouri.

CONCLUSION

Therefore, it is the opinion of this department that even though there is a statutory provision which entitles the Department of Health of Kansas City to receive \$8.00 per person per month for each mental patient confined to a hospital established and maintained by public funds, yet the Comptroller and Director of Budget of Missouri is not authorized to honor a requisition since there have been no funds appropriated from which such payment can be made.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John S. Phillips.

Yours very truly,

JOHN M. DALTON Attorney General

JSP:lw

No statutory authority exists to permit the state to become obligated to pay the expenses of a band and drum and bugle corps designated by a particular Veterans' Organization in attending its National Convention.



July 7, 1953

Honorable Newton Atterbury
State Comptroller and
Director of the Budget
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"We have been approached in regard to paying expenses of the St. Agnes Band and Drum and Bugle Corps for a trip to the National Am. Vets. Convention in New York City.

"We question the legality of the payment due to the following facts:

"1. Payment would be made out of appropriations for 1951-53, H. B. 433, Sec. 10.100. This was the Omnibus Bill that was not finally passed until May or June, 1952.

"2. The trip was made in August, 1951, before the bill became a law.

"3. The appropriation does not carry any relief or emergency clause.

"If this is to be paid, such payment must be made prior to July 1, 1953, as the \$2,500.00 left in this appropriation expires as of the end of the present fiscal year.

"Your opinion in this matter will be appreciated."

Section 10.110, Laws of Missouri 1951, page 230, to which you refer reads as follows:

"Division of Resources and Development-for the advertising of Missouri.-There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Five Thousand Dollars (\$5,000.00) for the use of the Division of Resources and Development for the purpose of carrying out the program of the Division of Resources and Development in advertising Missouri by sending one band and one drum and bugle corps to be designated by the Veterans' Organization having the largest membership in the State of Missouri to its National Convention and for the purpose of sending one band and one drum and bugle corps to be designated by the Veterans' Organization with the next largest membership in the State of Missouri to its National Convention for the period beginning July 1, 1951 and ending June 30, 1953."

The import of this section as written, is that \$5,000.00 is appropriated for the use of the Division of Resources and Development for the purpose of carrying out the program of the Division in advertising the State of Missouri. The money is to be used in sending one band and one drum and bugle corps to the National Convention of each of the two largest Veterans' Organizations in the State. Such band and drum and bugle corps as may be designated by the particular Veterans' Organization.

As we understand the particular matter to which you refer, the St. Agnes Band and Drum and Bugle Corps was designated by the Am. Vets., a Veterans' Organization, and did attend the National Convention of such organization without the consent or

approval of the Division of Resources and Development. In fact the only authority which the Division has exercised is a mere certification of the expenses of such trip to the comptroller for payment. That the legislature may appropriate money for the Division of Resources and Development for the purpose of carrying out its functions, there can be no doubt. However, it is our opinion that the General Assembly cannot in an appropriation bill control the mode or manner of discharging these functions or grant to a Veterans' Organization the power to designate a band and drum and bugle corps to attend its National Convention and bind the Division of Resources and Development to pay the expenses incurred. Such an attempt, we believe, would be general legislation, inconsistent with appropriation bills and repugnant to the Constitution.

Section 23 of Article III of Missouri Constitution 1945, provides as follows:

"Limitation of scope of bills-contents of titles-exceptions. No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

This provision has been on occasions before the Supreme Court for interpretation. In the case of State ex rel. Gaines v. Canada, et al., 342 Mo. 121, the court said:

"* * *Legislation of a general character cannot be included in an appropriation bill. To do so would violate Section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of Section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects.* * *"

In the case of State ex rel. Davis v. Smith, 335 Mo. 1069, the court said:

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend Section 13525, it would have been void in that it would have violated Section 28 of Article IV of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt what the amendment of a general statute such as Section 13525, and the mere appropriation of money are two entirely different and separate subjects. (State ex rel. Hueller v. Thompson. State Auditor, 316 Mo. 272, 289 S. W. 338.)"

While, although this appropriation measure might be construed so as to limit the use of the funds appropriated to the payment of the expenses of a band and drum and bugle corps designated by a particular Veterans' Organization in attending its National Convention, we find no general legislation authorizing such a designation or authorizing an obligation to be so incurred by the State and the contended obligation in this particular case was not incurred by the Division of Resources and Development in the discharge of its functions, assuming that such could have been done, a question upon which we do not express opinion.

Since we have determined that the expense to which you refer was not legally incurred, we need not discuss the fact that it was incurred prior to the passage of Section 10.110, supra, since it would have no effect upon the issue at hand.

CONCLUSION

Therefore it is the opinion of this office that there exists no statutory authority under which the State may incur an obligation to pay the expenses of a band and drum and bugle corps in attending the National Convention of a Veterans' Organization under circumstances where the band and drum and bugle corps is designated by a particular Veterans' Organization.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General IT COURTS.

JUL ES:

. Jircuit Jadge ret red under A. . I, Sec. 27, Constitution of Missouri, 1945, is entitled to receive one-half of the amount of what would be his present salary were he not retired and remained in office, SALARIES AND FEES: rather than one-half of his salary at the time of his retirement. Such retired Judges are throw entitled to the benefits of any increase of salary of Circuit Judges made after their retirement, but before the end of their term of office.

July 30, 1953



Honorable Newton Atterbury Comptroller and Budget Director Department of Revenue Jefferson City, Missouri

Dear Mr. Atterbury:

You request an official opinion of this department as follows:

> "We are quoting below a letter received from Ray G. Cowan, retired Circuit Judge, Jackson County, Missouri:

"Dear Mr. Atterbury:

I retired as Circuit Judge of Jackson County, Missouri, under Section 27 of Article 5 of the Constitution of 1945 of Missouri. This section provides that I am to receive one-half of my regular compensation as Judge of said circuit until the end of my term of office. My term of office expires on January 1, 1957.

Since retiring I have been paid monthly on the basis of an annual salary for Circuit Court Judges of Jackson County, Missouri of \$10,000. Before I retired from the bench a statutory enactment increasing the pay of said Circuit Court Judges to \$11,000 was passed and was to become effective on February, 1952. Recently the salaries for Circuit Court Judges of Jackson County, Missouri were again increased to \$14,000 effective August, 1953. I am of the opinion that my compensation under Section 27, Article 5

of the Constitution of 1945 of Missouri should be made to reflect these increases in salary. I would be sincerely appreciative if you would attend to this matter.

With every cordial good wish, I remain

Very truly yours,

Ray G. Cowan!

"We would like an opinion as to whether Judge Cowan should receive any benefit from the increases in Circuit Court Judges' pay since his retirement. We understand from Judge Cowan that the increase from \$10,000 to \$11,000 was passed by the Legislature and signed by the Governor but had not become effective prior to his retirement."

Voluntary retirement of Judges of courts of record and Magistrates because of physical or mental disability is provided by Article V, Section 27, Constitution of Missouri, 1945, as follows:

"Sec. 27. Retirement of Judges.--Any judge of a court of record or magistrate who is unable to discharge the duties of his office with efficiency by reason of continued sickness or physical or mental infirmity shall be retired from the office by order of a committee composed of three judges of the supreme court, one judge of each of the courts of appeals, and three circuit judges, elected by the judges of the respective courts, after notice and a fair hearing and on a finding of two-thirds of the committee that the disability is permanent. The judge so retired shall receive one-half his regular compensation until the end of his term of office.

The supreme court shall prescribe rules of procedure under this section."

(Underscoring ours.)

Legislation supplementing this constitutional provision has been enacted and now appears as Section 476.400, et seq., RSMo 1949.

Section 476.440 specifies the amount of compensation to a Judge or Magistrate retired under this constitutional provision. This section reads as follows:

"476.440. Retirement pay for judge or magistrate

"A judge or magistrate retired from office by the action of such committee shall receive from the state, county or municipality legally obligated to pay his salary one-half his regular compensation until the end of his term of office."

(Underscoring ours.)

The Supreme Court of Missouri has also described certain rules under this constitutional provision by Rule 12, "Rules of Procedure of the Committee on Retirement of Judges and Magistrates." Rule 12.07 requires that the order of retirement state that: "* * * he receive one-half his regular compensation until the end of his term of office, * * * ."

The salary of Circuit Judges was increased by the Legislature in 1951 to the amounts listed in Section 478.013, V.A.M.S. The salary of Circuit Judges was further increased by the 67th General Assembly in Senate Bill No. 232. Said Bill being duly enacted and approved by the Governor May 27, 1953. Said Bill reads as follows:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. Section 478.013 of an act of the 66th General Assembly found at Laws of Missouri, 1951, at page 430, approved January 4, 1952, is hereby repealed and one new section enacted in lieu thereof to be known as section 478.013, and to read as follows:

"478.013. From and after the effective date of this section, each judge of the circuit court of a judicial circuit composed of a single county or city which

now has or may hereafter have more than two hundred thousand inhabitants, shall receive an annual salary of fourteen thousand dollars, eleven thousand dollars of which shall be paid by the state out of the state treasury and three thousand dollars by the county or city composing said circuit; each judge of the circuit court of a judicial circuit composed of a single county which now has or may hereafter have more than seventyfive thousand inhabitants and less than two hundred thousand inhabitants, shall receive an annual salary of twelve thousand two hundred dollars, eleven thousand dollars of which shall be paid by the state out of the state treasury and one thousand two hundred dollars by the county composing said circuit. Each judge of a judicial circuit composed of two or more counties within which circuit any part or portion of a city is located which city now has or may hereafter have more than two hundred thousand inhabitants shall receive an annual salary of twelve thousand two hundred dollars, eleven thousand dollars of which shall be paid by the state out of the state treasury and one thousand two hundred dollars of which shall be paid by the counties composing such circuit in proportion to their population and all other judges of the circuit courts of this state shall each receive an annual salary of eleven thousand dollars, payable by the state out of the state treasury. No circuit judge shall practice law or do a law business nor shall he accept, during his term of of-fice, any public appointment or employment for which he receives compensation for his services."

It is to be noted that neither of the above-quoted statutes increasing the salary of Circuit Judges mention whether such increases would be applicable to those Circuit Judges retired under Article V, Section 27, possibly, because retirement under that provision has been infrequent.

Honorable Newton Atterbury:

There are no cases on this specific point, nor any which would indicate the answer to our question, neither has an examination of the proceedings of the Constitutional Convention, 1944, disclosed any discussion on this particular point. It is, therefore, necessary for us to determine the meaning of this provision purely upon the basis of the language used, bearing in mind that the over-all intent of this provision was to provide a method for removing permanently disabled Judges which would nevertheless not work undue hardship upon the Judge at the time of his disability. The language of the Constitution of the supplemental legislation and of the Supreme Court Rule is that the retired Judge shall receive one-half his regular compensation until the end of his term of office. This appears to mean one-half of the amount of salary to which he would be entitled were he actively discharging the duties of his office. It would be arbitrary and unjustified by the language of the retirement provisions to set the compensation of a retired Judge at one-half of the amount of his salary at the time of his retirement.

CONCLUSION

It is, therefore, the opinion of this office that a Circuit Judge retired under Article V, Section 27, Constitution of Missouri, 1945, is entitled to receive one-half of the amount of what would be his present salary were he not retired and remained in office, rather than one-half of his salary at the time of his retirement. Such retired Judges are entitled to the benefits of any increase of salary of Circuit Judges made after their retirement, but before the end of their term of office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

APPROPRIATION:
DEPARTMENT OF PUBLIC
HEALTH AND WELFARE:
CONSTITUTIONAL:
GENERAL ASSEMBLY:

Construing House Bill 396 passed by the 67th General Assembly. Part invalid as an attempt by the General Assembly to legislate in an appropriation act.

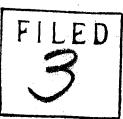
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John M. Dalton

July 30, 1953

XXXXXXXXX

John C. Johnsen



Mr. Newton Atterbury
State Comptroller and Director
of the Budget
Department of Revenue
State of Missouri
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent letter for an opinion which reads:

"Governor Phil M. Donnelly on June 30, 1953, sent the Secretary of State signed House Bill No. 396.

"The Governor attached to House Bill No. 396, at the time of signing, a statement of items, or portions of items, to which he objected. Section 7 of his transmittal letter reads as follows:

"In Section 6.010 (page 2 of the Truly Agreed To and Finally Passed bill, lines 27 to 37, inclusive) and in Section 6.020 (page 4, lines 44 to 55, inclusive) and 6.160 (page 14, lines 40 to 49, inclusive), appropriating funds for the use of the Director of the Department of Public Health and Welfare, the Division of Health, and the Director of Welfare, respectively, the following language is contained in the appropriations for Operation:

"* * *provided that no funds shall be expended out of this appropriation for any postage or postal charges except the following:

(A) Those funds necessary for the operation of postage meter machines in the central office.

Mr. Newton Atterbury

- (B) Those funds necessary for the purchase of postage for use by regular traveling field employees.
- (C) Those funds necessary for the purchase of postage for use by local county offices."

'In my opinion, these restrictions amount to general legislation in an appropriation act. The Supreme Court of Missouri in numerous cases has held that general legislation may not properly be included in an appropriation act and that whenever an attempt is made to do so the provision which amounts to general legislation is invalid.

'I am directing the State Comptroller to obtain from the Attorney General his opinion regarding the effect of these provisions.'

"Will you please give us a written opinion on this matter, advising us what position we should take if items for postage coming under such limited appropriations should be presented to us."

The particular sections of House Bill 396 passed by the 67th General Assembly and questioned are Section 6.010 and 6.020. Section 6.010, supra, reads in part:

"Section 6.010. There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund, the sum of Thirty-two Thousand Dollars (\$32,000.00), for the use of the Director of the Department of Public Health and Welfare, for the payment of salaries, wages and per diem of officers and employees; for the original purchase of property; for the repair and replacement of property; and for the general operating expenses; for the period beginning July 1, 1953 and ending June 30, 1955, as follows:

Personal Service:

Additions, Repairs and Replacements:

Operation:

General expense: including communication, printing and binding, transportation of things, travel within and without the state, material and supplies, consisting of educational scientific supplies, stationery and office supplies, and other ordinary and necessary expense; provided that no funds shall be expended out of this appropriation for any postage or postal charges except the following:

- (A) Those funds necessary for the operation of postage meter machines in the central office.
- (B) Those funds necessary for the purchase of postage for use by regular traveling field employees.

(Underscoring ours.)

Section 6.020, supra, reads, in part, as follows:

"Section 6.020. There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund, the sum of One Million One Hundred Sixty Thousand Dollars (\$1,160,000.00), for the use of the Division of Health, for the payment of salaries, wages and per diem of officers and employees; for the original purchase of property; for the repair and replacement of property; and for the general operating expenses; for the period beginning July 1, 1953 and ending June 30, 1955, as follows:

Personal Service:

Additions, Repairs and Replacements:

Operation:

General expense: communications, printing and binding, transportation of things, travel within and without the state, rent of machines, other general expense including materials and

supplies, consisting of educational scientific supplies, medical, surgical, laboratory and hospital supplies, stationery and office supplies, for reimbursement to counties, and cities for expenses in operating approved local health units and other ordinary and necessary expense; provided that no funds shall be expended out of this appropriation for any postage or postal charge except the following:

- (A) Those funds necessary for the operation of postage meter machines in the central office.
- (B) Those funds necessary for the purchase of postage for use by regular traveling field employees.
- (C) Those funds necessary for the purchase of postage for use by local county offices. * * ***

(Underscoring ours.)

It is well established that the General Assembly cannot legislate by an appropriation act. To do so would violate the provision of Section 23, Article III, Constitution of Missouri which reads:

"Sec. 23. Limitation of Scope of Bills--Contents of Titles--Exceptions.--No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated."

The objectional features in the foregoing sections of said House Bill 396 are underscored. The underscored portions are the same in both sections.

In State v. Smith, 75 S. W. (2d) 828, l.c. 830, a member of the State Board of Barber Examiners brought a mandamus action against the State Auditor, to compel him to issue a warrant for personal services rendered by him as a member of said board, under an Appropriation Act appropriating out of the State Treasury, chargeable to the general revenue fund, \$3,000 to the Board of Barber Examiners' Fund. The Legislature under Section 13525, R. S. Mo. 1929, provided all salaries and expenses of said Board shall be paid by warrants drawn against the fund created

from fees collected and paid into the State Treasury and against the fund only. The Court held that general legislation cannot be included in an Appropriation Bill, to do so would violate Section 28, Article IV, Constitution of Missouri, 1875, and ordered the alternative writ issued, quashed, and a peremptory writ denied, and in so doing the Court said:

"We agree that the power of the Legislature over these matters, subject to constitutional limitations, is supreme. We also agree that the Constitution does not prevent the Legislature from providing that public officers' salaries and expenses shall be paid out of the general revenue. This being true, the Legislature had authority to provide that all or any specified part of the salary and expenses of the barber board should be paid out of the general revenue, but it did not do so. On the contrary, it has provided, in express terms, by section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), that the salaries and expenses of such board shall be paid by warrants drawn against the fund created from fees collected by the board and paid into the state treasury, and against that fund only. The Legislature could, at any time, provide a different method for paying the salaries and expenses of this board by amending section 13525, or by repealing it and enacting a new law in lieu thereof, but until it does so, section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p.637), remains the law of this state. We cannot escape the conclusion that if section 13525, R. S., is still the law, and if it provides that the salaries and expenses of the board shall be paid out of the fund created from the fees collected by the board, and out of that fund only, the attempt to appropriate money out of the general revenue fund to pay any part of such salaries or expenses is contrary to the existing law of the state, as declared in section 13525, supra.

"It cannot be said that the act appropriating \$3,000 from the general revenue

fund to the board of barber examiners' fund amounted to an amendment of section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate \$3,000 from one fund to another. It reads as follows:

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dellars to the Board of Barber Examiners Fund.' (Laws 1933-34, p. 12, Sec. 12B.)

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S. W. 338."

Also, in a more recent case, State v. Canada, 113 S. W. (2d) 783, 1. c. 790, the Court said:

"Appellant contends that Missouri would not pay his full tuition in an adjacent State, but only the difference between the tuition charged by the University of Missouri and that charged by the adjacent States. as provided in the appropriation act of The proviso in the 1935 act which 1935. attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent States is unconstitutional and void: A general statute (section 9622, R. S. 1929 (Mo. St. Ann. Sec. 9622, p. 7328)) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent State. statute cannot be repealed or amended except by subsequent general legislation,

Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S. W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S. W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * **

Under the foregoing decisions the Supreme Court has held that valid and invalid portions of an appropriation bill are separable. In view of this, that portion of said House Bill 396 appropriating money for said Department of Welfare is valid and that portion underscored which attempts to legislate and which is clearly invalid should be entirely disregarded.

CONCLUSION

Therefore, it is the opinion of this department that those underscored portions of Sections 6.010 and 6.020, House Bill 396, passed by the 67th General Assembly are invalid for the reason that it is an attempt by the Legislature in an appropriation act to pass general legislation which has been declared by the Appelate Courts of this state to be invalid. However, this does not in any manner invalidate the balance of the bill appropriating money to said department.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General TAXATION: Steamboats and other vessels owned by corporations to be assessed in the county in which such owner has its principal place of business.

July 31, 1953

FILED NO. 3

Honorable Roderic R. Ashby Prosecuting Attorney Mississippi County Charleston, Missouri



Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"Enclosed find a copy of an opinion which I have this day given the County Court of Mississippi County, Missouri.

"Simpson Oil Company, a corporation, whose home office is in Charleston, Missouri owns two boats and pays taxes on these boats in New Madrid County. Simpson Towing Company is an individual, Gladys Simpson, whose home is in Charleston, Missouri and owns one boat and pays taxes on this boat in Mississippi County, Missouri.

"Please give your opinion whether or not the two boats which are taxed in New Madrid County, Missouri should be taxed in Mississippi County?

"This opinion must be received within the next three weeks before the tax books are made up."

It is our thought that the taxation of steamboats and other vessels is controlled by the provisions of Chapter 154, RSMo 1949. Your attention is particularly directed to the provisions of Section 154.010, RSMo 1949, reading as follows:

"1. Steamboats and other boats and vessels used in navigating the waters of this state, and all shares, stocks and interest therein, are hereby declared a special class of property for the assessment and collection of taxes.

"2. All taxes on such property shall be assessed and collected in the county or city in which the owner or owners of said property may reside at the time of assessment."

You have not so stated directly in your opinion request, but we have assumed that the vessels referred to are used on the Mississippi River. Such being the case, we think it beyond question that such vessels are used "in navigating the waters of this state" within the meaning of that phrase as used in Section (1) of the statute quoted, supra. We are persuaded to this view by reason of the provisions of Section 2 of the Act of Admission of the Territory of Missouri into the Union.

In the preparation of this opinion we have also given due regard to the provisions of Section 137.095, RSMo 1949, which reads as follows:

"All tangible personal property of business and manufacturing corporations shall
be taxable in the county in which such
property may be situated on the first day
of January of the year for which such
taxes may be assessed, and every business
or manufacturing corporation having or
owing tangible personal property on the
first day of January in each year, which
shall, on said date, be situated in any
other county than the one in which said
corporation is located, shall make return
thereof to the assessor of such county or
township where situated, in the same manner as other tangible personal property
is required by law to be returned."

It will be observed that the latter statute deals with the taxation of the tangible personal property of business and manufacturing corporations in a general manner whereas the statute previously quoted, namely Section 154.010, RSMo 1949, deals with a particular portion of such general class of tangible personal property, namely steamboats and other boats and vessels used in navigating the waters of this state. It is true that the general statute was enacted subsequent to the special statute which deals only with steamboats and other vessels. On the face of it, there appears to be a repugnancy between the provisions of the two statutes, but we feel that such apparent lack of harmony is to be resolved by application

of the rule with respect to general and special statutes which has been declared by the Supreme Court of Missouri in the case of State ex rel. McKittrick, Attorney General, vs. Carolene Products Company, 144 S.W. (2d) 153, from which we quote, 1.c. 156:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. Quoted with approval in the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S.W. 129, loc. cit. 132." (Emphasis ours.)

We think the underscored portion of this rule to be applicable in the present instance, particularly in the light of the fact that the latter enacted statute, that is to say, Section 137.095, RSMo 1949, does not purport to repeal, in any manner, the provisions of the earlier enacted statute, namely, Section 154.010.

Applying the foregoing rule and in the light of the plain and unambiguous phraseology found in Section 154.010, RSMo 1949, it is our thought that such statute is controlling with respect to the taxation of steamboats and other boats and vessels used in navigating the waters of this state.

CONCLUSION.

In the premises, we are of the opinion that steamboats and other vessels used in navigating the waters of this state, which are owned by corporations, have a situs for purposes of taxation in the county in which such corporation has its principal place of business.

Honorable Roderic R. Ashby

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB: sw

GENERAL ASSEMBLY: APPROPRIATION: COMPTROLLER: Contingent expenses of the General Assembly incurred prior to July 1, 1953 can be paid out of contingent fund General Assembly appropriation 1951-53 and out of Section 8.020, House Bill 397 passed by the 67th General Assembly.



November 16, 1953

Mr. Newton Atterbury State Comptroller and Director of the Budget Jefferson City, Missouri

Dear Mr. Atterbury:

This will acknowledge the receipt of your request for an opinion, the pertinent part of which reads:

"We wish to request an opinion in regard to paying accounts incurred during the last six months of the 1951-53 biennium by the House of the Missouri Legislature.

We believe you are familiar to some extent with this matter. In brief, the House has accumulated items which should be paid amounting to \$17,783.21. They have a balance in their 1951-53 contingent account appropriation of \$8,354.61. They have a balance in their 1953-55 appropriation, allotted and unexpended, in the amount of \$44,536.23. All the above items have been certified to the Comptroller for payment between the dates of February 27, 1953 and May 30, 1953, with exception of the item of \$5,471.86 to cover the House's fifty per cent pay of the Inaugural expenses.

Would it be possible to pay the accounts above mentioned out of the 1951-53 appropriation as far as possible and then pay the balance of the accounts out of the 1953-55 appropriation?"

A well established rule of Statutory construction is that appropriation acts must be construed strictly: St. v. Weatherby, 168 S.W. (2d) 1048, 350 Mo. 741. In St. ex rel. Bradshaw v. Hackman, the court held that no State office can pay out the money of the State, except pursuant to Statutory

authority authorizing and warranting such payment. Another well established rule of Statutory construction is to ascertain the law makers intention from words used and all rules of interpretation are to be treated as subordinate to that requireing determination of Legislative intent, State v. Ball 171 S.W. (2d) 787.

Section 8.010 and 8.020 of House Bill 397 passed by the 67th General Assembly reads:

"There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund, the sum of Five Hundred Seventy-three Thousand Dollars (\$573,000.00), to pay the salaries of the members of the 67th and 58th General Assemblies for the period beginning July 1, 1953 and ending June 30, 1955.

--There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund the sum of Five Hundred Seventy Thousand Dollars (\$570,000.00) or so much thereof as may be necessary to pay the contingent expenses and to pay the salaries of elective and appointive officers and other employees of the General Assembly for the period beginning July 1, 1953 and ending June 30, 1955, as follows:

Contingent expenses of the Senate......\$210,000.00 Contingent expenses of the House......\$360,000.00

You inquire if certain contingent expenses of the House of Representatives incurred in the early part of 1953 and duly certified for payment to the comptroller prior to May 30, 1953 may be paid out of the contingent fund of the appropriation 1951-53 so far as said fund will permit and the balance paid out of the foregoing appropriation under House Bill 397.

Certainly you may allow payment of such items of expense out of the contingent appropriation for 1951-53 and so far as said fund will permit.

At first blush it would appear that the foregoing appropriation in House Bill 397 was for the purpose of defraying expenses incurred only during the period beginning July 1, 1953 and ending June 30, 1955. However, a careful examination of said appropriation bill will disclose that the purpose of said appropriation is to pay among other things contingent expenses of the General Assembly for the period of July 1, 1953 and ending June 30, 1955 which does not designate that said appropriation is only for the payment of such

contingent expenses incurred during said period but as will be shown herein by the decision of the Supreme Court that the only question is whether said expenses come within the object to which the appropriation is to be applied. That the period specified in said appropriation merely fixes a period for which said appropriation is available.

A very similar situation arose and was decided in the case of State ex rel. vs. Thompson, 45 S.W. (2d) 1078. The facts involved in that case were briefly these: The relatrix had in 1923 been found eligible to receive a Missouri pension for the deserving blind. Her application had been duly approved and certified to the State Auditor at that time. She remained on the roll until April 1, 1926, at which time the commission administering the blind pension act unwarrantedly removed her name therefrom. was restored to the roll on September 12, 1928, and thereafter received her pension. As a result of subsequent proceedings she was restored on the roll on May 8, 1931, retroactive to April 1, 1926, the date of her removal therefrom. The respondent in the case, the State Auditor, refused payment for the period from April 1, 1926, to September 12, 1928, on the ground that the then current appropriation for the biennial period beginning the first day of January, 1931, and ending on the 31st day of December, 1932, was not available for that purpose.

The court, in disposing of this contention, said at 1.c. 1078:

"The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in chapter 51, Revised Statutes, 1929,' it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January, 1931, and ending on the thirty-first day of December, 1932,1 if read into the act itself, merely limits the period within which the appropriation made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable.

"Section 8893 (Revision of 1929) provides that an adult blind person having the qualifications therein prescribed 'shall be entitled to receive, when enrolled under the provision of this article, an annual pension,' etc. One is 'enrolled under the provision of this article' when his name is placed on the blind pension roll by the state auditor. Section 8900. When enrolled the pensioner is entitled to a pension from the date of the filing of his application with the probate court. An Applicant's name is placed on the blind pension

roll upon certification by the commission for the blind; it is stricken from the roll upon a like certification when the commission, after notice and hearing, determines that the pensioner is no longer qualified to receive a pension. Section 8896."

While the foregoing decision deals with a blind pension appropriation and the question in this instance is with contingent expenses of the General Assembly, we are unable to see any distinction and believe that said decision is also applicable to contingent expenses of the General Assembly, that is, that the sole object to be determined is whether or not it comes within the object of the appropriation. And we so hold notwithstanding the fact that apparently the General Assembly by its action has placed a different construction on the law for the reason that it has not been uncommon for the General Assembly to make additional appropriations for specifically paying expenses and claims where former appropriations were insufficient, as under House Bill 465 passed by the 67th General Assembly providing for another appropriation for the payment of contingent expenses of the General Assembly for a period ending "une 30, 1953 which appropriation further provides that it is in addition to appropriations made for the same purpose for 1951-53. However, it is a well established rule of Statutory construction that legislative construction of a law is not conclusive as to its meaning.

Therefore, in view of the foregoing decision, we conclude that such contingent expenses questioned herein may be paid out of the contingent fund of the General Assembly 1951-53 insofar as such fund will permit and the balance of such contingent expenses may be paid out of the contingent fund under section 8.020, House Bill 397.

CONCLUSION

Therefore, it is the opinion of this department that you may pay any such contingent expenses properly certified out of the contingent fund for the appropriation of the General Assembly 1951-53 insofar as such funds will permit and the balance of such contingent expenses out of the appropriation provided under section 8.020, House Bill 397, passed by the 67th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General CIVILIAN _MPLOYEES: SOCIAL SECURITY: Civilian employees of the National Guard, who are paid by the Federal Government, are not subject to coverage under the State Social Security Law.



December 22, 1953

Honorable Newton Atterbury Comptroller and Budget Director Department of Revenue Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"We have been presented with a question concerning the civilian employees of the National Guard.

"Are the civilian employees State employees or Federal employees?

"In order to give you some of the background, Don Guffey was present at a meeting with the financial officer of the National Guard, General Sheppard, along with Mr. Moore and Mr. Meyer of this office, when we discussed the possibility of these employees being State employees and subject to coverage under the State Social Security program. These employees are paid directly by the Federal Government, however, are hired and supervised by General Sheppard of the Adjutant General's Office."

It would appear that your inquiry as to whether civilian employees of the National Guard were state or federal employees is made to determine whether such employees are "subject to coverage under the State Social Security Program." Therefore, if we answer the question whether civilian employees of the National Guard are subject to coverage under the State Social Security Act, we will have determined the matter of your inquiry.

On July 21, 1951, this department rendered an opinion, a copy of which is enclosed, to Honorable Marion Spicer, Clerk of the Supreme Court of Missouri, which opinion held:

"Since the members of the State Board of Law Examiners do not receive their remuneration from the State, they are not covered under the provisions of Senate Committee Substitute for Senate Bill #3.

"We are further of the opinion that the executive director of the Missouri Bar and the General Chairman of the Advisory Committee not being officers or employees of the State or any political subdivision thereof, or any instrumentality of either of them, cannot be covered under the provisions of Senate Bill #3."

We direct particular attention to page 4 and to the first and second paragraphs of page 5 of this opinion. It will be noted (p.4) that, in holding that the State Board of Law Examiners are not covered by the provisions of old age and survivors insurance law, the opinion laid down the principle that "unless an individual is receiving his remuneration from the state, he is not covered by the agreement entered into with the Federal Security Administrator, as an employee of the state, for the state would have no way of collecting the contributions imposed by this act."

In view of your statement that the employees in question are "paid directly by the Federal government", and not by the state, we believe that this principle would apply in this instance.

CONCLUSION

It is the opinion of this department that civilian employees of the National Guard, who are paid by the Federal Government, are not subject to coverage under the State Social Security law.

The foregoing opinion, which I hereby approve, was written by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/ld

CONDEMNATION FOR RIGHT OF WAY:

For County Roads: Duty of Prosecuting Attorney: King Road Bill: It is the duty of the Prosecuting Attorney to represent the county in condemnation of right-of-way for establishment of county road.



January 8, 1953 1-9-53

Hon. Harold B. Bamburg Acting Prosecuting Attorney Pettis County Sedalia, Missouri

Dear Mr. Bamburg:

We have your recent letter in which you request an opinion of this department. Your letter in part is as follows:

"I would like to know if it is the duty of the prosecuting attorney to represent the County in a condemnation suit for a King Bill Road, or if this is a matter to be handled by a private attorney."

The so-called King Road Bill is set forth in Section 231.440, RSMo 1949 to Sections 231.500 inclusive. These sections provide for the improvement, construction, reconstruction and restoration of county roads. The law pertaining to the process of opening and establishing county roads is set forth in the statutes and the part of such law pertaining to the duties of prosecuting attorneys for right of way for county roads is set forth in Section 228.100 RSMo 1949 which we quote as follows:

"If it appears that any person through whose lands such proposed road should run has failed or refused to relinquish the right of way, or is not willing to take the amount of damages offered him by the court or petitioners, or both, or in case any such owner is incapable of contracting or is a nonresident of this state, and it further appears to the county court that the proposed road is of such great public utility as to warrant its establishment, the county court shall order the road established and shall direct the prosecuting attorney of the county to

institute proceedings in the name of the county in the circuit court for the purpose of condemning such lands. Such proceedings shall be instituted and conducted by said prosecuting attorney under the provisions of chapter 523, RSMo 1949. (L. 1949 p. 551 § 8476)

(Underscoring ours)

CONCLUSION

We are accordingly of the opinion that it is the duty of the Prosecuting Attorney to represent the county in condemnation proceedings for the obtaining of right-of-way necessary for any county road.

Respectfully submitted

SAMUEL M. WATSON ASSISTANT ATTORNEY GENERAL

APPROVED:

ATTORNEY GENERAL

SMW: A

MOTOR VEHICLE: REGISTRATION: LICENSE: A motor vehicle registration license is unnecessary where the motor vehicle is used exclusively on the private property of the owner.



June 25, 1953

Honorable Jim Banner Representative, Camden County Camdenton, Missouri

Dear Sir:

This is in reply to your request for an official opinion from my office received on June 17, 1953. This request is as follows:

"I would like to have an opinion and here is my proposition.

"I have just opened a cave which is three fourths of a mile from the Glaize arm of the Lake. Now this would be my own private road and I would like to use an old school bus to transport my customers from the lake to the cave. There would be no charge to the customers for transporting them. And what I want to know is, would I have to buy license for this bus if I kept it on my own private road? It is a 36 passenger bus and I think if I had to buy license it would prohibit me from using it."

It will be noted in the language of the statute that one of the conditions making necessary the registration of a motor vehicle and that it shall be operated or driven upon the highways of this State. Section 301.020, RSMo 1949, in pertinent part is as follows:

"301.020. Registration of motor vehicles. Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing:"

Honorable Jim Banner:

From the context of your letter it is presumed that the proposed thirty-six passenger bus will not be used at all for the above purpose.

In the case of State ex rel. D.C. McClung vs. Becker, 288 Mo. 607, the court stated at 1.c. 612, as follows:

"* * The owner of such vehicle may operate it on his own premises without being subject to the payment of the registration fee imposed by the statute. In such case he will pay the general property tax. The State maintains roads and bridges at great expense and exacts a license fee for the privilege of driving or operating these high-powered vehicles thereon. It is clear therefore that the registration fee is not a tax on the vehicle, but upon the privilege of operating it on the highways of the State."

It may be seen that since the proposed use of this motor vehicle is to be confined entirely to property belonging to you registration and license will not be necessary.

CONCLUSION

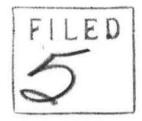
Therefore, it is the opinion of this office that a motor vehicle registration license is unnecessary where the motor vehicle is used exclusively on the private property of the owner.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James W. Faris.

Yours very truly,

JWF:mw:irk

JOHN M. DALTON Attorney General CRIMINAL LAW: HIGHWAYS: MOTOR VEHICLES: Mere accidental dropping of dangerous substances upon highways is not alone a criminal offense. Penalty for violation of Section 304.160, RSMo 1949, provided by Section 304.570, RSMo 1949.



March 30, 1953

Honorable Harold W. Barrick Prosecuting Attorney Pettis County Sedalia, Missouri

Dear Mr. Barrick:

By your letter of March 10, 1953, you request an official opinion of this office. Your request was phrased, in part, as follows:

"I herewith request an opinion from your office with regard to the above numbered section, 304.160, R.S.Mo., 1949.

"My specific question is this: Is the driver of a vehicle criminally liable, under this section, when the dangerous substances named in the section are accidentally dropped from his vehicle? Is the driver subject to the punishment as set out in Section 304.570, R.S.Mo., 1949?"

Sections 304.160 and 304.570, RSMo 1949, are quoted herewith:

"304.160. Placing glass, etc., on highway prohibited. -- No person shall throw or place, or cause to be thrown or placed, on or upon any highway, any tacks, nails, wire, scrap metal, glass, crockery, sharp stones, or other substances injurious to the feet of persons or animals, or to the tires or wheels of vehicles, including motor vehicles. Any person who has purposely, accidentally, or by reason of an accident, dropped from his

person or any vehicle, any such substance upon the highway, shall immediately make all reasonable efforts to clear such highway of the same."

"304.570. Penalty for violations. -Any person who violates any of the provisions of this chapter for which no
specific punishment is provided, upon
conviction thereof, shall be punished
by a fine of not less than five dollars
nor more than five hundred dollars or
by imprisonment in the county jail for
a term not exceeding two years, or by
both such fine and imprisonment."

To determine whether an offense under the above sections has been committed, it is necessary to ascertain the intent required to make criminal the commission of the act prohibited, or failure to perform the act required to be performed.

22 C.J.S. 87 sets forth the following text as to what intent is required in statutory criminal offenses:

"Whether or not criminal intent or knowledge is an element of a statutory crime is a matter of statutory construction to be determined in a given case by considering the subject matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature. * * * "

The two sentences of Section 304.160, supra, should be examined separately. The first sentence creates a prohibition against placing certain articles and substances upon the highway. The second sentence imposes a duty to remove such articles and substances from the highway. In the first sentence there is no specific provision for punishing accidental dropping, but in the second sentence, there is specific provision for dealing with dangerous articles and substances that have been accidentally dropped upon the highway.

In further construing Section 304.160, supra, the words of action constituting the offense, to wit: 'throw' and 'place', should be defined. In Webster's New International Dictionary, Second Edition, Unabridged, 'place' is defined as follows:

Hon. Harold W. Barrick

"1. To put in a particular spot or place, or in a certain relative position; to fix; settle; locate; dispose; as to place a book on a shelf. * * * "

'Throw' is defined by the same authority as follows:

"5. To fling, cast, or hurl, with a certain whirling motion of the arm; as to throw a ball; hence, to fling or cast in any manner; to propel; hurl; send; * * * "

The two above words both connote a definite intent to perform such action. However, the word 'accident' is defined as:

"1. Literally, a befalling. (a) An event that takes place without one's foresight or expectation; an undesired, sudden, and unexpected accident * * * "

Examination of the definitions of the words 'throw', 'place' and 'accident' leads to the conclusion that before criminal penalty can be invoked, under the first sentence of Section 304.160, supra, there must be a definite intent to have the proscribed substance or article upon the highway.

The question arises under the second sentence as to whether one may be held liable for failing to make all reasonable efforts to clear the highway of substances dropped without the knowledge of the person dropping it.

Strict liability has been imposed by statute upon persons engaged in selling foods, drugs and alcohol. It has been imposed upon operators of automobiles, and imposed for violations of regulations concerning safety of the highway. Thus in Regina v. Woodrow, 115 M & W 404, 153 Eng. Reps. 907, a tobacco dealer was held liable to a penalty for having in his possession adulterated tobacco, although he purchased it as genuine, and had no knowledge or cause to suspect that it was adulterated. The statute under which the defendant was prosecuted was an amendment to a previous act, wherein knowledge of adulteration was essential, and the amendment was for the express purpose of removing the required element of knowledge.

In the case of Commonwealth v. Farren, 91 Mass. 489, a

Hon. Harold W. Barrick

person selling adulterated milk was convicted, even though he had no knowledge that the milk was adulterated. In this instance, the statute under which the defendant was prosecuted was an amendment of a previous statute requiring knowledge of adulteration. The amendment was for the purpose of eliminating the knowledge requirement.

In the case of Hayes v. Schueler, 107 Kan. 635, 193 Pac. 311, the conviction of the defendant for violation of a city ordinance, requiring a motor car to display a red rear light at night, was upheld, even though the light became extinguished without knowledge of the defendant.

In the cases cited above, the statutes were either reenactments of previous statutes wherein knowledge of violation was required, or else the statute, by its language, was subject to no other interpretation.

Since it is an elementary principle of statutory construction that each statute is to be construed as a whole, and all provisions thereof are to be considered and must be construed strictly in favor of an accused, we must consider the import of the phrase "make all reasonable efforts." Since it is impossible to make any reasonable effort to clear the highway without knowledge that a substance has been dropped, the implication is strong that the legislature did not intend to impose strict liability and penalize persons, who, unknowingly dropping a substance on the highway, have failed to remove the same.

In answer to your question as to whether persons who violate Section 304.160 are to be punished in accordance with Section 304.570, we should examine the history of the two sections.

Section 304.160 was formerly subsection (j) of Section 8401, Missouri Revised Statutes, 1939, section heading 'Miscellaneous Offenses', and was punishable by subsection (d) of Section 8404, Missouri Revised Statutes, 1939. Subsection (j) of Section 8401 was repealed by the 1949 revision, and re-enacted as Section 304.160. Subsection (d) of Section 8404 was also repealed and re-enacted as Section 304.570, to continue the general penalty clause in this chapter, even though other parts of Section 8404 were removed.

CONCLUSION

It is, therefore, the opinion of this office that:

(1) A person accidentally dropping a substance proscribed

Hon. Harold W. Barrick

by Section 304.160, RSMo 1949, cannot be held criminally liable for failure to make all reasonable efforts to clear such substance or article from the highway, unless he has knowledge that the substance has been dropped.

(2) Penalty for violation of Section 304.160, RSMo 1949, is prescribed by Section 304.570, RSMo 1949.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General SPECIAL ROAD DISTRICTS: ELECTIONS:

Manner of casting a ballot in an election to continue or discontinue the organization of a special road district.

April 3, 1953



Honorable Harold W. Barrick Prosecuting Attorney of Pettis County Sedalia, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"I herewith request an opinion from your office concerning the interpretation of above mentioned subsection of Section 233.160 R.S. Mo., 1949. It appears that this subsection is confusing as to the manner of casting a ballot and the determination of the outcome of an election for dissolution of a special road district.

"Such an election has been petitioned for in Pettis County, and the County Court is awaiting an interpretation of this subsection by your office before setting the date for the special election. I am sure that they would appreciate an opinion as soon as it is possible for you to obtain one for us."

Section 233.160, RSMo 1949, provides for the holding of an election to vote on the proposition of dissolving a special road district. Paragraph 3 of this section to which you refer, reads as follows:

"3. The county court shall have the ballots for such election printed and shall have printed on such ballots 'For the disorganization of the special road district,' 'Against the disorganization of the special road district,' with the direction 'Erase the clause you do not favor.' If a majority of the votes upon such proposition be cast against it, said district shall be disincorporated and the operation of the law shall cease in said district. In all other respects said election, and the results thereof, shall be governed by the provisions of sections 233.010 to 233.165."

It is provided that the ballots to be used at such election shall have printed thereon "for the disorganization of the special road district," "against the disorganization of the special road district." Said section further provides that the ballot shall contain the direction "erase the clause you do not favor." The term erase used in connection with election laws is defined in 15 Words and Phrases, 168, citing the case of Vallier v. Brakke, 64 N. W. 180, as follows:

"* * *a voter may erase the name of a candidate by crossing it out, as one of the definitions of 'to erase' is to cross out, and a cross would indicate the intention to erase it as well as drawing a line through it."

Under such definition we are of the opinion that if a voter wishes to vote for the disorganization of the special road district he would do so by drawing a line through or striking out the clause against the disorganization of the special road district, and if a voter wishes to vote against the disorganization, he may do so by drawing a line through or striking out the clause for the disorganization of the special road district. In making a determination of the outcome of such election, a count would be made of the clauses not so stricken out either for or against the proposition.

CONCLUSION

Therefore it is the opinion of this office that under Section 233.160, RSMo 1949, providing for an election to vote on the question

Honorable Harold W. Barrick

as to whether the organization of a special road district is to be continued or discontinued a voter may vote for the disorganization by striking out the clause as contained on the ballot "against the disorganization of the special road district" and vice versa. In making a determination of the outcome of such election a count would be made of the clauses not stricken.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

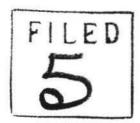
Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

SUBPOENAS: Circuit Clerk may Issue subpoena in blank.

WITNESSES:



May 21, 1953

Honorable Harold W. Barrick Prosecuting Attorney Pettis County Sedalia, Missouri

Dear Mr. Barrick:

In your letter of May 12, 1953, you requested an official opinion on the following question:

"'Can a Circuit Clerk under the applicable Statutes of Missouri legally issue a subpoena for a witness in blank'?"

Section 491.090, RSMo 1949, authorizes issuance of summons to witnesses by the Clerk of the Court wherein a matter is pending, or by a notary public of the county, as follows:

"491.090. Summons of witnesses.--In all cases where witnesses are required to attend the trial in any cause in any court of record, a summons shall be issued by the clerk of the court wherein the matter is pending, or by some notary public of the county wherein such trial shall be had, stating the day and place when and where the witnesses are to appear."

Section 491.100 (1), RSMo 1949, specifies the form of summons of witnesses:

"491.100. Subpoena, how issued--action of court when subpoena commands product-ion of papers.--1. Such summons shall be in the form of a subpoena, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give

testimony at a time and place therein specified. The clerk of the court wherein the matter is pending, or the notary public of the county wherein such trial shall be had, shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service."

(Underscoring ours.)

This section was previously Section 1898, R.S. Mo. 1939, and read as follows:

"Sec. 1898. Subpoena, how issued and served.--Such summons shall contain the names of all witnesses for whom a summons is required, by the same party, in the same cause, at the same time, who reside in the same county, and may be served in any county in the state."

The obvious purpose of amending Section 1898 (Laws 1947, Vol. II, Page 237) was to eliminate the necessity of filling in the names of witnesses in the subpoena by the issuing clerk or notary public, and to provide for issuance of "blank" subpoenas.

CONCLUSION

It is, therefore, the opinion of this office that the Clerk of a Circuit Court may issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly.

JOHN M. DALTON Attorney General

PMcG:irk

TAXATION:

SERVICEMAN:

Penalty for delinquent state and county property taxes should not be assessed on property owned as tenants by the entirety, where such delinquency occurs during period that husband is absent from

his home and engaged in the military service

of this state or of the United States.

JOHN M. DALTON



July 7, 1953

John C. Johnsen

Honorable Harold W. Barrick Prosecuting Attorney Pettis County Sedalia, Missouri

Dear Mr. Barrick:

This is in response to your request for opinion dated June 9, 1953, which reads, in part, as follows:

"At the request of Miss Hazel Palmer, County Collector of Pettis County, I hereby request an official opinion from your office on the following question:

Can a penalty be waived by the county collector on property taxes assessed against property held by the entirety by a service man and his wife where the service man was on involuntary active duty and has just returned?"

The question submitted involves the interpretation of Section 139.100, RSMo 1949, the pertinent portion of which reads as follows:

"1. If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 140.100.

"2. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor; provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States; * * *"

The comparable section under the 1939 revision (Sec. 11085, R.S. Mo. 1939) was construed in an opinion of this office dated October 18, 1945, and directed to the Honorable Forrest Smith, State Auditor, Jefferson City, Missouri, a copy of which we enclose. Section 11085, R.S. Mo. 1939, was amended, following the rendition of the above-mentioned opinion, in the Laws of 1947, Vol. II, page 425, but the amendment does not alter the conclusion reached therein.

The conclusion of the 1945 opinion was that the collector of state and county taxes should not charge any penalty, as provided in Section 11124, R.S. Mo. 1939 (Sec. 140.100, RSMo 1949), against any taxpayer during the period that the taxpayer is absent from his home and engaged in the military service of this state or of the United States. Since the pertinent statutory provisions are the same now as they were at the time of the rendition of that opinion, we hereby reaffirm the conclusion reached therein.

As we understand the question submitted by you, the only difference that exists between the situation that you have presented to you and the general problem that was analyzed in the 1945 opinion is that under your set of facts the serviceman in question owned the property against which the tax was assessed as a tenant by the entirety with his wife. In our opinion that fact would not alter the conclusion reached in the 1945 opinion.

The nature of the tenancy under a tenancy by the entirety is such that neither the husband nor the wife have any separate interest in the property so owned. In Brewing Co. v. Saxy, 273 Mo. 159, 1.c. 163, the court so construed the tenancy:

"In Garner v. Jones, 52 No. 68, it was said:

"'At Common law a conveyance in fee to husband and wife, of real estate, created a tenancy

by the entirety. But being one person in law, they took the estate as one person. Each being the owner of the entire estate; neither of whom had any separate or joint interest, but a unity or entirety of the whole. * * *"

Again, Mo. 1.c. 170, the court said:

" * * * we conclude that where a judgment and execution thereon are against a husband alone, not including the wife, such judgment and execution cannot affect in any way property held by them by the entirety, nor can it affect any supposed separate interest of the husband therein, for he has no separate interest."

It necessarily follows that if the husband has no separate interest in the property held as tenants by the entirety neither does the wife. Therefore, any assessment of a penalty for delinquency in the payment of taxes on property held as tenants by the entirety would necessarily be an assessment against both the husband and the wife. In view of the proviso contained in Section 139.100, supra, it is our conclusion that such an assessment of a penalty for delinquent taxes cannot be made.

We do not believe that this can properly be referred to as a waiver of the penalty by the county collector. The word "waive" is defined in Black's Law Dictionary, Second Edition, as follows:

> "In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong."

In the situation presented, and under the conclusion reached, the county collector did not have the opportunity to assess the penalty otherwise provided for delinquency of property taxes because Section 139.100, supra, says that "said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States." (Emphasis ours.)

CONCLUSION

It is the opinion of this office that the penalty for delinquent property taxes provided for in Section 140.100, referred to in Section 139.100, RSMo 1949, should not be assessed on property owned as tenants by the entirety, where such delinquency occurs during the period that the husband is absent from his home and engaged in the military service of this state or of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml Enc. TAXATION:

(COPY)

Unassessed personal property may not be added to tax books after October 31 by assessor, collector or county court, and therefore person whose property was not assessed is entitled to a statement that no taxes were owed by him. County of residence on January 1 is county from which statement regarding personal property tax liability must be obtained for use under Section 301.025, MoRS, 1951 Supp.

July 31, 1953

Filed: No. 5

Honorable Harold W. Barrick Prosecuting Attorney Pettis County Sedalia, Missouri



Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"At the request of Miss Hazel Palmer, County Collector of Pettis County, I hereby request an official opinion from your office on the following questions:

- 1. Where a county assessor has failed to assess a resident's personal property, including an automobile, located in his county on January 1, and the person comes to pay his or her taxes and discovers such failure to be assessed, can the assessor or the collector or the county court make an addition on the tax book of an assessment due so the person could pay the tax thereon for the current year then due?
- 2. If a resident of one county in Missouri on January 1 moves to another county (whether one day or six months after assessment date) and comes to the collector's office where he last moved to pay his taxes due November 1 and his name is not on the personal property tax

book, can he be put on as an addition if he says he was not assessed in the other county and had not paid any current taxes where he resided on January 1?

- 3. When a person is put on as an addition to the current tax book after January 1, can the penalty which begins January 1 be waived by the county collector, or must the penalty also be added?
- 4. Would being a resident of another county in Missouri on assessment date, January 1, and not being assessed there, force the county collector to tell the person to go back to that county and obtain his statement or clearance so he can secure an automobile license in the county where he moved to and where he now resides?
- January 1, 1952, providing that personal property taxes be paid before license is issued, can any county collector refuse to give any person who might come to the tax window and request it, a statement that no taxes for the preceding year are due in that office, even though the person says he did not live in that collector's county on assessment date and even though from questioning the person, the collector may believe the person does owe such tax in another county in Missouri and is just trying to circumvent the law?"

Your inquiries all concern the application of Section 301.025, MoRS, 1951 Supp., which reads as follows:

"No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due. Every county and township collector

shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms."

Answer to your inquiries requires consideration of the general scheme for the assessment and collection of personal property taxes. Section 137.075, RSMo 1949, fixes January 1 as the assessment date for taxation of tangible personal property. Section 137.090, RSMo 1949, makes tangible personal property taxable at the residence of the owner thereof.

Section 137.115, RSMo 1949, provides:

"1. After receiving the necessary forms the assessor or his deputy or deputies shall, except in the city of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation.

"2. The person listing the property shall enter a true or correct statement of such property, in a printed blank prepared for that purpose, which statement after being filled out shall be signed and either affirmed or sworn to as provided in section 137.155. The list shall then be delivered to the assessor."

Section 137.125, RSMo 1949, provides, in part:

"1. If any person required by this chapter to list property shall be sick or absent

when the assessor calls for a list of his property, the assessor shall leave at the office, or the usual place of residence or business of such person, a printed assessment blank and a printed notice, requiring such person to make out and mail or take to the office of said assessor, not more than twenty days from the date of such notice, a sworn statement of the property which he is required to list."

Section 137.130, RSMo 1949, provides:

"whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

Section 137.215, RSMo 1949, provides for the assessor's making the personal property tax book. Under Section 137.245, RSMo 1949, the assessor's books are required to be completed on or before May 31 of each year.

Section 137.265, RSMo 1949, provides:

"An assessment of property or charges for taxes thereon shall not be considered illegal on account of any informality in making the assessment, or in the tax lists, or on account of the assessment not being made or completed within the time required by law."

Section 137.280, RSMo 1949, provides:

"If any person, being notified as aforesaid, shall fail to deliver the required list to the assessor, the property which ought to have been listed shall be assessed at double its value; and if the assessor shall neglect or refuse so to do, he shall be liable in each case, to a penalty of fifty dollars, to be recovered at the suit of the county, and to be paid into the county school fund; provided, that the assessor may omit assessing the penalty in any case where he is satisfied the neglect is unavoidable and not willful."

Section 138.010, RSMo 1949, provides that the county board of equalization, in regular session, may add any property omitted from the assessor's books.

Section 138.380, RSMo 1949, authorizes the State Tax Commission "To cause to be placed upon the assessment rolls at any time during the year omitted property which may be discovered to have, for any reason, escaped assessment and taxation, * * *

Under Section 137,290, RSMo 1949, the tax books are required to be delivered to the county collector before October 31 of each year and he thereupon proceeds to collect the taxes listed in said books.

A fundamental rule of our taxing system is that "there must be a valid assessment to support a levy for taxes." State ex rel. Jackson County Library Dist. v. Evans, 360 Mo. 1052, 232 S.W. (2d) 386, l.c. 388.

The above outlined statutory scheme for the assessment of personal property for taxation shows quite clearly that the assessment machinery must be put in operation by the assessor's calling on all persons residing in his county and requiring them to make a list of their personal property. Section 137.115, supra. If the owner of such property to whom the list has been delivered fails or refuses to return such list to the assessor, the assessor may make the list for him, but delivery of such list to the taxpayer is a condition precedent to the right of the assessor to do so. State ex rel. Wenneker v. Cummings, 151 Mo. 49, 52 S.W. 29; State ex rel. Ziegenhein v. Spencer, 114 Mo. 574, 21 S.W. 837.

Said statutes also contemplate that the assessor's duties should be performed prior to May 31 of each year. Thereafter, the assessments may be adjusted by the county board of equalization or the State Tax Commission and omitted property added by those agencies in accordance with the statutes. Sections 138.010 and 138.380, supra. No authority is conferred upon the assessor or collector to add omitted personal property to the assessment books after the completion of the assessor's books and their delivery to the county collector.

In view of the above statutory scheme of assessment of personal property, under which the duty of seeing that all property is assessed is placed primarily upon the assessor, we find no authority vested in either the assessor, the collector or the county court to place on the tax books personal property

of a person who, after delivery of the tax books to the collector, comes to pay personal property taxes and finds that his name is not on the tax books. Therefore, our answer to your first inquiry is that, under the circumstances set forth therein, neither the assessor or the collector, nor the county court, is authorized to make an addition on the tax book of the personal property of such person. Under such circumstances, there having been no valid assessment of personal property of such person, such as to render him liable for taxes for the year in question, the collector would be required under Section 301.025, supra, to furnish such person a statement that no personal property tax is owed by him.

We do not feel that Section 137.265, above quoted, would permit the placing of additional personal property on the tax books at such time. To do so would preclude the taxpayer's rights to the review of his assessment as provided by statute, and it is our opinion that Section 137.265, supra, cannot be so construed as to authorize the addition of personal property to the tax books after they have been delivered to the collector.

As for your second inquiry, our answer is the same as to your first, particularly in view of the fact that, inasmuch as January 1 is the assessment date (Sec. 137.075, supra), such person's property is not properly taxable for the year in question in the county to which he has moved.

As for your third inquiry, we find no authority for adding a taxpayer's name to the personal property books after January 1 for the preceding taxable year, and therefore the question of penalty could not properly arise.

As for your fourth inquiry, we are of the opinion that liability for personal property taxes being determined as of January 1, the statement regarding tax liability required by Section 301.025 must be obtained from the collector of the county in which the person resided on said date, and that therefore he should be required to obtain a statement of no tax due, if such is the case, from the collector of the county in which he resided on January 1.

As for your fifth inquiry, as we pointed out in answer to your fourth question, responsibility for making such statement must be placed upon the collector of the county in which the person resided on the assessment date of January 1. Consequently, we are of the opinion that whenever a collector is advised by a person requesting a statement that no taxes are due from such

person that he did not reside in the collector's county on the assessment date, such collector would be under no obligation to furnish such statement.

CONCLUSION

Therefore, it is the opinion of this office that:

- and such omission is discovered after the tax books have been placed in the hands of the county collector, neither the assessor nor the collector nor the county court may add the personal property of such person to the tax books for such year and that, no assessment of the property of such person having been made, he would be entitled to receive from the collector a statement, under Section 301.025, MoRS, 1951 Supp., that he owed no personal property taxes for such year;
- 2. When a person moves from one county to another after the assessment date, the county to which he moves cannot place his name on the personal property tax books of said county for such year, and therefore could not do so after the books have been delivered to the collector;
- 3. Personal property for the preceding taxable year may not properly be added to the tax books after January 1 of the following year, and therefore no question of payment of penalty on such personal property taxes can properly arise;
- 4. Under Section 301.025, MoRS, 1951 Supp., a statement regarding personal property tax liability must be obtained from the collector of the county in which the property owner resided on the assessment date of January 1: and
- 5. When a county collector is requested to render a statement to a person that such person owes no personal property taxes and the county collector is advised by such person that he did not reside in such county on the assessment date, the county collector is under no obligation to furnish such person with a statement that no personal property taxes are owed by him.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General LOTTERIES: GIFT ENTERPRISES:

An operation whereby a school issues numbered receipts for ten cents each, or twelve for \$1.00, which receipts entitle the holder to a chance for a prize, contains the elements of a lottery and is, therefore, illegal.



November 16, 1953

Honorable Harold W. Barrick Prosecuting Attorney Pettis County Sedalia, Missouri

Dear Sir:

You have submitted to this department a request for an official opinion based upon facts which may be summarized as follows:

An organization here in this county is receiving from persons making donations, sums of money in return. For such donation a numbered receipt is issued with the number of free tickets being based upon the number of 10-cent donations made.

We also gather from your letter and the enclosed "receipt" that prizes consisting of turkeys will be awarded to persons making donations who have not indicated precisely how the distributees of such prizes will be determined, but we assume that such distribution will be upon the basis of a drawing of numbers or by lot. You have inquired if such a scheme amounts to a lottery.

Enclosed is an opinion rendered by this department on March 17, 1953, to Honorable Douglas W. Green, Prosecuting Attorney of Greene County. From a reading of this opinion you will note that Missouri law (Sec. 563.430, RSMo 1949) prohibits a "lottery." You will further note that this opinion holds that a "lottery" is composed of three elements, to-wit: prize, chance, and consideration.

Honorable Harold W. Barrick

Let us now examine the operation involved in the instant case in order to determine whether the elements necessary to constitute a lottery are present. It is, of course, obvious that the elements of "chance" and "prize" are present, because, while the "receipt" does not say so, it clearly implies that a "drawing" will be held to determine which persons receive the ten FREE turkeys, thus bringing in the element of "chance." The turkey, of course, constitutes the "prize".

A reading of that portion of the Green opinion relating to "consideration" (beginning with the last paragraph on page 4) would seem to make it plain that the money paid for tickets (10 cents for one ticket; 12 tickets for \$1.00) which entitle the holder to a "chance" for a "prize" (a turkey), does constitute "consideration".

It might perhaps be argued that the money paid for the tickets was what the ticket itself stated it to be, to-wit, a "donation"; but if it is a pure "donation" why then is a prize offered which entitles the maker of each "donation" eligible for the prize? Obviously, to induce "donations" in which case the money paid would certainly constitute "consideration".

We believe, therefore, that in the operation which you outline, the three elements necessary to constitute a lottery are present; that the operation is a lottery, and is therefore illegal.

CONCLUSION

It is the opinion of this department that an operation whereby a school issues numbered receipts for ten cents each, or twelve for \$1.00, which receipts entitle the holder to a chance for a prize, contains the elements of a lottery, and is, therefore, illegal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON Attorney General COUNTY COURTS THIRD CLASS COUNTIES: It is the opinion of this de-SALARY AND MILEAGE: partment that county court



September 11, 1953

The state opinion of this department that county court judges, in counties of the third class, will, for the remainder of their present terms, receive \$10.00 per day for the first tendays in any month in which court is held, and \$5.00 per day for each additional day in each month in which court is held, and 5¢ per mile necessarily travelled in going to and returning from the place of holding court.

Honorable William T. Bellamy, Jr. Prosecuting Attorney Saline County Marshall, Missouri

Dear Mr. Bellamy:

This department is in receipt of your recent request for an official opinion, which request is as follows:

"The Judges of the County Court of this county have asked that I write you and get your opinion with regard to House Bill #70 of the recent 67th General Assembly which took effect August 29, 1953. This Bill repealed Section 49.110 and enacted a new Section 49.110 with regard to the compensation of County Judges.

"The only material change was to allow the County Judges 2d more per mile going to and from court than was previously the case. The new act very clearly provides that this change will take place from and after the expiration of their present terms of office. It is my own opinion that this is very clear and that they will not be allowed 7d until their present terms expire, inasmuch as no additional duties are created and this is in effect a raise in pay. Consequently, in view of all this, I can't see how they would be entitled to 7¢ a mile presently for going to and from court but they asked that I get your opinion in this regard.

"The main problem with regard to the act as I see it is what salary and mileage

the Judges will be allowed for the remainder of their present terms. The act very clearly repeals the old statute relating to their salary and mileage and states that the new salary will not take effect until their present terms of office expire. Consequently, I should like to know just what salary and mileage they are entitled to for the remainder of their present terms of office."

Section 49.110, RSMo 1949, Cumulative Supplement, 1951, fixed the compensation of County Court Judges in counties of the third class at \$10.00 per day for the first ten days in each month in which court is held, and at \$5.00 per day each day thereafter upon which court is held. House Bill No. 70, which became effective August 29, 1953, repeals the above section and re-enacts it with the exception that the rate of mileage is changed from 5¢ to 7¢. House Bill No. 70 states that Judges of the County Court in counties of the third class shall "from and after the expiration of their present terms of office," receive \$10.00 per day for the first ten days in each month that court is held, and \$5.00 per day each day thereafter that court is held, and 7¢ mileage.

Your question is, since Section 49.110, supra, has been repealed by House Bill No. 70, which went into effect August 29, 1953, but which does not apply to Judges during their present terms, under what statute do these Judges draw salary and mileage.

We believe that the answer to this question is found in Section 1.120, RSMo 1949, which reads:

"The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. (683, A. 1949 S.B. 1001)"

The provisions in House Bill No. 70 regarding pay are identical with repealed Section 49.110, supra, and so the pay provisions in that section is continued, as is the 5¢ mileage provision during the present terms of the Judges.

CONCLUSION

It is the opinion of this department that county court judges, in counties of the third class, will, for the

Honorable William T. Bellamy, Jr.:

remainder of their present terms, receive \$10.00 per day for the first ten days in any month in which court is held, and \$5.00 per day for each additional day in each month in which court is held, and 5¢ per mile for each mile necessarily travelled in going to and returning from the place of holding court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:A:irk

TAXATION: MERCHANTS TAX: Person who at his residence in one county, by telephone and mail, sells ties stored in another county is a merchant and subject to merchants tax.

October 29, 1953



Honorable G. C. Beckham Prosecuting Attorney Crawford County Steelville, Missouri

Dear Mr. Beckham:

This is in reply to your letter of recent date requesting the opinion of this department concerning the question presented therein, which is as follows:

"An individual who is a resident of Franklin County is engaged in the railroad tie business. This individual buys railroad ties from saw mill operators; stores them at three different tie yards in Crawford County. He then takes orders from Railroad Companies and then loads these ties onto railroad cars at the yard and ships them out of the county. His sales are actually transacted either by telephone or by correspondence from his residence in Franklin County. These three yards are merely used to store the railroad ties on while they belong to this individual.

"The question is whether or not this individual would be a merchant as defined by the above section of the statutes and whether or not he would be liable for a merchants tax upon the railroad ties stored on these three yards in Crawford County. I would appreciate having the opinion of your office on this question."

Section 150.010, RSMo 1949, is applicable and sets forth the definition of merchant. Said section reads as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise of any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

At the outset, it is our conclusion that the person in question is a merchant under the terms of Section 150. 010, supra. A general definition of merchant is found in the Kansas case of Campbell vs. City of Anthony, 20 P. 492, 40 Kan. 652, as follows:

"A merchant is one who traffics or carries on trade, one who buys goods to sell again--one who is engaged in the purchase and sale of goods--and includes lumber dealers."

Under Section 150.010, supra, every person who deals in the selling of goods, wares and merchandise, at any place occupied for that purpose is declared to be a merchant. In this case, the sales are actually transacted either by telephone or by correspondence from the residence in Franklin County, Missouri, of the person involved. We feel that a dual occupancy exists in that this person's residence is also occupied for the purpose of making such sales.

Said section further provides that a person shall be deemed to be a merchant whether said sales are made from a

stock on hand or by ordering goods from another source. This provisions indicates that the place where the goods are stored or located is not the determining factor.

The fundamental rule in the construction of statutes is to ascertain and give the effect to the purpose of the legislature. State ex rel Consolidated School District No. 1, vs. Hackmann, 302 Mo. 558, 258 S. W. 1011. The Missouri Courts seek to arrive at the intention of the legislature as disclosed, in part at least, by objectives of the legislation. In re Duren, 355 Mo. 1222, 200 S. W. (2d) 343. We feel that the purpose or object of said section was to include in the definition of merchant, those persons engaged in buying and selling goods, wares, and merchandise at any particular place regardless of where such goods, wares and merchandise are stored or located. To hold otherwise, we believe, would be to place a strained or unreasonable construction on said section of the statutes and might possibly result in dual taxation in some cases.

We submit that the ad valorem tax on such merchants was intended by the legislature to be levied at the place where the person involved is engaged in the selling, of goods, wares, and merchandise. In other words, at the place which is actually occupied for the purpose of said transactions.

CONCLUSION

Therefore, it is the opinion of this department that a person who is a resident of Franklin County, Missouri, and is engaged in buying and selling railroad ties, said transactions being conducted at his residence in Franklin County, Missouri, is a merchant under Section 150.010, RSMo 1949, and, as such, is subject to taxation in Franklin County, Missouri, under Section 150.040, RSMo 1949, even though said merchant stores railroad ties in Crawford County, Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. David Donnelly.

Very truly yours,

JOHN M. DALTON Attorney General SCHOOLS: Board of directors of school district may direct where pupils will attend school within the district in order to provide best educational facilities for school

children.

JOHN M. DALTON



/-3/-53 January 31, 1953

John C. Johnsen

Mr. Max B. Benne Prosecuting Attorney Atchison County Rock Port, Missouri

Dear Sir:

Your predecessor, Mr. Walter L. Mulvania, requested an opinion of this department shortly before he finished his term of office. We are assuming that you, as the present prosecuting attorney, would be interested in receiving the opinion, and therefore we are submitting it to you on the basis of the request made by Mr. Mulvania. His letter, in part, reads:

"May the school board of a Reorganized School District, organized pursuant to the provisions of Sections 165.677 to 165.703 of R.S. Mo. 1949, determine where the children in the elementary grades shall attend school within the district? It will be the purpose, of course, of the Board to continue various schools within the district for the reason that the facilities are inadequate at the central school building to accommodate all those who might like to attend there. This very problem has arisen in another reorganized district where the parents decided to send their children into the Tarkio school instead of the school closest to them, which caused the school rooms to become terribly overcrowded.

"Because this is an act that has been recently enacted I find no decisions on this particular point. If the Board has general supervisory control over the district to the extent that it can direct

that the children in the country shall attend the school nearest them, then the problem of overcrowding can be immediately solved."

Under Section 1, Article IX of the Constitution of Missouri, the responsibility for the establishment and maintenance of free public schools has been reposed in the General Assembly. In carrying out this responsibility the General Assembly has enacted many laws providing for the organization and operation of school districts throughout the state and laws declaring the powers and duties of boards of directors of school districts.

The Supreme Court of Missouri, in Kansas City v. School District of Kansas City, 356 Mo. 364, 201 S.W. (2d) 930, in declaring that a school district was an instrumentality of the state, said at S.W. 1.c. 933:

" * * A school district is a 'public corporation! forming an integral part of the State and constituting that instrumentality of the State utilized by the State in discharging its constitutionally invoked governmental function of imparting knowledge to the State's youth. The School District of Oakland v. The School District of Joplin, 340 Mo. 779, 102 S.W. 2d 909, and cases therein cited. It has been said a school district is in no sense a municipal corporation with diversified powers, but is a quasi public corporation, 'the arm and instrumentality of the state for one single and noble purpose, viz., to educate the children of the district. " " " "

The sections of the statutes hereinafter referred to will be those contained in the Revised Statutes of Missouri, 1949, unless otherwise indicated.

Sections 165.657 to 165.707 provide for the organization, maintenance and operation of reorganized school districts.

With regard to the directors of reorganized school districts, Section 165.687, in part, provides:

" * * * The directors above provided shall be governed by the laws applicable to sixdirector school districts."

Under the above statute we must look to the laws applicable to six-director school districts in determining the statutory powers and authority of the board of directors of a reorganized district.

Pertaining to the powers and duties of the board of directors of school districts which are applicable to six-director districts, Section 163.010, in part, provides:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district - said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. * * * *"

Section 163.120 provides:

"It shall be the duty of the board to visit the schools under their care, examine into their condition and the progress of the pupils, advise and consult with the teachers, and to exercise such supervision as will best promote the interests of the schools."

(Emphasis ours.)

Under Section 165.370 the board of directors is given the power to establish the site of the schools within the district which it governs. Thus the section reads:

"When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the board shall select and procure a site in each newly formed ward and erect a suitable school building thereon and furnish the same; and the board may also establish schools of a higher grade, in which studies not enumerated in section 168.050, RSMo 1949, may be pursued; and whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

The appellate courts of this state have had occasion to determine the authority of school boards under the last-quoted section.

In the case of Velton v. School Dist. of Slater, 6 S.W. (2d) 652, a taxpayer's suit was brought by resident taxpayers of a school district to enjoin the school board from moving the grade school in said district to a high school building and moving the high school to the grade school building. Allegations were made that the high school building was not centrally located or properly equipped for elementary grades and was not easily accessible to pupils of grade school age and that it would necessitate a large number of small children traveling a greater distance to attend school. The Kansas City Court of Appeals, in ruling favorably to the school board of the district in its exercise of discretionary power in changing the sites of the particular schools, said at l.c. 654:

"The board of directors has full discretion in the matter of changing the schools and schoolhouses in this district, and it appears that after the expiration of many years subsequent to the erection of the two buildings that the board, for some reason or reasons, good and sufficient to themeselves, have decided to move the grade school to the high school building and the high school to the grade school building. We cannot interfere with their discretion

in the matter. Aside from this, so long as both buildings are continued to be used for school purposes (no distinction between the two being made in the statute) there is not in the proposed interchange of pupils such a diversion of the use of the buildings as would warrant interference by the courts.

"Of course, the board having a right to locate the buildings, the matter of convenience to the pupils was one peculiarly within the discretion of the school board. While some of the grade school pupils may be inconvenienced after the change is made, and it is not stated what proportion of the grade pupils will be inconvenienced, the law, contrary to the contention of plaintiffs, makes no distinction as to the two classes of pupils in this regard. No allegation is made in reference to the center of school population in this district. It may be that, taking the school children as a whole, the convenience of the majority may be better served by exchanging the pupils as proposed."

Under the above case the action of the school board, which was upheld by the court, in effect determined where the pupils of elementary and high school age would attend school. This action was declared to be a discretionary power which the court would not disturb.

In the case of State ex rel. Miller v. Board of Education of Consol. Sch. Dist. No. 1 of Holt County, 21 S.W. (2d) 645, resident taxpayers of a school district instituted an action in mandamus to compel the board of directors of a school district to reopen the grade schools within the district which it had previously closed. The school board had been of the opinion that the outlying grade schools within the district were unsatisfactory for school purposes and had closed said schools. The school board then exercised its discretion to open a grade school in the high school building within the district. In ruling that the school board had such authority the Kansas City Court of Appeals, at 1.c. 649, said:

" * * * We think there is no question but that the board of education was within its rights when it exercised its discretion to

open a grade school in the high school building in each of the school years, 1923-1924 There is no question raised and 1924-1925. concerning the adaptability of the central or high school building for this use or that there was not sufficient room in it, after taking care of the high school pupils, for the opening of a grade school therein. So we are not called upon to decide what would be the result had the board interfered with the high school pupils in opening the primary school in the building. From all the evidence shows, it appears that there was sufficient and suitable room in the high school building for conducting a grade school of the kind that was requested of the board at the time, and we would not be justified in saying that the board abused its discretion in the matter under all of the circumstances."

Again in the above case, the effect of the action of the school board was to declare where the grade school children would attend school.

Under the above authorities it would seem that the board of directors of a reorganized school district would have the authority and discretionary power to prevent the overcrowding of school facilities at the central school building, which, if permitted, would not promote the best interests of the school or the pupils attending.

By statute the board of directors is given the supervisory control over the schools within its district and may act in the manner that will best promote the interests of the school.

By statute the board is empowered to make needful rules and regulations for the organization and government of its school district. Under such authority we believe that the board of directors could take such action required to eliminate or prevent an overcrowded condition in the schools within the district in order to provide the best educational facilities possible for the school children.

Mr. Max B. Benne

CONCLUSION

In the premises, it is the opinion of this department that the board of directors of a reorganized school district would be authorized to direct where school children within the district would attend school in order to eliminate or prevent an overcrowded condition within any school or schools within the district.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Frank Thompson.

Yours very truly,

JOHN M. DALTON Attorney General

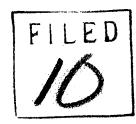
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MUNICIPAL CORPORATIONS:

BONDS:

(1) Bonds voted for sewer system; not be converted for use on water system; (2) city could not become indebted for 20% of its valuation for such purpose and also 10% of its valuation for water system.

JOHN M. DALTON



April 29, 1953

John C. Johnsen

Honorable Allen Bowsher Missouri Senate Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would appreciate an opinion on these two matters that have come up in my district. I would appreciate an early reply.

"1. Can bonds, previously voted for a sewer system, be converted for use on a water system if the people vote to convert and if the bond holders agree?

"2. Can a city be bonded for 20% of its valuation for a sewer system and simultaneously be bonded for 10% of its valuation for a water system?"

Sections 26(b), 26(c) and 26(d) of Article VI of the Constitution of Missouri, 1945, authorize municipalities to become indebted upon the vote of the inhabitants. Sections 95.115 to 95.160, RSMo 1949, provide the statutory method for the incurring of indebtedness under these constitutional provisions. The construction of a sewer system is a purpose for which indebtedness may be so incurred under Section 26(d) of Article VI. See also Section 250.040, RSMo 1949, Laws of Missouri, 1951, p. 638, 640.

Examination of the statutes reveals no provision authorizing the submission to a vote of the inhabitants a proposition

to divert funds previously acquired through a bond issue for one purpose to another purpose. "When the Legislature has expressly provided a method or methods by which a power conferred upon a municipality shall be exercised, the municipality has no implied power to exercise it in another manner." State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W. (2d) 363, l.c. 367.

The Legislature has provided for the incurring of indebtedness, but having made no provision for the diversion of funds acquired under such procedure, we perceive no authority under which an election might now be held which would enable the city to use the funds voted for the sewer system for a water system.

"No election can be had unless provided for by law." State ex rel. McHenry v. Jenkins, 43 Mo. 261, 1.c. 265.

we find no case in which the courts of this state have passed upon the authority of a city to divert funds in a situation and in the manner such as here presented. However, the courts have indicated that such diversion is not to be permitted. In the case of Thompson v. City of St. Louis (Mo. Sup.), 253 S.W. 969, 1.c. 972, the Supreme Court, in discussing a bond issue of the city of St. Louis, stated: "Through the receipt of the proceeds of the bonds the city incurred certain obligations, to be sure, but they were essentially those that rest upon the custodian of a trust fund. It was bound to see that the fund was applied to the purposes for which it was created and no other, and that in general was the extent of its obligation in the premises." (Emphasis ours.)

In the case of Stephens v. Bragg City, 224 Mo. App. 469, 27 S.W. (2d) 1063, 1.c. 1064, the court stated:

" * * * This money did not belong to the general revenue fund of the city. It was the product of bonds voted by the people of the city to secure money for a specific purpose, and when the bonds were issued and sold the money received thereby could not legally be used by the city for any other purpose. * * * * " (Emphasis ours.)

In our consideration of your first question we have assumed that the bond issue originally approved was expressly for the purpose of construction of a sewer system, and that the city in

question had not taken advantage of Sections 250.020 and 250.030, RSMo 1949 (Laws of Mo. 1951, p. 638), and that there was nothing in the proposal which might have indicated that the proceeds were to be used for a combined water and sewer system.

As for your second inquiry, Section 26(b) of Article VI of the Constitution of Missouri, 1945, as amended, provides:

"Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per centum of the value of such taxable tangible property."

Section 26(c) of Article VI of the Constitution of Missouri, 1945, provides:

"Any county or city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for county or city purposes not to exceed five per centum of the taxable tangible property shown as provided in section 26(b)."

Section 26(d) of Article VI of the Constitution of Missouri, 1945, provides:

"Any city, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted not exceeding in the aggregate an additional ten per centum of the value of the taxable tangible property shown as provided in section 26(b), for the purpose of acquiring rights of way, constructing, extending and improving the streets

and avenues and acquiring rights of way, constructing, extending and improving sanitary or storm sewer systems. The governing body of the city may provide that any portion or all of the cost of any such improvement be levied and assessed by the governing body on property benefited by such improvement, and the city shall collect any special assessments so levied and shall use the same to reimburse the city for the amount paid or to be paid by it on the bonds of the city issued for such improvement."

Section 26(e) of Article VI of the Constitution of Missouri, 1945, provides:

"Any city, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness in an amount not to exceed an additional ten per centum of the value of the taxable tangible property shown as provided in section 26(b), for the purpose of paying all or any part of the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city, provided the total general obligation indebtedness of the city shall not exceed twenty per centum of the assessed valuation."

Inasmuch as you refer to incurring indebtedness of a percentage of assessed valuation, we assume for the purpose of this opinion that you refer to general obligation bonds, not revenue bonds, to which limitations on indebtedness prescribed by the Constitution are not applicable. Section 27, Article VI, Constitution of Missouri, 1945; City of Maryville v. Cushman, 249 S.W. (2d) 347.

Section 26(e) of Article VI of the Constitution limits the power of a city to incur an additional indebtedness for water and light plants to situations in which the total general obligation indebtedness of the city does not exceed twenty per cent of the assessed valuation. No such express limitation is found in Section 26(e) of Article VI authorizing a city to incur additional indebtedness for sewer purposes. However, these sections

are in pari materia and should be construed together, if possible, to ascertain the intention of the framers of the Constitution. State ex rel. City of Columbia v. Wilder, 197 Mo. 1, l.c. 7, 94 S.W. 495.

Considered together, we feel that the framers of the Constitution intended to impose a twenty per cent limitation upon the general indebtedness which a city might incur. Obviously, under Section 26(e), if a city had already incurred general obligation indebtedness in the amount of twenty per cent for sewer purposes, it could not further obligate itself by general obligation indebtedness under Section 26(e) for lights or water works because of the express limitation found in that section. Since the obligation could not be incurred in such circumstances, we feel that the framers of the Constitution did not intend to permit, under Section 26(d), the incurring of an additional ten per cent indebtedness above the twenty per cent limitation which the city might have incurred under Section 26(e), but rather intended that, in any event, the limitation should be twenty per cent.

Examination of the Debates of the Constitutional Convention of 1945 bears out this construction. The provisions of Section 26 of Article VI, exclusive of what is now Section 26(e), were considered at one time. Transcript of Debates, pages 3085-3104. Subsequently, what is now Section 26(e) was introduced and considered separately. In introducing what is now Section 26(e), Mr. Bradshaw stated (Transcript of Debates, page 4086):

"Now the purpose of this section is not to increase the indebtedness that might be permitted by a city, but rather to give a greater degree of flexibility to that indebtedness. In the Constitution at the present time there is in Section 12a. a similar provision applying to a few more utilities which applies to cities of less than 30,000. In Section 12 there was such a provision for some of the larger cities. Now, in previous Section 13 we authorized a general obligation indebtedness of as much as twenty percent for cities. Ten percent of that was specifically for the purpose of public improvements of street and sewer systems. That leaves a ten percent which could be available for other municipal purposes.

"Now. it has been called to our attention by some of the people interested in the smaller cities, that the particular provision be adopted, whereas it increased the total by five percent and actually reduced the possible total for this purpose by five percent because the present Constitution, in Section 12a, allowed ten percent for a number of such purposes in addition to the five percent that was generally available for cities. The purpose of putting the section in, if it is put in, would be that it does not change the maximum which we have already approved, that could be incurred for general obligation purposes, but it would give a greater degree of flexibility where some smaller cities particularly interested in water works, something of that kind that might not wish to, might wish to be issued more obligation bonds, than permitted by the ten percent; in other words, we have reduced those by five percent in the setup for general obligation bonds at this time, but in order not to create an additional debt power for them, we put the proviso, 'provided the total should not exceed that which the Convention has already authorized. Therefore, merely authorizes a greater degree of flexibility within the indebtedness which has already been approved by the Convention." (Emphasis ours.)

CONCLUSION

Therefore, it is the opinion of this department that the proceeds of bonds previously voted by a municipality for a sewer system may not be diverted for use for a water system, and that a city may not incur a general obligation indebtedness in excess of twenty per cent of its valuation, and that it could not therefore incur a general obligation indebtedness for twenty per cent of its assessed valuation for a sewer system and simultaneously a general obligation indebtedness for ten per cent of its valuation for a water system.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

CRIMINAL LAW: PRELIMINARY HEARING: No authorization for payment for a copy of the transcript of the original examination in the preliminary hearing of a homicide case.



May 27, 1953

Honorable Joseph M. Bone Prosecuting Attorney of Audrain County Mexico, Missouri

Dear Sir:

This will acknowledge the receipt of your letter of April 30th, 1953, in which you request an opinion of this department. Omitting caption and signatures, this request is as follows:

"Please advise if under the provisions of Sec. 544.390 it is necessary that a copy of the examination of the defendant and of the witnesses accompany the warrant of commitment? If not, must the original accompany the warrant of commitment, and if so, how does it finally reach the Circuit Court?

"If it is necessary that a copy accompany the warrant of commitment, what provision is made for the payment to the Reporter for such copy?

"It has been the custom locally in homicide cases, of course, to reduce the testimony to writing. The original is filed with the other papers in the cause in the Circuit Court and a copy is delivered to the defendant. Recently, following the taxing of costs of the original at fifteen cents per one hundred words, under the provisions of Sec. 485.150, Mo. R.S., and a copy at

Honorable Joseph M. Bone

five cents per one hundred words, the State Auditor only allowed the amount charged for the original. If it is impossible to legally charge for a copy of the transcript where the same is required, then it is going to be impossible for the Magistrate Judge to obtain the services of a competent reporter for homicide preliminary examinations."

The statutory provision that you wish construed is Section 544.390, RSMo 1949, which provides as follows:

"All examinations and recognizances taken in pursuance of the provisions of this chapter shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offense is cognizable, on or before the first day of the next term thereof, except that where the prisoner is committed to jail, the examination of himself and of the witnesses for or against him, duly certified, shall accompany the warrant of commitment, and be delivered therewith to the jailer."

You also cite Section 485.150, RSMo 1949, which prescribes the following:

"Each magistrate may appoint a competent stenographer or reporter to write and certify evidence of witnesses in cases of homocide and such stenographer shall be allowed a fee of fifteen cents for every one hundred words and figures. Such fee shall be taxed as costs and paid as other costs in the case."

We also wish to bring to your attention Section 544.370, RSMo 1949, which states the following:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

You state in your request that it has been the custom in your locality to reduce the testimony to writing in homicide cases. Such

Honorable Joseph M. Bone

practice is in keeping with Section 544.370. This section does not require that there be an original and a copy but only provides that the testimony be reduced to writing.

Section 544.390, likewise, fails to provide for an original and a copy of the testimony but only provides that a transcript of the testimony taken at the preliminary be delivered to the clerk of the court where the offense is cognizable on or before the first day of the next term of court. Further, that in case the defendant is committed to jail, the transcript or record shall accompany the warrant of commitment and be delivered to the jailer. In other words, if the defendant makes bond after the preliminary, the transcript of testimony reduced to writing at the preliminary, is filed in the office of the clerk of the court having jurisdiction of the offense. If he fails to make bond and is committed to jail, such transcript is delivered to the jailer. These provisions of the statute were passed to assure the defendant of having a record of the testimony taken at the preliminary hearing available to him.

Section 485.150, RSMo 1949, specifies that in homicide cases the stenographer appointed by the Magistrate to take the testimony shall receive a fee of fifteen cents for each one hundred words and figures. However, it makes no provision for a copy or the fee to be allowed in taking and transcribing same. So far as we could determine, there is no provision which provides that a copy of this type of testimony shall be made and no provision as to the cost or who shall pay for it.

Another question concerns the manner in which an original transcript of the examination taken at a preliminary is returned to the court when it has been attached to the warrant of commitment where the defendant was committed to jail. There have been no decisions along this line but it would appear that when the defendant is brought into court that the transcript is delivered at the same time to the clerk thereof.

CONCLUSION

It is therefore the opinion of this department that there is no authorization under the law for payment for a copy of the transcript of the original examination in the preliminary hearing of a homicide case. Under such premise, the State Auditor is correct in refusing to approve payment for such copy.

It is further the opinion of this department, that where a defendant has been committed to jail and the transcript of the

Honorable Joseph M. Bone

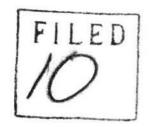
examination of the witnesses at the preliminary hearing has been attached to the warrant of commitment and delivered to the jailer that such transcript can be delivered into the court or to the clerk thereof at the same time that the defendant is brought in for trial.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John S. Phillips.

Very truly yours,

JOHN M. DALTON Attorney General CONSERVATION
COMMISSION:
APPROPRIATION:
LEGISLATURE:

Construing Section 4.510 of House Bill No. 361, passed by the Sixty-seventh General Assembly.



June 11, 1953

Mr. I. T. Bode Director Missouri Conservation Commission Jefferson City, Missouri

Dear Mr. Bode:

This will acknowledge receipt of your request for an official opinion, which reads:

"In accordance with the instruction of the Conservation Commission in regular meeting on June 2, 1953, I am transmitting to you herewith a request for an official opinion as follows.

"Section 4.510 of House Bill No. 361 reads as follows:

"Section 4.510. There is hereby appropriated out of the state treasury, chargeable to the Conservation Commission Fund, including but not limited to funds received from federal or other cooperating agencies for wildlife and forest conservation, not to exceed Eight Million Five Hundred Thousand Dollars (\$8,500,000.00) for the use of the Conservation Commission for the payment of salaries, wages and per diem of the officers, members and employees; for the original purchase of property; for the repair and replacement of property and for ordinary and necessary operating expenses; provided, however, that no funds shall be expended from this appropriation for the rental or erection of a building for use as a central office building of the

Conservation Commission and; provided further that no funds shall be expended from this appropriation except in accordance with a budget regularly adopted by the Conservation Commission; for the period beginning July 1, 1953 and ending June 30, 1955.

"The Commission questions the validity of that portion of the section as underlined above, and requests your opinion as to whother or not the Legislature can place such limitations on the use of its funds. It would be appreciated very much if prompt attention could be given to this request."

House Bill No. 361, passed by the 67th General Assembly, is an appropriation bill.

The law is well established in this state that the General Assembly cannot legislate by an appropriation act. Legislation of a general character cannot be included in an appropriation bill. To do so would violate the provisions of the Constitution of Missouri, namely, Section 23, Article III, Constitution of Missouri, 1945, which follows Section 28, Article IV, Constitution of Missouri, 1875, and reads:

"Limitation of scope of bills -contents of titles -- exceptions.-No bill shall contain more than one
subject which shall be clearly expressed in its title, except bills enacted
under the third exception in section
37 of this article and general appropriation bills, which may embrace the
various subjects and accounts for
which moneys are appropriated."

In State v. Smith, 75 S.W. (2d) 828, l.c. 830, a member of the State Board of Barber Examiners brought a mandamus action against the State Auditor, to compel him to issue a warrant for personal services rendered by him as a member of said Board, under an Appropriation Act appropriating out of the State Treasury, chargeable to the general revenue fund, \$3,000 to the Board of Barber Examiners' Fund. The Legislature under Section 13525, R.S.Mo. 1929, provided all salaries and expenses of said Board shall be paid by warrants drawn against

the fund created from fees collected and paid into the State Treasury and against the fund only. The Court held that general legislation cannot be included in an Appropriation Bill, to do so would violate Section 28, Article IV, Constitution of Missouri, 1875, and ordered the alternative writ issued, quashed, and a peremptory writ denied, and in so doing the Court said:

"We agree that the power of the Legislature over these matters, subject to constitutional limitations, is supreme. We also agree that the Constitution does not prevent the Legislature from providing that public officers' salaries and expenses shall be paid out of the general revenue. This being true, the Legislature had authority to provide that all or any specified part of the salary and expenses of the barber board should be paid out of the general revenue, but it did not do so. On the contrary, it has provided, in express terms, by section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), that the salaries and expenses of such board shall be paid by warrants drawn against the fund created from fees collected by the board and paid into the state treasury, and against that fund only. The Legislature could, at any time, provide a different method for paying the salaries and expenses of this board by amending section 13525 or by repealing it and enacting a new law in lieu thereof, but until it does so, section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), remains the law of the state. We cannot escape the conclusion that if section 13525, R.S., is still the law, and if it provides that the salaries and expenses of the board shall be paid out of the fund created from the fees collected by the board, and out of that fund only, the attempt to appropriate money out of the general revenue fund to pay any part of such salaries or expenses is contrary to the existing law of the state, as declared in section 13525, supra.

"It cannot be said that the act appro-

priating \$3,000 from the general revenue fund to the board of barber examiners' fund amounted to an amendment of section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637). It does not attempt to amend that section. Its sole purpose was to appropriate \$3,000 from one fund to another. It reads as follows:

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dollars to the Board of Barber Examiners Fund.' (Laws 1933-34, p. 12, Sec. 12B.)

"Besides, legislation of a general character cannot be included in an appropriation bill. If this appropriation bill had attempted to amend section 13525, it would have been void in that it would have violated section 28 of article 4 of the Constitution which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no doubt but what the amendment of a general statute such as section 13525, and the mere appropriation of money are two entirely different and separate subjects. State ex rel. Hueller v. Thompson, State Auditor, 316 Mo. 272, 289 S.W. 338."

Also, in a more recent case, State v. Canada, 113 S.W. (2d) 783, 1.c. 790, the Court said:

"Appellant contends that Misscuri would not pay his full tuition in an adjacent State, but only the difference between the tuition charged by the University of Missouri and that charged by the adjacent States, as provided in the appropriation act of 1935. The proviso in the 1935 act which attempts to limit the authority of the board of curators to the payment of the difference between the tuition in Missouri and in the adjacent States in unconsti-

tutional and void. A general statute (section 9622, R.S. 1929 (Mo. St. Ann. Sec. 9622, p. 7328)) authorizes the board of curators of Lincoln University to pay the reasonable tuition fees of negro residents of Missouri for attendance at the university of any adjacent State. This statute cannot be repealed or amended except by subsequent general legislation. Legislation of a general character cannot be included in an appropriation bill. To do so would violate section 28 of article 4 of the Constitution, which provides that no bill shall contain more than one subject which shall be clearly expressed in its title. There is no question but what the mere appropriation of money and the amendment of section 9622, a general statute granting certain authority to the board of curators, are two different and separate subjects. State ex rel. Davis v. Smith, 335 Mo. 1069, 75 S.W. 2d 828; State ex rel. Hueller v. Thompson, 316 Mo. 272, 289 S.W. 338. The valid and invalid portions of the statute are separable. If we disregard the invalid proviso, there is left a complete workable statute which appropriates the sum of \$10,000 for the purposes therein named. * * * "

Sections 40(a) and 43, Article IV, Constitution of Missouri, 1945, vest in the Conservation Commission full authority to control, manage, restore, conserve and regulate the bird, fish, game, forestry and all wildlife resources of the state and administration of all laws pertaining thereto, and further provide that all fees, moneys or funds arising from the operation and transactions of the Commission shall be expended and used by said commission for such purposes.

In view of the foregoing decisions, the court has clearly stated that valid and invalid portions of an appropriation bill are separable. Therefore, that part of said bill merely appropriating money for said commission is valid and that portion underscored in your request is clearly invalid, and should be entirely disregarded.

CONCLUSION

Therefore, it is the opinion of this department that the portion of Section 4.510, of House Bill No. 361, underscored in your request, is invalid for the reason that it is an attempt by the Legislature in an appropriation act to pass general legislation which has been declared by the appellate courts in this state to be invalid. However, this does not in any manner invalidate the portion of said appropriation immediately preceding the underscored part included in your request.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH:sw:lrt

CONSERVATION COMMISSION AGENTS: No Conservation Commission agent

POWERS:



June 24, 1953

or other officer has any lawful
authority to confiscate or hold
permanently or destroy property
of an individual used in the
violation of the Game and Fish
Laws or regulations of the Conservation Commission. Such officer or agent may only take temporarily into his custody any
such property to be used as
.... evidence to convict a vio-

: lator.

Honorable W. T. Bollinger, Jr. Member Missouri House of Representatives 67th General Assembly Van Buren, Missouri

Dear Mr. Bollinger:

This is the opinion you recently requested, by letter, from this office, respecting the power of agents of the State Conservation Commission to confiscate or hold property of persons apprehended in the violation or believed to be violating hunting and fishing regulations established by that Commission. Your letter reads as follows:

"I desire a ruling on whether a Conservation Agent has authority to confiscate or hold property such as boating equipment if a man is either caught violating a regulation or if he is merely thought to be violating a regulation.

"This is a result of people coming to me who have been warned by Agents that this will be done."

Your question is, "whether a Conservation Agent has authority to confiscate or hold property such as boating equipment if a man is either caught violating or is merely thought to be violating a regulation." As we view your question we understand it to mean: Is an agent of the Commission authorized to confiscate and hold, under such circumstances, the property of an individual permanently and to deprive him of the ownership thereof? Webster's New International Dictionary, Second Edition, page 560, defines the word "confiscate," definition 1: "To seize as forfeited to the public treasury; to appropriate, as an estate."

We believe, therefore, that your question must be answered by reference to pertinent text authorities, our

Constitution and our statutes, as construed by our Supreme Court, and upon the theory that such confiscation and holding of property under the assumed conditions which you state, divest the owner of title thereto, and you ask that this office give our opinion whether such agents have the authority to take such property into custody for the State, and whether the State thereupon becomes vested with the permanent title thereto. Generally, the rule involving the right to confiscate property, unlawfully used in the violation of law, is stated in 25 C.J., pages 1172, 1173, to be as follows:

"There can be no forfeiture of property unless the forfeiture is judicially determined. Even where under statute the forfeiture takes place at the time of the commission of the offense, it is not fully and completely operative and effective and the title of the state or the government is not perfected until there has been a judicial determination. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution. * * *.

There are conditions and occasions in the enforcement of statutes prohibiting crimes and misdemeanors which constitute exceptions to the above-cited text when a statute provides that property may be seized at the time of a lawful arrest or is taken under a lawful search warrant and may be held and used as evidence in the trial of a charge of violation of criminal statutes. There is also an exception where property lawfully seized may be confiscated and destroyed without judicial approval if such property constitutes per se a public nuisance or a public danger, and other property, capable of lawful use, may be ordered confiscated and destroyed by judicial decree that such other property is used in violation of law. 12 C.J., pages 1251, 1252, on this question states the following text:

"* * * It is competent for the legislature to authorize the summary seizure and destruction of things which cannot be put to a lawful

use, as, for example, gaming apparatus, lottery tickets, false weights and measures, food products unfit for human consumption, and milk kept for sale and not conforming to the standard fixed by law, and also of things that, either by the common law or by statute, constitute a public nuisance. The legislature may also authorize the destruction of property in case of urgent necessity, for example, to prevent the spread of a conflagration or of pestilence, or the advance of a hostile army. Other things, susceptible of property rights and capable of lawful use, may be authorized to be confiscated or destroyed on a judicial determination of their use in violation of law, but not otherwise. Thus the confiscation of intoxicating liquors kept in violation of law may be authorized on judicial condemnation, and it seems even on summary proceedings where kept in such a manner as to constitute a nuisance; but such liquors are regarded as property and therefore not subject to confiscation except as stated above. And in like manner the confiscation of boats, nets, or fishing tackle used in violation of law may be authorized on notice and hearing, or if a public nuisance, by summary process; but, in the absence of these conditions, due process does not permit the destruction of such property, or of guns, ammunition, or dogs used in unlawful hunting. legislature may, without violation of due process of law, authorize the destruction of animals or their products, or of fruit trees, for the purpose of preventing the spread of disease or pests; but a statute authorizing the summary destruction of any animal disabled from further use is void for want of due process, as is also a statute authorizing the destruction of unlicensed dogs, and a statute directing that hogs running at large be taken up and sold without notice to the owner. * * *."

Respecting the disposition of property seized under a lawful arrest or under a search warrant, 56 C.J., page 1260, states the following text:

"Where the property was not illegally seized, as where it was taken under a search warrant issued on probable cause, or was taken as an incident to a lawful arrest, or was voluntarily surrendered such property need not be returned before it is used in the criminal prosecution, * * * *."

The case of State vs. Rebasti, 306 Mo. 336, involving the question of search and seizure, was considered by the Supreme Court of this State. The Court held that, under a lawful arrest officers have the right to search the person arrested and take from him and seize any article for evidential purposes, found upon his person, or belonging to him and found in his presence, or on his premises. The Court so deciding, 1.c. 345, said:

"No complaint is made as to the manner of the defendant's arrest; he was law-fully arrested. Being lawfully arrested, the officers had a right to search him and his possessions in the room where he was arrested and take from him any article which might be used in securing his conviction. * * *."

The Supreme Court of this State held to like effect in the case of Holker vs. Hennessey, et al., Pixler, Sheriff, Garnishee, 141 Mo. 527, 1.c. 539, 540, the Court on the point saying:

"Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape. The officer has the undoubted right to make the search, and considering the nature of the accusation he may, when acting in good faith, take into his possession any article he may suppose will aid in securing the conviction of the prisoner or will prevent escape. 'He holds all, whether money or goods, subject to the order of the court, which, in proper circumstances, will direct him to restore the whole or

a part to the prisoner.* Bish. Crim. Proc., secs. 211, 212; Wharton, Crim. Pl. and Pr., secs. 60, 61.

The Supreme Court of this State has had before it numerous cases for the construction of statutes authorizing the seizure and destruction of property used in the violation of criminal laws where the unlawful use of the property was determined by judicial process and also in cases where the property so unlawfully used was seized by officers as constituting a public nuisance itself, or as some of the cases put it, was "outlawed," and was summarily and lawfully destroyed. The case of State ex rel. Igoe, et al. vs. Joynt, Circuit Judge, 110 S.W. (2d) 737, was a case which arose out of the operation of what the Court held was a gambling device called a "rotary merchandiser", operated much on the plan of a slot machine, and was set up for public play, and it was played by the public, so the case recites, in the City of St. Louis, Missouri. The Police Department seized the machine as a gambling device under statutes then permitting the Board of Police Commissioners of the City of St. Louis to seize and destroy gambling devices. The owner obtained a temporary restraining order against the Board of Police Commissioners from Judge Joynt, Judge of Division No. 2 of the Circuit Court of the City of St. Louis, Missouri, and praying that, after hearing, permanent injunction be issued against the Board. The Board sued out a writ of prohibition in the Supreme Court against the Circuit Judge. The Supreme Court held that the respondent Circuit Judge had no jurisdiction to hear the case, and made its preliminary rule in prohibition against the Judge, permanent. The effect of the decision was to approve the seizure of the gambling device by the Police Department and which also left said Board of Commissioners free to order and accomplish the summary destruction of the device. So holding, the Court, 1.c. 740, said:

"Here, the rotary merchandiser, as we have demonstrated above, is shown by the petition to be unlawful in itself. It is apparent from its construction that the device lends itself to no lawful purpose, but only to illegal use. Its only design and value is for use in violating our gambling statutes. That it is set up by the owner for use

by the public is admitted in the petition, which action under our laws constitutes a felony. The maintenance of this device described by the owner as a gambling device, capable of no lawful use and being extensively used and displayed by the owner and his licensees for public play, is a public nuisance, and the police under their general powers have the right to seize it and destroy it summarily. * * *."

The Court, in the Joynt Case, referred to the case of Lowry vs. Rainwater, 70 Mo. 152, cited by the owner of the gambling device. The Rainwater case, however, arose out of the seizure of property in and of itself not unlawful property but in its very nature harmless. In the Rainwater case the Court had held that before the property seized could be destroyed, it must be determined by judicial proceedings to be an element and an item used in gambling so as to become a public nuisance, and, thereupon, be destroyed. The Court on the same page, 1.c. 740, on this point, said:

"* * * An extension dining table had been seized and destroyed by the police on the charge that it was kept as a prohibited gaming table. We held that a summary mode of judicial proceedings should be provided in order to determine whether such property was used or held for purposes condemned by the statutes. That case is clearly distinguishable from the one now before us. the property under the scrutiny of the court was in its very nature lawful and harmless. It was only by proof of its unlawful use that it became subject to destruction. The table in itself constituted no offense, but it was its employment in gaming which was unlawful, and proof of that fact, we held, required judicial determination. * * *."

Again, the Supreme Court considered a like case in State ex rel. McDonald, Justice of the Peace, et al. vs. Frankenhoff, Judge, 125 S.W. (2d) 816. The case originated in St. Joseph, Missouri. A Justice of the Peace had given notice to the owner of the property in question that on a certain subsequent date at his court room the Justice would conduct a hearing to determine whether the property described

in said notice were gambling devices. The respondent Circuit Judge ordered certiorari for the Justice of the Peace to submit his record in the case. Prohibition followed at the instance of the Justice and Constable in the Supreme Court. The Court held the property, one slot machine and two pin ball machines, were gambling devices, and that the Circuit Judge had no jurisdiction to hear the case and that it had no jurisdiction to issue the extraordinary writ of certiorari. The Court, l.c. 818, in holding that the machines were unlawful, and following the rule stated in the Joynt case, supra, l.c. 818, said:

"Therefore, under our ruling in State ex rel. v. Joynt, supra, we hold that the machines in question were unlawful property and not protected by law, regardless of the manner in which they were seized. * * *."

The Joynt and Frankenhoff cases are cited only to indicate the distinction observed by the Supreme Court of this State between the kind of property and its unlawful/ use as a public nuisance that authorizes its seizure and summary destruction without judicial proceeding, and the kind of property, all though used in violating criminal laws, and yet not in itself harmful to the welfare of the community, and which may be used for a lawful purpose, that requires a judicial decree of seizure and authorization for the destruction of such property.

There is now no statute in force in this State authorizing the seizure, forfeiture and summary destruction of property used in a violation of the Fish and Game Laws or the rules and regulations, in relation to fish and game, fixed by the Conservation Commission.

Section 40 (a) of Article IV of the 1945 Constitution of this State under the title of "Conservation", gives the Conservation Commission jurisdiction to control and regulate forestry and wildlife resources of this State. Said Section in that behalf reads, in part, as follows:

"Conservation Commission--Jurisdiction--Number, Qualifications, Terms and Reimbursement of Members--Vacancies, --The centrol, management, restoration, conservation and regulation of the bird,

fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * *."

The authority given the Conservation Commission by said Section 40 (a) of the present Constitution, was Section 16 of Article XIV of our Constitution of 1875, adopted under initiative petition as Amendment No. 4, November 3, 1936, and published Laws of Missouri, 1937, pages 614, 615, as provided in Section 675, Article IV, Chapter 4, R.S. Mo. 1929.

The effect of Constitutional Amendment No. 4 on the statutes that named the offense and prescribed the punishment for violation of Fish and Game Laws as to whether the Amendment repealed such statutes, was the basis of the decision in Marsh vs. Bartlett, Sheriff, 121 S.W. (2d) 737, a proceeding in the Supreme Court in Habeas Corpus. Court, in that case discussed fully the legislative authority necessary to be expressed in naming the offenses and prescribing the punishment therefor, for violations of game and fish statutes and regulations as promulgated by the Conservation Commission, and the regulatory and administrative authority of the Commission, as well. In holding that the Conservation Commission had constitutional authority to control fish and game and to fix regulations respecting the entire subject, and further holding that the Legislature had the authority and had exercised the authority to prescribe the violation of such regulations as criminal offenses and prescribe the punishment therefor, the Court, 1.c. 744, said:

"It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. * * *

"The term 'regulate' will be sufficient for the moment. It includes ordinarily

the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S.W. 648, 5 L.R.A., N.S., 186. Regulation and legislation are not synonymous terms. In re North-western Indiana Tel. Co., 201 Ind. 667, 171 N.E. 65, 70. Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. Southern R. Co. v. Russell, 133 Va. 292, 112 S.E. 700, 703.

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word *regulate* and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the Grimaud Case, supra, punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. * * * * "

There was a statute in force in this State until its repeal, Laws of Missouri, 1945, page 664, authorizing the seizure and summary destruction or other disposition thereof by the Commission of articles found in use in the violation of the Fish and Game Laws. This was Section 8952, R.S. Mo. 1939. The section as it then stood read as follows:

"8 8952. Certain articles forfeited to state and fund derived from sale thereof to be placed in game protection fund

"The unlawful use of any articles contrary to the provisions of the game and fish laws shall forfeit the same to the state, and upon their being found by law under any of the conditions prohibited by this article, shall be destroyed, used in the work of the game and fish department, or sold by the game and fish commissioner and the money derived from the sale thereof placed in the game protection fund."

Section 8952, R.S. Mo. 1939, was first enacted, Laws of Missouri, 1909, page 519. The section was carried in each Revision thereafter, with one amendment of little consequence, down to and including the Revision of 1939. This section, along with many other sections of Article II and Article III, Chapter 47, R.S. Mo. 1939, was repealed, Laws of Missouri, 1945, page 664. There has been no statute of like terms or effect in force in Missouri since the repeal of said Section 8952.

We are advised, however, by the office of the Secretary of State of Missouri that the Rules and Regulations of the Conservation Commission revised to January 1: 1951, by the Commission, including Section 8 on page 9, as published by the Commission in brochure or booklet form have not been amended, changed or set aside, and now remain on file as required by law in the office of the Secretary of State of this State. Said Section 8 of such Rules and Regulations providing for the confiscation and forfeiture of any articles used contrary to the statutes of this State or to the provisions of said Rules and Regulations and for the summary destruction of such articles or other disposition of the same, is, with slight deviations of words, in almost the identical language as was contained in said Section 8952 as it stood in the Revised Statutes of Missouri, 1939, and until its repeal. Laws of Missouri, 1945, page 664. Said Section 8 as the same is now included in such Rules and Regulations filed in the office of the Secretary of State, reads as follows:

"Sec. 8. Certain articles forfeited to state. The unlawful use of any articles contrary to the statutes of this state or to the provisions of this code shall forfeit the same to the state, and upon their being so found by law under any of the conditions contrary to such statutes or this code, may be destroyed, used in the work of the Commission, or sold by it and the money derived from the sale thereof placed in the Conservation Commission fund."

Neither Section 40 (a) nor any other section of our Constitution, 1945, in the powers given to the Conservation Commission to control, manage, restore, conserve and regulate forestry and wildlife resources of this State, contains any authority for the Commission to promulgate rules

or regulations authorizing its agents to confiscate or destroy or otherwise dispose of articles used in violation of the Game and Fish Laws or in violation of the Rules and Regulations adopted by the Commission for enforcing the Act, so as to deprive the owner of ownership thereof. It appears clear, we believe, that said Rule 8 in its terms and form was considered by the Commission as taking life and authority from said Section 8952, R.S. Mo. 1939, or from Revisions of statutes prior thereto, containing sections of similar terms with like purpose and intent. It further appears, therefore, that upon the repeal of said Section 8952, R.S. Mo. 1939, Laws of Missouri, 1945, page 664, whatever authority, if any, the Commission had to adopt said Section 8 and include the same in the Rules and Regulations of the Commission, filed in the office of the Secretary of State, respecting the control and regulation of forestry and all wildlife resources of this State as an effective authority, if any, for the confiscation, destruction or other disposition of property used in the violation of such Rules and Regulations or in violation of the statutes of this State, became a nullity and was rendered void by the repeal of said Section 8952, R.S. Mo. 1939, Laws of Missouri, 1945, page 664, and that said Section 8 of such Rules itself, was by said repeal of said Section 8952 rendered void and of no effect. It, therefore, appears plain that said Section 8 as the same now appears in the Rules and Regulations of the Commission, on file in the office of the Secretary of State of this State, and as published by the Commission in brochure or booklet form, exists without statutory or constitutional authority, and is, therefore, void and of no effect. Chapter 252, RSMo 1949, contains the present statutes relating to fish and game. There are numerous sections of said Chapter authorizing the inspection by any agent of the Commission of licenses, the inspection of any warehouse, common carrier or agent, servant or employee thereof, and to examine every package in any such place which the agent has reason to believe contains wildlife not lawfully transported or lawfully had in possession, or if any such agent shall suspect or have reason to believe that any such package is falsely labeled, making the refusal to permit such search or evading the same, a misdemeanor with a fine prescribed of not less than \$50.00 nor more than \$150.00. These sections, 252.060 and 252.090. authorizing such inspection are cited and their general terms noted in order that they may not be confused with the terms of other statutes which we now refer to, which provide for the arrest of persons found violating, or reasonably believed to be violating the Game and Fish Laws, or Rules and Regulations adopted by the Conservation Commission, and prescribing the proceedings thereafter to be followed.

Sections 252.080 and 252.100, RSMo 1949, we find, are the only sections in said Chapter 252 which provide the authority of agents of the Conservation Commission to make arrests and prosecute violators of the Game and Fish statutes of this State and the Rules and Regulations adopted by the Commission respecting the preservation and the taking of game and fish in this State. Section 252.080, providing when arrests may be made by the Conservation agents or other officers, reads as follows:

"252.080. Arrests by commission agents, when

"Every authorized agent of the commission shall have the same power to serve criminal process as sheriffs and marshals, only in such cases as are violations of this law and rules and regulations of the commission. and have the same right as sheriffs and marshals to require aid in the execution of such process. Any such agent may arrest. without warrant, any person caught by him or in his view violating or who he has good reason to believe is violating, or has violated this law or any such rules and regulations, and take such person forthwith before a magistrate or any court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases. (L. 1945 p. 774 sec. 6.)"

This section provides that any such agent may arrest, without warrant, any person caught by him or in his view violating or whom he has good reason to believe is violating, or has violated, the Game and Fish Laws, or any such rules and regulations, and take such person forthwith before a Magistrate, or any Court having jurisdiction, who shall proceed without delay to hear, try and determine the matter as in other criminal cases. (Emphasis ours.) There is no provision, not one word or syllable in said section, or elsewhere, authorizing the agent to "confiscate", or "hold", or destroy any articles of property, summarily or otherwise, being used by a person violating the Game and Fish Laws or whom such agent has good reason to believe has violated such laws. We believe that, under such statutes, as would be the case in the prosecution of the violation of any other criminal statute, when an arrest is made for the

violation of game and fish statutes or such regulations, any such agent or other officer would be authorized to take into his possession at the time of the arrest of the individual any articles or property from the person or found in the custody and presence of such individual as may afford evidence which will aid in the securing of conviction of the prisoner for violation of the Game and Fish Laws. This is the holding in the Hennessey and Rebasti cases, supra. He may take the individual arrested before a Magistrate or Court having jurisdiction, to be dealt with according to law. Section 252.100 of said Chapter 252 points out what proceedings shall then be commenced against said individual so under arrest. Section 252.100, RSMo 1949, reads as follows:

"l. Any authorized agent of the commission, sheriff, marshal or their deputies, may make complaint and cause proceedings to be commenced against any person for the violation of this law or of any such rules and regulation and such officer shall not be obligated to furnish security for costs.

"2. He may search, without warrant, any creel, container, gamebag, hunting coat, or boat in which he has reason to believe wild life is unlawfully possessed or concealed; and at any and all times may seize any wild life in the possession or control of any person violating or who there is good reason to believe has violated this law or any of the rules or regulations of the commission; provided, however, that he shall first obtain a search warrant to enter and search an occupied dwelling and outbuildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car for such purposes and then only in the daytime, and in the search of a cold storage locker plant every precaution shall be exercised to prevent contamination of foods stored therein. Any judge, or magistrate having jurisdiction, shall issue to such agent, sheriff, or marshal, a search warrant upon his complaint being made on oath in writing that the affiant has reasonable and probable cause to believe that wild life is possessed or concealed in such occupied dwellings and outbuildings immediately adjacent thereto, cold storage locker plant, motor vehicle, or sealed freight or express car contrary to this law or to any such rules and regulations.

"3. Any person who shall resist such search or interfere with such agent or officer in the execution of a search warrant shall be deemed guilty of a misdemeanor."

We have seen from the terms of Section 252.080, supra, that any agent of the Commission may arrest, without warrant, any person caught by him or in his view, for violating, or whom he has reason to believe is violating, or has violated the Fish and Game Law or any such rules and regulations. We believe that Subsection 2 of Section 252.100, supra, must be considered and applied to any case at the time of making such arrest. The terms of said Sections 252.080 and 252.100 must be applied together, each as the complement of and as a necessary aid to the other, providing for an arrest and taking custody of property used in the violation of the Game and Fish Laws or regulations of the Commission as evidence in a prosecution for such violation. Said Subsection 2 of Section 252.100 provides that the agent or officer may search, without warrant, (meaning a search warrant), any creel, container, gamebag, hunting coat or boat in which he has reason to believe wildlife is unlawfully possessed or concealed, and at any and all times may seize any wildlife in the possession or control of any person violating or whom there is good reason to believe has violated this law or any of the Rules or Regulations of the Commission. Certainly, specimens of game killed of fish caught illegally and found in such receptacles would be competent, admissible and material evidence to be introduced at a trial upon the prosecution of the prisoner for violation of such Game or Fish Laws or such regulations. It would be proper and lawful also, we believe, for such agent or officer to take any other item of property from the person or in the presence and custody of the prisoner to be used in like manner as evidence in the prosecution of any such prisoner and to keep such property in his custody and available for such purpose, or, as said Subsection 2 further provides, after such prisoner has been taken before a Magistrate, under Section 252.080, either before or after the actual prosecution has been commenced against the prisoner, if the officer or agent shall make complaint, in writing, and upon his oath that the affiant has reasonable and probable cause to believe that wildlife is possessed or concealed in occupied dwellings and outbuildings immediately adjacent thereto, under the control of the prisoner, cold storage lockers, plants, motor vehicles or sealed freight or express cars contrary to the Fish and Game Laws or to any such rules and regulations, the Judge or Magistrate having jurisdiction shall issue to such officer or agent a search

warrant, first had and obtained however, before any such place is searched, authorizing the search in the daytime only any such places or things for such purpose of supplying evidence to convict such violator.

We further believe that, if in any complaint, under oath, in the proceedings it be asserted that any property, taken either from the person of the prisoner or from his immediate custody and presence, or by such search warrant, is being or has been used in the violation of such laws and regulations, and constitutes a nuisance per se and is incapable of other lawful use, the Court or Magistrate before whom such proceeding is being conducted, would be authorized to judicially determine that such property is or is not capable of lawful use; is or is not a nuisance per se and, accordingly, order forfeiture and destruction of the same or refuse, as the case may be, to order such forfeiture or destruction. In the absence of such judicial determination we believe that no officer or agent of the Commission has any authority whatsoever to confiscate and hold so as to permanently deprive the owner thereof, any property used in the violation of the Game and Fish Laws of this State or the Rules and Regulations of the Conservation Commission relating to the same. We believe such of-ficer may only take into his official custody and hold, temporarily, solely as and for evidence in the prosecution of any person charged with the violation of such Game and Fish Laws or such regulations property taken from the person of the prisoner or in his immediate custody and presence. or obtained by reason of a search warrant, and that when the use thereof as evidence in a prosecution of the prisoner has been concluded, such property is subject to the order of the Court or Magistrate to be returned and restored to the prisoner as the owner thereof. This also is the holding of our Supreme Court in the Hennessey case, supra.

It appears clear from the above cited and quoted authorities that neither a conservation Commission agent nor other officers has any authority to confiscate or hold property so as to deprive the owner permanently thereof, such as boating equipment, or any other property used in violating the Game and Fish Laws of this State or a regulation of the Conservation Commission, or where such agent or officer has good reason to believe that a person is violating such laws or regulations; that an officer or agent of the Commission is authorized by law only to take into his custody at the time of making a lawful arrest, without warrant, or by a search warrant, property from the person of the individual who is violating, or is believed, upon

reasonable grounds by such officer or agent to be violating such laws or regulations, for the purpose of using such property as evidence to convict such individual upon a prosecution against him for such violation; that such property, when its use as evidence in such prosecution has been completed is subject to the order of the Court or Magistrate to be restored to the owner thereof, unless, upon a hearing, under notice to the owner, the property is judicially determined to be incapable of lawful use and is a nuisance per se, and upon such determination forfeiture and destruction of said property be ordered by the Court or Magistrate.

CONCLUSION

It is, therefore, considering the premises, the opinion of this office:

- 1) That no Conservation Commission agent or other officer has any authority to confiscate or hold permanently, so as to deprive the owner thereof of the title thereto, any property, such as boating equipment, or other property, used in the violation of the Game and Fish Laws of this State or the rules and regulations fixed by the Conservation Commission, where an individual is caught violating such statutes or regulations or the agent or officer has good reason to believe that such individual is violating or has violated such statutes or regulations;
- 2) That Section 8 on page 9 of the Rules and Regulations of the Commission, revised to January 1, 1951, on file with the Secretary of State of this State, as the same is published and appears in brochure or booklet form as issued by the Missouri Conservation Commission and now in circulation, authorizing agents of the Commission or other officers to seize, confiscate and summarily destroy or otherwise dispose of articles and property used in the violation of the Game and Fish Laws of this State or the Rules and Regulations adopted by the Commission respecting the control and regulation of forestry and wildlife in this State, exists without statutory or constitutional authority, and is, therefore, void and of no effect:
- 3) That such Conservation agent or other officer may take into his possession and custody temporarily, any

property used in the violation of the Game and Fish Laws of this State or the rules and regulations fixed by the Conservation Commission, from the person of the violator or found in his immediate custody and presence or by means of a search warrant, only for the purpose of using such property as evidence to aid in the conviction of any individual, in the prosecution of such individual for such violations, caught violating such statutes or regulations, or whom the agent or officer has good reason to believe is violating or has violated such laws or regulations;

4) That when the use of such property as evidence for the purpose of aiding in the conviction of such violator has been accomplished, all such property is subject to the order of the Court having jurisdiction, or a Magistrate, to be returned and restored to such individual as the owner thereof, unless the Court upon a hearing, after notice to the owner, judicially determines that such property, or any of the same, is incapable of lawful use and constitutes a public nuisance as used in such violations, if any, and orders the confiscation of such property to the State and its subsequent destruction.

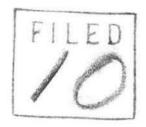
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

SCHOOLS: SCHOOL DISTRICTS: SCHOOL TRANSPORTATION: Board of directors in common school district may employ parent of child to transport such child to school, but may not employ the child himself or make allowances to such child in lieu of transportation; school districts not liable in tort for negligence of driver.



November 12, 1953

Honorable Joseph M. Bone Prosecuting Attorney Audrain County Mexico, Missouri

Dear Mr. Bone:

This is in response to your request for opinion dated September 9, 1953, which, omitting caption and signature, reads as follows:

"The president and clerk of the school board of Union School District 94, Audrain County, Missouri, have requested me to obtain an opinion from the Attorney General on the following points relative to the transportation of pupils of the district as follows:

- 1. Do the Directors of the school district have the power and authority to make payments from the public school funds of said district to a parent of a pupil of said district, if the parent furnishes the transportation to a public school?
- 2. Whether or not the Board of Directors has the power and authority to make such payments or allowances to a pupil of a district attending public school and furnishing his own transportation?
- 3. If the school Directors have the power and authority mentioned in questions one and two, would they be authorized to make such payments and allowances, if said school district maintained a school bus for the transportation of pupils of said district attending a public

school, or could they still make these allowances in individual cases where private transportation is furnished either by the pupils or their parents where they do not use public school bus facilities of the district?

4. If allowances are made for private transportation of pupils as indicated in questions one and two, would the school district be liable to said pupils or a third party in the event of an accident?"

We have been informed by you in a subsequent letter that the school district in question is a common school district.

1. The statute applicable to all districts, which authorizes the board of directors of a common school district to provide free transportation of pupils, is Section 165.140, RSMo 1949. That section reads as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district. who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 165.037. If twothirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and

provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district: (provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit.

Under the circumstances mentioned therein it is to be noted that the board of directors "shall arrange for and provide such transportation." The manner in which such transportation shall be provided is not specified.

In State ex rel. Rice v. Tompkins, et al., 239 Mo. App. 1113, 203 S.W. (2d) 881, 883, the St. Louis Court of Appeals said:

"When transportation in a school district has been voted it is the duty of the Board of Directors or Board of Education to provide for such transportation, providing money is available in the incidental fund of the district to meet the expense thereof, and if the Board, without reasonable cause therefor, fails to provide transportation, it may be compelled to do so by mandamus. However, this does not mean that the court may by the hard and unyielding writ of mandamus substitute its discretion for that of the Board as to the means and manner and sufficiency and safety of the transportation to be furnished. * * *

"The statute expressly vests with the Board the right and duty of making all needful rules and regulations for the free transportation of pupils and to prescribe the duties of the person employed for the purpose of such transportation, - which in this case would be the bus driver."

Therefore, it is apparent that the Legislature vested the board of directors with the discretion of determining the method and manner in which the transportation should be provided. This being so, there would seem to be nothing to prevent a board of directors from employing the father of a child to transport such child to school if, in the exercise of its discretion, it would be advisable to do so and provided that the other requirements of law are met.

More specifically, you will note that Section 165.140, supra, provides that the board "shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board." The contract of employment must be in writing and meet the other requirements prescribed in Section 432.070, RSMo 1949. If state aid is sought, the method of transportation must meet the approval of the State Board of Education as provided in Section 165.143, RSMo 1949. The unit of transportation is also subject to the inspection of the county superintendent of schools under Section 167.050, RSMo 1949. In other words, if the father of a child is to be employed by the district for the purpose of transporting such child to school, he must be treated the same as any other individual employed for that purpose.

2. Your second question must be answered in the negative. The only authority which the board of directors has with regard to this question is to provide the transportation. It has no authority to make payments to any individual in lieu of providing the transportation. Many states have statutes authorizing such payments, but we have none.

The effect of paying a child who transported himself would be the same as a payment in lieu of transportation because it would not be logical to say that the board could employ the child to transport himself to school and to require the child to give bond for the faithful discharge of the duties of transporting himself. In addition, such a bond would be of doubtful, and at least limited, validity since executed by a minor (31 C. J., Infants, Section 189, page 1083). Further, the employment must be by written contract, and an infant, subject to certain exceptions, does not have the capacity to bind himself absolutely by contract (31 C. J., Infants, Section 148, et seq., page 1058).

Therefore, we do not believe that the board of directors of a common school district has the power and authority either to employ or to make payments or allowances to a pupil who furnishes his own transportation.

3. We have ruled that the board of directors does have the authority mentioned in question number 1, but not that mentioned in question number 2. Therefore, our answer to question number 3 is based upon this premise.

Having held that, by virtue of its discretion to do so, the board may employ a parent to transport his child to school if the parent meets all the requirements established for the employment of any other competent person for this purpose, it follows that the circumstances under which this may be done also lies within the sound discretion of the board. Consideration should be given to the economic practicality of the arrangement, i.e., whether it would be economical for the district to do so, and to the basic purpose of the free transportation law which is to facilitate attendance at school. No hard and fast rules can be laid down by which the board can be guided in determining under what circumstances it should or should not contract with the parent of a child to transport such child to school. It should be further borne in mind that if state aid is sought, the method of transportation must meet the approval of the State Board of Education. In essence, however, the board must exercise its discretion in this regard.

4. This office held in an opinion directed to Honorable Stephen J. Millett, Prosecuting Attorney of Caldwell County, Braymer, Missouri, under date of January 12, 1940, that a school district is not liable in tort for the negligence of its bus driver. Since we believe that opinion adequately answers your question numbered 4, we are enclosing a copy of that opinion.

CONCLUSION

It is the opinion of this office that the board of directors of a common school district has the power and authority to employ the parent of a child for the purpose of transporting such child to school, provided that all the requirements of law with regard to the employment of any person for that purpose are met. This office is of the opinion, however, that a child who furnishes his own transportation may not be employed for that purpose nor may allowances be made to him in lieu of providing free transportation for him.

The board may exercise its discretion in determining under what circumstances a parent may be employed for the purpose of transporting his child to school.

Honorable Joseph M. Bone

It is the further opinion of this office that a school district is not liable in tort for the negligence of its driver employed for the purpose of transporting children to school.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

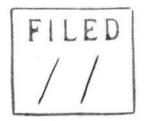
Very truly yours,

JOHN M. DALTON Attorney General

JWI:ml Enc.

PROSECUTING ATTORNEYS:

SALARIES:



Effective date of H.B. 160 is August 29, 1953. In computing salary of prosecuting attorney in 3rd and 4th class county, determine the base salary; add 25% of base salary; add 25% of this figure; add \$600.00.

June 15, 1953

Honorable C. Dudley Brandom Prosecuting Attorney Daviess County Gallatin, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I am advised that legislation has recently been passed and signed by the Governor on or about May 13th which required Prosecuting Attorneys of third and fourth class Counties to investigate Judicial Parole Applicants, and for such additional services, provided for a \$600.00 per year salary allowance (\$50.00 per month). Would you kindly advise as to whether this legislation contained an emergency clause and was thus effective May 13th, or what date such legislation is effective?

"Also, I would appreciate receiving your interpretation as to the proper computation of Prosecuting Attorney salaries in Counties of third and fourth class in view of this new legislation. The new legislation and the following three sections apparently must be construed for a determination of this question: 56.280, 56.290, 56.300. The manner in which these four salary provisions are interpreted will greatly vary the total salary received.

Honorable C. Dudley Brandom

"For example: In Daviess County, where the population is in the category between 11,000 and 12,500, the salary variation, depending upon method of computation, would be per annum: \$24,75.00 or \$2625.00 or \$2812.50. At quick glance at the wording of these Sections, it would appear that 56.280 and 56.290 would first be computed together, then possibly the new legislation of \$600.00 added, and then 56.300 computed on top of that, or it is possible that the new legislation and 56.280 are first computed together since such name specific fixed and set amounts, and then 56.290 and 56.300 are thereupon computed."

Your first question relates to the effective date of legislation requiring prosecuting attorneys in third and fourth class counties to investigate judicial parole applications, and providing compensation of \$600.00 per annum therefor. Such legislation was embodied in House Bill No. 160, which was passed by the Legislature without an emergency clause, and which will therefore become effective 90 days after final adjournment of the Legislature. Since the Legislature finally adjourned on May 31, 1953, House Bill No. 160 will become effective on August 29, 1953.

Your next question is regarding the proper method of computing the salaries of prosecuting attorneys in third and fourth class counties in view of House Bill No. 160.

As you state, Section 56.280, RSMo 1949, sets forth the base salary which prosecuting attorneys in third and fourth class counties are to receive. That salary, in a county in your population bracket, is \$1200.00 per year. Under Section 56.290, RSMo 1949, as alleged compensation for juvenile court services, "The prosecuting attorney in counties of the third and fourth class, in addition to the compensation provided in section 56.280, shall receive an amount equal to twenty-five per cent of the annual salary provided in section 56.280 ** *." This, in your case, would be 25% of \$1200.00, which would be \$300.00, which, added to the \$1200.00 base pay, would be a total of \$1500.00.

Section 56.300, RSMo 1949, assigns additional duties to prosecuting attorneys in relation to coroners' inquests, and provides that "Prosecuting attorneys shall receive as compensation for the additional services and duties required under this law, in addition to the salaries and fees now allowed such prosecuting attorneys by law, an amount equal to twenty-five per cent of the annual salary and fees of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose."

It will be noted that the above quoted portion of Section 56.300 uses the term "salary and fees" as being the basis upon which the 25% set forth in Section 56.300 is to be calculated. The use of the word "fees" in this respect is, we feel, somewhat confusing. Section 56.300, supra, lists numerous services for which a prosecuting attorney shall be allowed a "fee." Section 56.340, RSMo 1949, provides that at the end of each month the prosecuting attorney shall pay over to the county treasurer all of these "fees", retaining none of them for himself. We feel quite sure that it was not the legislative intent that the 25% provided for in Section 56.300 be computed upon the basis of the base salary and these "fees", none of which are retained by the prosecuting attorney. We feel rather that reference is made to Section 56.290, supra, which uses the word "compensation" and not "fees". We believe that the same is true of Section 56.300, supra, which uses the word "compensation".

So far the situation appears to be clear. What is not so clear is whether, to the \$1500.00 which you have in salary by reason of Section 56.280 and 56.290, supra, is added the \$600.00 per annum provided for by House Bill No. 160, which would be a total of \$2100.00, to which would be added 25% of \$2100.00 as provided by Section 56.300, supra, which would be a total of \$2625.00, or whether the 25% provided for by Section 56.300 should be taken of \$1500.00, which would be \$375.00 added to \$1500.00, a total of \$1875.00, to which would be added the \$600.00 provided by House Bill No. 160, for a total of \$2475.00. We believe that the latter method is the proper manner of calculation.

CONCLUSION

It is the opinion of this department that the effective date of House Bill No. 160 is August 29, 1953.

It is the further opinion of this department that in comput-

Honorable C. Dudley Brandom

ing the salary of a prosecuting attorney in a third or fourth class county, the following procedure should be followed:

Determine the base salary according to population as set forth in Section 56.280, RSMo 1949; add to this base salary 25% of the base salary as provided by Section 56.290, RSMo 1949; to this figure add 25% of the figure, as provided by Section 56.300, RSMo 1949; to this figure add \$600.00 as provided by H. B. 160.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON water and Attorney General

HPW:lw

Suey 3/457

- -- July 3 5-3 - --

Construction placed on proposed House Bill.

LEGISLATURE AND STATUTES:

March 10, 1953

FILED 12

Honorable Ealum E. Bruffett Member, House of Representatives 67th General Assembly Capitol Building Jefferson City, Missouri

Dear Mr. Bruffett:

This will acknowledge receipt of your request for an opinion which reads:

"I am sending you a copy of a bill which I hope to introduce. My question concerns sub-section 2, which I have enclosed in parenthesis. I am wondering if this section as written would force the surveyor to be an engineer from engineering school or would it permit him to hold this office if he had learned by experience or other means except engineering school.

"Your opinion on this matter will be very much appreciated."

The prosed bill in question repeals Sections 60.010, 61.160, 61.170, 61.180 and 61.200, RSMo 1949, and enacts in lieu thereof one new section relating to the same subject matter. The new section, namely 60.010, reads:

"1. At the regular general election in the year 1954 and every four years thereafter, the qualified voters of each county in classes two, three, and four shall elect a county surveyor who shall also serve as ex officio highway engineer, who shall hold his office for a term of four years and until his successor is duly elected and qualified.

"2. The county surveyor and ex officio highway engineer shall be skilled in the laying of drains, in bridge, culvert and road building and general road work, and he shall have a practical knowledge of civil engineering."

We do not find any decisions construing such provisions contained under sub-section 2 of Section 60.010 of the proposed bill.

The present bills regarding qualifications for county highway engineers under first class counties provide that he should be not only skilled and experienced in general road, bridge and culvert work but must also be authorized to practice engineering under the laws of this state providing for and requiring the registration of professional engineers. (See Section 61.030, RSMo 1949.) However, this is not true as to highway engineers for class two, three and four counties. That law relating to qualifications of such engineers provides that they should be skilled in laying of drains, in bridge, culvert and road building and general road work and should also have a practical knowledge of civil engineering. (See Section 61.170, RSMo 1949).

One of the primary rules of construction of statutes is to ascertain the lawmaker's intent, from the words used if possible, and to put upon the statutory language, honestly and faithfully, its plain and rational meaning and to promote its object. (See Haynes v. Unemployment Compensation Commission, 183 S.W. (2d) 77, 353 Mo. 540.)

While this of itself is not conclusive, it does, at least to some extent, indicate the legislative intent in enacting the foregoing provisions, which was that the county highway engineer in class one counties should be a registered engineer and in class two, three and four counties said county highway engineer need not be a registered engineer but shall have some practical knowledge of civil engineering.

At the present time there is no law requiring one to qualify for county surveyor in class two, three and four counties to be a registered engineer but only that he must be a suitable person. (See Section 60.010, RSMo 1949.)

This proposed bill combines the two offices, that of county surveyor and county highway engineer in counties of the second, third and fourth classes. The word "skill" as a limitation of expert evidence must be regarded in its broadest sense. In

Nesbitt v. City of Butte, 163 P. (2d) 251, 255, 188 Mont. 84, objections were raised that a witness was not shown to be qualified to give opinion evidence under Section 10531 of the Revised Code 1935, under which a witness may give his opinion on a question or science, art or trade when he is skilled therein. The court held that said witness was qualified notwithstanding most of his experience and skill was a result of actual experience and not education, he having only studied some little engineering at home, in so holding the court said:

"We think that Hardy was shown to be sufficiently qualified by training and experience to permit the reception of his opinion testimony as a skilled witness; and further, that he was shown to have sufficient knowledge of the facts, gained by personal observation, to enable him to form an opinion entitled to be considered by the jury.

"According to definition, as found in 32 C.J.S., Evidence, Sec. 456, p. 94, a skilled witness is one 'possessing, with regard to a particular subject or department of human activity, knowledge and experience which are not acquired by ordinary persons. [Irion v. Hyde, 110 Mont. 570, 105 P. 2d 666.] * * * [He] may be qualified by professional, scientific, or technical training, or by practical experience in some field of activity conferring on him special knowledge not shared by mankind in general, the rule in this respect being that one who has been engaged for a reasonable time in a particular profession, trade, or calling will be assumed to have the ordinary knowledge common to persons so engaged.' A witness qualified by observation may state the cost of doing certain work. 32 C.J.S., Evidence, Sec. 503, p. 164."

(Underscoring ours.)

(See also Schwantes v. State, 106 N.W. 237, loc. cit. 247, 127 Wis. 160.)

"Practical" as defined by Webster's New International Dictionary, 2nd Edition, reads in part as follows: * * * "3(a) Engaged in some practice; working; as, a practical farmer.

(b) Active, busy. (c) Practiced; having experience. 4. Given or disposed to action as opposed to speculation, etc.; skillful or experienced from practice; evincing practice or skill; capable of applying knowledge to some useful end; as a practical mind; a practical electrician."

Honorable Ealum E. Bruffett

The court in Lamons v. Yarbrough, 55 S.E. (2d) 551, loc. cit. 556, said: "The word 'practical' is defined by Webster as capable of applying knowledge of theory to practice." In John Hancock Mutual Life Insurance Company v. Scroder, 180 S.W. 327, loc. cit. 331, 235 Ala. 653, the court held that a charge that if injured lost substantial use of both feet for the purpose that people commonly and ordinarily use their feet, the insured lost use of both feet within the meaning of the policy, was correct, since words "substantial use" means "practical use." This would indicate that all that was necessary under your proposed bill would be that said official have some skill or ability in laying of drains also in bridge, culvert and road building work and substantial knowledge of civil engineering and that he need not actually be a graduate engineer from some engineering school or a registered engineer in this state.

CONCLUSION

In view of the foregoing, it is the opinion of this department that the enclosed proposed bill as written does not require the surveyor in second, third and fourth class counties to be a graduate engineer but that he may qualify if he has practical knowledge of civil engineering which knowledge may be gained by actual experience or any other method.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General MOTOR VEHICLES: LICENSE:

The term "owner" in Section 301.010, Laws Mo. 1951, DIRECTOR OF REVENUE: means: (1) The holder of the legal title. (2) vendee when the vehicle is subject to an agreement for conditional sale. (3) The vendee when the vehicle is subject to an agreement on a lease with a condition of

JOHN M. DALTON

April 17, 1953

sale. (4) A mortgagor in the event he is entitled to possession of the vehicle: in accordance with the definition in said section.



XXXXXXXX

J. C. Johnsen

Honorable David A. Bryan Supervisor, Motor Vehicle Registration Department of Revenue State of Missouri Jefferson City, Missouri

Dear Sir:

This office is in receipt of your request for an official opinion which reads as follows:

> "We respectfully request an official opinion as to the meaning of the term 'Owner' as defined in Section 301.010, Paragraph 18, Conference Committee Substitution for Amended Senate Committee Substitution for House Bill No. 283, particularly as it relates to the operation of motor vehicles and trailers upon Missouri Highways under Lease Agreement.

"Also, will the registration, that is, the License Plate, be issued in the name of the Lessor or the Lessee?"

The definition of "owner" which was Paragraph 18 in Section 301.010 of Conference Committee Substitution for Amended Senate Committee Substitution for House Bill No. 283, now found in Laws of Missouri, 1951, page 696, Paragraph 18, is as follows:

> "'Owner, ' the term owner shall include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the

Honorable H. M. Long

agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act;"

The word "owner" can be interpreted to have a great variety of meanings in regard to real or personal property. In Volume 73, C.J.S., Section 13, page 189, it is stated:

"As applied miscellaneously, various persons or classes of persons have been held to be or not to be 'owners,' depending on the circumstances of the particular case.

"As applied miscellaneously, the term 'owner' has been held to include an agent; a manager and attorney in fact; a bona fide claimant; and administrator to whom a leasehold interest descends: the beneficiary of a trust: a corporation; executors; a guardian in possession of, and exercising complete control over, ward's property; encumbrancers; a judgment creditor; a mortgagee purchaser at a foreclosure sale; a married woman; a mortgagor or his assigns; the purchaser at a tax sale; a receiver; a state; a stockholder in a corporation who is also a director, manager, and clerk; the principal stockholders in a lessee corporation; trustees; a trustee in bankruptcy; and a trust company."

It will be seen that it is necessary to limit such a word by statutory definition. The initial sentence of Section 301.010, Laws Mo. 1951, is as follows:

"As used in Chapters 301 and 304, RSMo. 1949, the following terms mean."

We believe that the definition that follows in paragraph 18 is controlling as to the interpretation of the word "owner" used in the Motor Vehicle Registration Law of Missouri. The term

Honorable H. M. Long

"owner" is used many times throughout Chapters 301 and 304, of the Revised Statutes of Missouri, 1949, to which it applies in accordance with the quotation above. It was certainly the intention of the Legislature that this word have a definite, certain and precise meaning.

We conclude that this definition includes these four classes of persons: (1) The holder of the legal title; or (2) the vendee when the vehicle is subject to an agreement for conditional sale and said vendee is entitled to immediate possession of the vehicle; or (3) the lessee when the vehicle is the subject of an agreement on a lease with the right of purchase upon performance of the condition stated in the agreement and with an immediate right of possession vested in the conditional vendee or (4) a mortgagor in the event said mortgagor is entitled to possession of the vehicle.

It is our opinion that since the term "owner" has been defined by the Legislature this definition should be followed in regard to the use of the word in Chapters 301 and 304 as it is so defined.

We must abide by the definition in regard to the registration of a vehicle wherein the word "owner" is used. Section 301.020, RSMo. 1949, is in part as follows:

"Every owner of a motor vehicle or trailer which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing: * * *"

A vehicle may be the subject of an agreement for conditional lease with the right of purchase thereof upon performance of the condition stated in the agreement and with an immediate right of possession vested in the lessee, and when it is, the lessee is then the owner as defined and may register the vehicle in his, the lessee's own name. Then the lessor of that same motor vehicle does not have the right to register it although he holds the legal title as the definition limits ownership to the holder of the legal title, or the lessee under the conditions we have stated, or a purchaser under a conditional sale, or a mortgagor as qualified in the definition. The lessor in the above case is disqualified as owner and the lessee has become the owner under the definition.

Since Section 301.020, supra, requires registration by the owner, a lessee, not having an agreement for conditional lease

Honorable H. M. Long

with the right of purchase upon performance of the conditions stated in the agreement and not having an immediate right of possession vested in himself, is not entitled to register a motor vehicle.

CONCLUSION

Therefore, it is the opinion of this office that the term "owner" as used in Paragraph 18, Laws of Missouri, 1951, page 696, means any person, firm, corporation or association who holds the legal title of a vehicle, or if the vehicle be the subject of an agreement for conditional sale or lease with right of purchase, then the vendee or lessee in the event he has the immediate right of possession, or if the vehicle is the subject of a chattel mortgage, then the mortgagor of the vehicle if he is entitled to possession.

Where a license plate is required to be issued for a motor vehicle it should be issued to the owner of the vehicle as defined in Section 301.010, Laws Mo. 1951, page 696. A lessee of a vehicle not qualifying as an owner under the definition is not entitled to have it registered in his name.

The foregoing opinion, which I hereby approve, was written by my assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General MOTOR VEHICLES; 1)When a surviving spouse inherits motor vehicle SALES OR USE TAX; from deceased owner who paid sales or use tax required by Secs. 144.440 and 144.450, Laws of Mo. 1951, and adds names of children to application for title as co-owners and surviving spouse's interest is exempt from tax under latter sec., children are not entitled to exemption under said sec. They are required to pay tax in amount of 2% of purchase price of vehicle less value of interest of surviving spouse.

2)A motor vehicle registered and operated in another state in good faith by owner 90 days, then moved into Missouri where certificate of title is sought, if sales tax paid by owner on purchase price in state of registry, and application for title is only in name of owner, he is exempt from sales or use tax under Sec. 144.450, supra. If owner gives spouse an interest in vehicle and desires spouse's name on application and certificate of title, Missouri sales or use tax is due. Tax is 2% of purchase price or appraised value of vehicle less value of interest retained by owner.



July 21, 1953

Honorable David A. Bryan Supervisor Motor Vehicle Registration Department of Revenue Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"It is respectfully requested that an opinion be given to each of the specific questions herein contained.

- "1. In an instance where a surviving spouse inherits a motor vehicle and meets the requirements for exemption from use tax (Sec. 144.450), then at the time Missouri title is applied for said surviving spouse desired to add one or more child's name to the new title
 - a. Would any sales or use tax be due?b. If answer to l(a) is 'yes', how much?
- "2. In an instance where a person is moving a motor vehicle into this state from another state and shall have registered and in good faith regularly operated said vehicle in said

other state at least ninety days prior to the date such person applies for Missouri title and therefore meets the requirements for exemption from use tax (Sec. 144.450) but desires to add spouses name to the new title -

a. Would any sales or use tax be due?
 b. If answer to 2(a) is 'yes', how much?"

From the facts given above, it appears that a surviving spouse inherited a motor vehicle from the deceased owner, and in making application for a certificate of title said spouse desires to have the names of his or her children added to the application, and to the certificate of title when issued, although it does not appear that an assignment of the deceased owner's title was ever made to such surviving spouse.

Section 301.210, RSMo 1949, requires an assignment of the certificate of title to be made by the owner when the motor vehicle described in said title is sold or otherwise transferred to another person. Unless the assignment is made in the manner provided by statute, the sale of the motor vehicle is fraudulent and void. Said section reads as follows:

- "1. In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer.
- "2. The buyer shall then present such certificate, assigned as aforesaid, to the director of revenue, at the time of making application for the registration of such motor vehicle or trailer, whereupon a new certificate of ownership shall be issued to the buyer, the fee therefor being one dollar.
- "3. If such motor vehicle or trailer is sold to a resident of another state or

country, or if such motor vehicle or trailer is destroyed or dismantled the owner thereof shall immediately notify the director of revenue. Certificates when so signed and returned to the director of revenue shall be retained by the director of revenue and all certificates shall be appropriately indexed so that at all times it will be possible for him to expeditiously trace the ownership of the motor vehicle or trailer designated therein.

"4. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

The deceased owner could not personally assign his title to the surviving spouse but his executor or administrator might properly make the assignment to said spouse. Upon the assignment having been made such spouse should then make application for title only in his or her name. Upon receipt of proper application, together with satisfactory proof that the applicant is the owner of the vehicle described therein, the Director of Revenue could legally issue a certificate of title in the name of the surviving spouse.

The proper procedure to be followed in assigning the title of the deceased owner, through his executor or administrator to a vendee or other transferee was discussed in an opinion of this department furnished to the Honorable H. A. Kelso, Probate Judge, Vernon County, Missouri, on March 6, 1953, a copy of which is enclosed for your consideration.

Unless the statutory procedure for assignment of title has been followed, and certificate of title issued in the name of the surviving spouse, then he or she never did acquire whatever title the deceased had in the motor vehicle. The mere adding of of the child's, or children's, names to the application for title could not convey any interest in said vehicle to them. Therefore, such attempted transfer of any interest to said children would not be an effective transfer or assignment of title within the meaning of Section 301.210, supra. Under these circumstances.

the Director of Revenue could not issue a certificate of title to the surviving spouse and children, since no satisfactory evidence could be produced that the applicants were the actual owners of the vehicle.

In the event the above-mentioned statutory procedure has been followed, and the surviving spouse has been issued a certificate of title in his or her name, then if such spouse desires to give an interest in the motor vehicle to his or her children, it is believed that the only way in which this can be done is for said spouse to assign the title to himself or herself and the child or children named. Application for new title should then be made to the Director of Revenue in the names of such assignees, and upon a satisfactory showing of the respective interests, certificate of title may be issued in the names of such assignees.

This brings us to the point in our discussion when a consideration of the subject-matter of the first inquiry is necessary.

Section 144.440, page 858 Laws of Missouri, 1951 imposes a tax upon every person for the privilege of using the highways of this state, and reads as follows:

- "1. In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to two percent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor vehicles purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri.
- "2. That at the time the owner of any such motor vehicle makes application to the director of revenue for an official certificate of title and the registration of the same as otherwise provided by law, he shall present to the director of revenue, evidence satisfactory to said director showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that said motor vehicle is not subject to the tax herein provided, and, if

Honorable David A. Bryan

said motor vehicle is subject to the tax herein provided, such applicant shall pay or cause to be paid to the director of revenue the tax provided herein.

"3. In the event that the purchase price is unknown or undisclosed or that the evidence thereof is not satisfactory to the director of revenue, the same shall be fixed by appraisement by the director.

"4. No certificate of title shall be issued for such motor vehicle unless said tax for the privilege of using the highways of this state has been paid."

Section 144.450, page 859, Laws of Missouri, 1951, provides exemptions from the tax referred to in the preceding section and reads as follows:

"In order to avoid double taxation under the provisions of this act, any person who purchases a motor vehicle in any other state and seeks to register it in this state shall be credited with the amount of any sales tax or use tax shown to have been previously paid by him on the purchase price of such motor vehicle in such other state. The tax imposed by section 144.440 shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, nor to motor vehicles brought into this state by a person moving any such vehicle into Missouri from another state who shall have registered and in good faith regularly operated said motor vehicle in said other state at least ninety days prior to the time it is registered in this state, nor to motor vehicles acquired by registered dealers for resale, nor to motor vehicles purchased, owned or used by any religious, charitable or eleemosynary institution for use in the conduct of regular religious, charitable or eleemosynary functions and activities, nor to motor vehicles owned and used by religious organizations in transferring pupils to and from schools

supported by such organization, nor where the motor vehicle has been acquired by the applicant for a certificate of title therefor by gift or under will or by inheritance, and tax hereby imposed has been paid by the donor or decedent, nor to any motor vehicle owned or used by the state of Missouri or any other political subdivision thereof, nor by an educational institution supported by public funds, nor to farm tractors."

The last quoted section specifically provides that the tax imposed by Section 144.440 shall not apply to motor vehicles upon which the tax provided by the chapter has been paid, and also, when the motor vehicle has been acquired by the applicant for a certificate of title by gift or under a will or by inheritance and the taxes have been paid by the donor or decedent.

We refer to the two particular instances of exemption from tax, among the various ones referred to in this section, for the reason that such instances are the only ones in point with the facts given in the first inquiry of the opinion request.

The facts given in said first inquiry do not indicate whether the sales or use tax imposed by section 144.440, supra, had been paid previous to the death of the owner of the motor vehicle nor does it indicate whether the child or children referred to, acquired their interest in the motor vehicle by purchase or as a gift from the surviving spouse of the deceased owner.

For the purpose of our discussion it will be assumed that the deceased owner had previously paid the sales or use tax and that the surviving spouse in desiring to have the names of the children added to the application for title is assumed to give each child an interest in the motor vehicle.

In the event the deceased owner had paid the tax and his surviving spouse inherits the motor vehicle from him as stated, then such spouse is exempt from the payment of the tax, provided, that he or she is able to prove the prior tax payment to the satisfaction of the director of revenue. The burden of proof is upon the applicant to establish the right to the exemption, for the exemptions authorized by Section 144.450, supra, are to be strictly construed in accordance with the terms of the statute, and unless the proof is sufficiently clear, no exemption will be allowed. This principle was held to be the law in the case of State v. Bates, 224 S. W. (2d) 996. The court at 1. c. 1000 said:

"Exemptions from the class to be taxed must be founded upon some rational basis. The use of exemption provisos in such legislation to limit the boundaries of the class established must rest upon some sound reason of public policy. To warrant the taxing of one object or person and the exemption of another object or person within the same natural class, the exemption must be founded upon a reason public in nature which in a reasonable degree, at least, would justify restricting the natural class. Exemptions from taxation are a renunciation of sovereignty, must be strictly construed and generally are sustained only upon the grounds of public They should serve the public, as distinguished from a private, interest. Such is the basis of equal and uniform taxation. * * **

If a satisfactory showing as above stated is made to the director of revenue, then under the express terms of the exemption statute, the surviving spouse would not be required to pay the tax provided the application for title applied for was in the name of such spouse, since no tax is due upon a motor vehicle not subject to the tax. However, the question arises as to whether the motor vehicle is exempt from tax if the names of the children are inserted in the application along with that of the surviving spouse.

In this connection we repeat that portion of Section 144.450 supra, which we believe to be particularly applicable in attempting to answer above question. Said section provides for exemption from the tax and reads as follows:

"" " "nor where the motor vehicle
has been acquired by the applicant
for a certificate of title therefor
by gift or under will or by inheritance,
and the tax hereby imposed has been paid
by the donor or decedent, " " "."

In attempting to arrive at the meaning of this statute, we call attention to some of the rules of statutory construction which we believe to be so well recognized as not to require any citations from court decisions of this state.

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One of the cardinal principles of statutory construction is to arrive at the intention of the lawmakers, and, if possible, from the words used in the statute under construction. In such instance, the words used are to be given their ordinary or common meaning unless from the context it appears that some other or different meaning was intended. In the construction of statutes it is also a well established rule that the legislature is presumed to enact a law which would in its operation or effect be reasonable, rather than unreasonable.

Keeping the above mentioned rules of statutory construction in mind, it is believed that Section 144.450 provides one exemption from the sales or use tax, and that the exemption can be allowable only to the person entitled to it, and once that exemption has been allowed to an applicant for title under the terms of the statute, no further exemption can be allowed to a person on the same motor vehicle. To construe the statute in any other manner would do violence to the clearly expressed intention of the legislators, and would result in a ridiculous and absurd situation.

Applying the provisions of Section 144.450 to the facts given above, the children whose names have been added or which shall be added to the application, in order to be entitled to an exemption from the sales or use tax must submit satisfactory evidence to the director of revenue that their donor had previously paid the tax, and that the property was not subject to the tax.

This showing the children cannot make because their donor inherited the vehicle from the deceased owner who had paid the tax. Such donor paid no tax as none was due and such donor is the only person entitled to the one exemption provided by the statute, consequently, the children cannot claim any further exemptions, but must pay the tax to the extent of the value of their interests in the motor vehicle. It is believed that the above construction of the statute, and its application to the facts before us is the only reasonable one which can be made under the circumstances and one which is believed to be in accord with the intention of the legislature as clearly expressed in the terms of said statute. To construe the statute and to apply it to such facts in any other manner would result in any orner unusual, if not a ridiculous situation.

To allow the children the exemption from the payment of the tax would be to ignore the statutory condition that their donor must have paid it, and this would have the effect of allowing

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them an exemption based upon a prior exemption, which of course, would violate the statute which allows only one exemption.

If the children-donees should become donors of their respective interests in the title of the vehicle mentioned, and their donees were also exempt from the payment of the tax and this procedure were to be continued indefinitely, then no tax would ever be collected and the only tax that ever has been paid was that by the deceased owner. Such procedure would serve as an instrumentality for defeating the intention and purpose of the legislature in the enactment of this taxing statute.

Under the provisions of paragraph 2, Section 144.440, supra, when the surviving spouse and children apply for a certificate of title they are required to submit evidence along with the application, satisfactory to the director of revenue of the amount of the purchase price paid or charged to the applicants in the acquisition of the motor vehicle, and that the sales or use tax provided by paragraph 1, of said section has been paid, or that the vehicle is exempt from the tax as aforesaid.

The purchase price cannot be shown since the applicants paid nothing for their respective interests but under the provisions of paragraph 3, of Section 144.440, supra, the director may have the vehicle appraised and the appraised value thus obtained shall be the basis upon which to compute the tax.

Ordinarily the entire appraised value of the vehicle would constitute the basis for computing the tax, but in the instant case the surviving spouse's interest is exempt, and must be deducted from the appraised value, for only the remainder or net value is subject to the tax.

The facts given in the opinion request fail to state the fractional part owned by the surviving spouse or the proportional part it bears to the whole as compared with the interests of the other co-owners. Such information is necessary before it can be dtermined what is the net amount of the children's interest subject to taxation. Once the value of the interest of the surviving spouse is known and said amount is deducted from the appraised value of the vehicle, the remainder will be the net amount upon which the tax is to be computed at the rate of 2% as provided by paragraph 1, Section 144.440, supra.

Therefore, in answer to your inquiry 1(a), for the reasons given above, it is our thought that a sales or use tax is due upon the motor vehicle referred to in the inquiry.

In answer to inqurry 1(b), it is our further thought that the tax due and owing will be 2% of the appraised value of the motor vehicle, less the value of the interest of the surviving spouse in said vehicle.

From the facts given in the second inquiry, it appears that one who had purchased a motor vehicle and registered it in a state other than Missouri, and in good faith has operated it in that state for at least minety days and subsequently moved the vehicle into Missouri where he seeks to have the same registered in the names of himself and spouse. It is claimed that under these circumstances the owner would be exempt from Missouri sales or use tax, but we do not agree with this statement, except with qualifications. It is assumed that the exemption to which the owner is said to be entitled is that mentioned in the first part of Section 144.450, supra. While it is not stated that the sales tax referred to by this section has been previously paid in the other state, for the purposes of our discussion it will be assumed that such tax has been paid in accordance with the terms of the statute and that when the application for Missouri title is made, proof of the prior tax payment is submitted to the Director of Revenue. Should such owner apply for title only in his own name, he would be entitled to the exemption, but would not be entitled to such exemption if the application is made in the names of himself and spouse, for reasons to be noticed presently.

What we have said above concerning the assignment of titles under the provisions of Section 301.210, supra, has no application to the facts before us, since that section refers only to the assignment or transfer of titles of vehicles registered in Missouri. In placing his spouse's name on the application for a Missouri certificate of title, it does not appear that the provisions of said section will have been violated by the owner of said vehicle.

The addition of the name of the spouse to the application is prima facie proof of the gift of some interest in the vehicle by the owner, the particulars of which must be shown to the director of revenue, and proof offered that the applicants are the actual owners of the vehicle and the extent of the interest claimed by each applicant.

Among the exemptions provided by Section 144.450, supra, is

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that in an instance when a motor vehicle or an interest therein is given to the donee who "had paid the tax imposed thereby", but this refers to the payment of the Missouri sales or use tax and the exemption does not apply if the payment of the sales tax had been made in some other state.

When the owner gives an interest in the vehicle to his spouse, as evidenced by the application for title, the donee would not receive such interest from a doner who had paid the Missouri sales or use tax upon the purchase price of the vehicle, and, of course, would not be entitled to the exemption.

Therefore, in answer to inquiry 2(a), it is our thought that the tax would be due and owing.

In answer to inquiry 2(b) it is our thought the tax would be 2% of the purchase price, or the appraised value of the vehicle less the value of the interest retained by the owner of said vehicle.

CONCLUSION.

Therefore, it is the opinion of this department that when a surviving spouse inherits a motor vehicle from a deceased owner who paid the sales or use tax on same as required by Sections 144.440 and 144.450, Laws of Missouri, 1951, and said spouse makes application for a Missouri certificate of title to which application the names of children are added as co-owners and the interest of the surviving spouse is exempt from tax-under the provisions of the latter section, said children are not entitled to an exemption from the tax under the provisions of the latter section. They are required to pay the tax in an amount equivalent to 2% of the purchase price of the motor vehicle, less the value of the interest of the surviving spouse.

It is further the opinion of this department that when one has previously registered a motor vehicle in another state and operated the vehicle for at least ninety days in said state, and moves the vehicle into Missouri where he applies for a Missouri certificate of title, and satisfactory proof is submitted to the director of revenue that the sales tax upon the purchase price of the motor vehicle was paid in the

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state of registry, then the owner is entitled to the exemption provided by Section 144.450, supra, if the application is made in the name of such registered owner. But when the owner becomes donor of some interest in the vehicle to his spouse, and desires to add said spouse's name to the application, and the certificate of title when issued, then the Missouri sales or use tax is due and owing to the extent of value of the interest of said spouse. Said tax is to be computed at the rate of 2% of the purchase price or appraised value of the vehicle, less the value of the interest retained by the owner in said motor vehicle.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

PMC: A

MOTOR VEHICLE: REGISTRATION: LICENSE AND FEE:

JOHN M. DALTON



Payment of prescribed registration fees under Sec. 301.060, Laws Mo. 1951, is required and a certificate of ownership to a motor vehicle must first be obtained as a prerequisite to obtaining a certificate of registration under Sec. 301.010(19) RSMo. 1949. Under the provision of the definition of owner in Sec. 301.010(18) Laws Mo. 1951, page 695, 697, the Director of Revenue is not authorized to register a motor vehicle in the name of any person except the owner under the definition of said section

XXXXXXXX

September 23, 1953

J. C. Johnsen

Mr. David A. Bryan
Supervisor, Motor Vehicle Registration
Division
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request of recent date for an official opinion of this office, in view of the length of the five page request letter it is deemed advisable to quote first the body of the letter then quote the questions immediately preceding the opinion replys thereto. The body of the letter of your opinion request is as follows:

"It is respectfully requested that an opinion be given to each of the specific questions submitted in this letter relative to the authority of the Director of Revenue under the administration of Chapters 301 and 144 R.S. Mo. 1949. In order to reduce the number of questions to a minimum and to avoid repetition a fact situation typical of transactions handled by this department is given followed by the questions arising out of the transaction.

"It has always been the position of this department and presumably the intent of the Legislature in enacting our Vehicle Registration Act that the person, firm, partnership, or corporation immediately responsible for the operation of a vehicle should be the one in whose name the vehicle is licensed and registered. Therefore, no certificate of title is given unless at the same time the vehicle is registered and all registration fees are paid. However, it is conceivable that the lawful owner and purchaser is not the one who is going to operate the vehicle in Missouri, but still desires a certificate

of title without having to register the vehicle. This type transaction usually occurs when a corporation organized and chartered in a state other than Missouri purchases vehicles from a Missouri dealer in order to let the Missouri dealer take advantage of additional sales and thus help him increase his quota or where such a corporation wants to lease these vehicles to another person, firm, partnership or corporation. Because the purchaser feels that he is entitled to a certificate of title upon payment of the sales or use tax but without payment of the registration fees, the following questions as to the authority of the Director are submitted:"

Your first question is as follows:

- "l. A foreign corporation organized and chartered in a state other than Missouri purchases vehicles in Missouri from a Missouri dealer intending to either operate the vehicles in the state of domicile or to lease them to another company, but not intending to operate them on Missouri highways:
 - "(a) Can the director issue a certificate of title in the name of the foreign corporation, who is the lawful owner and legal title holder, upon payment of the Missouri sales or use tax to the director, but without payment of the license or registration fee?
 - "(b) Would the answer to 1(a) be changed in any way if, in addition to the facts outlined above, the foreign corporation, while chartered and organized in a state other than Missouri, also maintained a branch office at a permanent address in Missouri and was licensed to do business in Missouri?
 - "(c) Assuming that the answer to 1(a) is 'yes', if the vehicles are immediately leased to a person, firm, partnership, or corporation to be operated by the lessee upon the highways of this state, is the lessee exempt from payment of the sales or use tax when he makes

application for a certificate of title and registration on the theory that the sales tax has been previously paid?"

It must first be presumed that what is meant by a certificate of title in your letter is now called a certificate of ownership. This is a common term and the Supreme Court cases on this same subject refer to a certificate of title in regard to the same section providing for this certificate of ownership. It possibly arose from the use of the word title in the original enactment of these sections. A certificate of ownership is provided for in Section 301.190, RSMo 1949, quoted in full for reference here and further reference throughout this opinion. Said section reads:

"l. No certificate of registration of any motor vehicle or trailer, or number plate therefor, shall be issued by the director of revenue unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle or trailer, or shall present satisfactory evidence that such certificate has been previously issued to the applicant for such motor vehicle or trailer. Application shall be made upon a blank form furnished by the director of revenue and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer."

The director of revenue shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name shall, thereupon issue an appropriate certificate, over his signature and sealed with the seal of his office, procured and used for such purpose. The certificate shall contain a complete description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, as the director of revenue may deem necessary, together with a statement of any liens or encumbrances which the application may show to be thereon.

"3. The fee for each original certificate so issued shall be one dollar, in addition to the fee for registration of such motor vehicle or trailer. The certificate shall be good for the life of the motor vehicle so long as the same is owned or held by the original holder of the certificate and shall hot have to be renewed annually."

It may appear from the context of the above and particularly from subparagraph "3" which provides that "the fee * * *shall be \$1.00 in addition to the fee for registration of such motor vehicle or trailer * * *;" that it was intended by this section that the certificate of ownership was to be issued only with the registration of a motor vehicle.

We have a further provision of law, however, in seeming conflict with the provision above and that is the underlined portion of Section 301.020, RSMo. 1949, quoted below, which is in part as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, containing:" (Underscoring ours.)

This above may be taken to mean that unless a motor vehicle is to be operated upon the highways of this state, it need not be registered and licensed. Can a certificate of ownership then be had for the motor vehicle without license payment? There are two interpretations possible. One, that "in addition to" means that the registration fee shall be paid simultaneously, the other would mean only that "in addition to" shows the dollar charge is not covered by the fee for registration and license.

It is provided in regard to the operation of motor vehicles upon the highway in subparagraph 2 of Section 301.080, Laws Mo. 1951, page 695-701, reads in part as follows:

"* * *When ownership of a non-registered vehicle, other than a commercial motor vehicle, which has not been previously operated on the public highways during the current registration year, is transferred the registration fee to

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be paid by the transferee shall be computed as provided above for new vehicles, providing a satisfactory affidavit of such nonoperation is filed with the motor vehicle department. * * **

Thus it is provided by the above for a certificate of ownership independent of registration. This last is cited for the
reason that there is a seeming conflict in the law if the fee for
a certificate of title and the fee for registration and license
must be paid simultaneously. The answer to question 1(a) must
therefore be that a lawful owner may obtain a certificate of ownership without the payment of the fee for a license to operate the
vehicle upon the highways of this state. Since the answer to
1(a) then is yes it would remain yes if the foreign corporation
mentioned in question (a) had a place of business in Missouri and
was licensed to do business in Missouri so long as the vehicles so
titled were not operated in Missouri.

Regarding question 1(c) of your request in accordance with the attached opinion defining "owner" dated April 17, 1953, and because no certificate of ownership or registration of a vehicle to an unqualified lessee as described in your question, hence the necessity for payment of sales or use tax would not arise.

In regard to the question which is designated as question 2 beginning in the first paragraph on page 3 of your request letter we quote the question here, which is as follows:

"It appears that a common business practice among owners of vehicles in this state is to enter into a written agreement with another person, firm, partnership, or corporation for the leasing of the vehicles for periods ranging from six months to several years. The position taken by this department has been to issue to the lessee a certificate of title and allow him to register the vehicle in his own name since the lessee is the one responsible for operating the vehicle during the term of the lease. Since the lessee appears to be entitled to have a certificate of title and registration in his name, even though he is not the lawful owner under Section 301.190, RSMo. 1949, and since the sales or use tax provisions appear to apply only to "owners" and not lessees the following questions as to how these provisions can be reconciled are submitted:

- "2. Assuming the following situation: Lessor of a vehicle is a Missouri resident and the holder of the legal title to the vehicle: a certificate of title has been issued in his name, plates have been issued to him all registration fees for the current year have been paid, and Missouri sales tax was paid when he purchased the vehicle; thereafter, he leases the vehicle to a lessee, also a Missouri resident, under a contract form of lease for a recited consideration of \$1.00 for a period of one year; among other terms the lease permits the lessee full use of the vehicle and contains covenants by the lessee that the vehicle will be returned to the lessor in the same condition at the expiration of the lease, except for the usual wear and tear:
 - "(a) Should the Director issue a certificate of title to the lessee upon his application even though such a lessee is apparently not the 'owner' as defined in Chapter 301 RSMo. 1949?
 - "(b) Assuming there is authority for issuing a certificate of title to the lessee is a sales or use tax payable by the lessee even though the lessor paid a sales or use tax when he purchased the leased vehicle?
 - "(c) If the answer to 1(b) is 'yes' should the Director of Revenue base his tax upon the total value of the vehicle or should the Director attempt to determine the value of the lease to the lessee?"

The answer to question 2(a) is no, in accordance with the attached opinion as to the definition of the word "owner" given with the answer to question 1(c), that being that there is no authority for the issuance of such a certificate of ownership as described as it would have to be to other than the lawful "owner."

Since there is no authority for the issuance of such a certificate of title there is no transaction for which a use tax could be collected under the circumstances set out in question 2(b).

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The answer to question 2(c) is also unnecessary since there can be no motor vehicle use tax due, there being no transaction where the duty arose to pay it.

Your third question including the paragraph immediately preceding it is as follows:

"Another common practice among business firms, especially large corporations with more than one place of business, is to purchase vehicles in the name of the company for the use of one of its subsidiaries, or branches, or for the use of its officers, agents, or employees. Since the subsidiary, branch, officer, agent, or employee is not the 'owner' but is responsible for the vehicle's operation under some kind of arrangement with the lawful owner, which often allows him complete control, it would appear from the apparent purpose of the Registration Act that he is entitled to have the vehicle registered in his name and a certificate of title issued by the Director. The following questions relative to this type of transaction are submitted:

- "3. Assuming the following situation: A resident Missouri corporation purchases several vehicles from a dealer in Missouri and pays the Missouri sales tax on the purchase; certificate of title is issued by the Director of Revenue in the corporate name and all registration fees are paid; thereafter, these same vehicles are assigned to a subsidiary of the corporation located in a different city and operated under a different name, and as a result of a mutual understanding, the subsidiary is to have complete control and management of the vehicles while they are assigned to it;
 - "(a) Should the Director issue a certificate of title to the subsidiary in its own name even though it is understood that the subsidiary is not the 'owner' of the vehicles?
 - "(b) If authority does exist for issuing a certificate of title in the name of the subsidiary, must a sales or use tax be paid to the director before title can be issued even though there is no actual sale, gift, or agreement and it is shown that the parent corporation paid a Missouri sales tax on the original purchase?

"(c) Would the answers to 2(a) and 2(b) be changed in any way if, instead of assigning the vehicle to a subsidiary, it was assigned to an officer, agent, or employee of the corporation for his personal and business use while residing in another city?"

In regard to this question it must first be stated that directions in regard to the registration of motor vehicles contained in Chapter 301 RSMo. 1949 and the amendments of 1951 on that subject are found in Section 301.190, RSMo 1949, subparagraph 1, previously quoted, in answer to question 1(a) in this opinion. It is to the effect that no certificate of registration is to be issued except upon an application and the granting of a certificate of ownership. Paragraph 2 of that same section will be requoted here for its reference:

"2. The director of revenue shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall, thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose.

* * *."

The latter portion of the above is omitted by us.

These sections referred to appear to prohibit a registration (by other than a lawful owner) rather than to either provide for it or condone such a transfer, or the issuance by the director of a certificate of ownership.

In answer to question 3(a) then there appears to be no reason why an assignment from one corporation to another corporation is any different than a transfer between natural persons. As was said by Judge C. B. Faris in the case of Commerce Trust Co. v. Woodbury, 77 Fed.(2d) 478, at 1.c. 487:

"(1,2) Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from its stockholders, whether they be one or more. In re Collins (C.C.A.) 75 F.(2d) 62; Wilson v. Crooks(D.C.) 52 F.(2d)

692; Majestic Co. v. Orpheum Circuit, Inc. (G.G.A.) 21 F. (2d) 720; Owl Fumigating Corporation v. California Cyanide Co. (D.C. 24 F. (2d) 718, loc. cit. 719; Pullman's Palace-Car Co. v. Missouri Pacific Ry. Co., 115 U.S. 587, 6 S. Ct. 194, 29 L. Ed. 499. Likewise, we think it must be conceded that neither ownership of all of the stock of one corporation by another, nor the identity of officers in one with officers in another. creates a merger of the two corporations into a single entity, or makes one either the principal or agent of the other. Fumigating Corporation v. Cyanide Co. (D.C.) 24 F. (2d) 718; Corsicana Bank v. Johnson, 251 U.S. 68, 40 S. Ct. 82, 64 L. Ed. 141; Marsch v. Railroad, 230 Mass. 483, 120 N.E. 120; Richmond, etc. Co. v. Richmond, etc., Ry. Co.(C.C.A.) 68 F. 105, 34 L.R.A. 625. But notwithstanding such situation and such intimacy of relation, the corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution, and when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud."

It should then be clear that a transfer between corporations is a transaction that should be consumated with every formality even though one of the corporations may own every share of the stock of the other corporation since they still remain as separate legal entities.

It would be well here to go into the distinct legal meaning of the word subsidiary. It is believed that the best definition of that word is contained in Baker v. Fenley et al. 128 S.W.(2d) 295, 298, 233 Mo. App. 998, 1003:

"* * *In relation to a company, he defines the word as 'a company of the shares of stock in which another company has at least a majority, giving it control.'"

Considering the above, and the definition of owner referred to hereinabove as contained in a previous opinion rendered to your Division, and which is attached, in answer to question 1(c) it

must be said that if the so-called subsidiary is not the owner as contained in the definition given in the statutes, Section 301.010, the Director should not issue a certificate of title. The answer to question 3(b) then is that since authority does not exist for issuing a certificate of title in the name of the subsidiary there could not be a transfer upon which a motor vehicle use tax would accrue and the answer to 3(c) is that there still cannot be a certificate of ownership issued to any officer, agent, employee or subsidiary corporation when it is understood that the transferee does not become the owner of the vehicle under the definition of owner.

Question 4, including the paragraph immediately preceding it, is as follows:

"A great amount of difficulty has been experienced in attempting to reconcile Section 301.190 RSMo. 1949, which apparently authorizes the Director to issue certificates of title and registration of vehicles in the name of persons, firms, partnerships, and corporations who are not lawful 'owner' of the vehicles as that term is defined in Section 301.010 (18) Laws, 1951, page 695, with the sections relating to the collection of the sales or use tax, Sections 144.070 and 144.440 RSMo. 1949. It does not appear that the sales or use tax sections contemplate the issuance of certificates of title to anyone other than an 'owner', thus raising the following question:

"4. Assuming that under Section 301.190 RSMo 1949 the Director of Revenue may issue a certificate of title to one who is not the lawful 'owner' as defined in Section 301.010 (18) RSMo 1949, but is otherwise entitled to have the same registered in his name, must such an applicant pay sales or use tax to the Director even though Sections 144.070 and 144.440 RSMo. 1949 relating to the collection of the sales or use tax appear to apply only to 'owners' and the sales or use tax has been previously paid by the lawful owner?"

In answer to the above question it must first be said that with the former definition of owner contained in Section 301.010, RSMo 1949, Subsection 16, was as follows:

"'Owner,' the term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively;"

Then Section 301.190 could have been construed as authorizing the Director to issue certificates of title and registration of vehicles to persons other than the holder of the legal title to the motor vehicle. It may be said, however, that the change to the new definition of owner as now contained in subparagraph 18 of the Laws of Mo. 1951, page 695, has changed the meaning of Section 301.190, as quoted on page 6, in its application, at least in regard to the authority of the Director to issue a certificate of registration to any one but the properly designated owner. It is presumed that in accordance with the old definition of owner the words "appropriate certificate" was used in the second subparagraph of the said section 301.190 because there could only be one issuance of the permanent certificate as provided for by this chapter 301 for each motor vehicle. Under the former definition the owner could register the motor vehicle and the lessee could also register it. The present definition of "owner" as mentioned above in Laws Mo. 1951, page 695, is discussed in the attached opinion heretofore mentioned. precludes, we believe, the issuance of a certificate of ownership to any other than those defined as owners under the statute. Where there is no transfer, no motor vehicle sales or use tax is to be paid. Whether or not sales tax is to be charged upon the rental of the motor vehicle is a separate and distinct problem not involved here. However, in the event a certificate of ownership is issued to one who qualified under the definition as "owner" then a use tax would have to be paid as a prerequisite to obtaining a title and registering as provided in paragraph 2. Section 144.440, Laws Mo. 1951, page 854, 858.

CONCLUSION

It is therefore, the opinion of this office that the Director of Revenue may, under provisions of Chapter 301, RSMo. 1949, and 1951 amendments thereto, issue a certificate of ownership to a motor vehicle without the necessity of the registration of such

Mr. David A. Bryan

motor vehicle when it is not to be operated on the streets or highways of this state. The residence of the corporation or individual seeking a certificate of ownership to a motor vehicle does not affect the privilege of obtaining such a certificate. The Director of Revenue is not authorized to issue a certificate of ownership to a lessee unless the lessee has a right of purchase upon performance of conditions with immediate right of possession, under the provisions of Chapter 301, RSMo. 1949 and 1951 amendments thereto.

This opinion which I hereby approve was written by my assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General

JWF:mw

OFFICERS: FEES AND SALARIES:

SHERIFFS:

Salary of sheriff in fourth elected in 1948 is reduced by change in

population as shown by 1950 decennial co

JOHN M. DALTON XXXXXXXXXX

1.29-53

January 29, 1953

John C. John:

Honorable Chas. B. Butler Prosecuting Attorney Ripley County Doniphan, Missouri

Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

> "The decennial census of 1940 showed the population of Ripley County to be 12606; the census of 1950 showed the population of Ripley County to 11404. Under Section 57.400, Statute 1949, the sheriff of fourth class counties was entitled to a salary of \$1900.00 a year when the population in counties having a population of 11500.00 and less than 13000.0. counties having a population of 10000.00 and less than 11500.00 the salary of the sheriff is now \$1800.00 a year. A sheriff elected in the year 1948 in a fourth class county, having a population 10000 and not more than 11500 would get only \$1800.00 a year.

> "I would like to have your opinion on the question if a sheriff elected in 1948, who was entitled to a salary of \$1900.00 a year, would be entitled to the same salary after the census for 1950 showed a population that only entitled the sheriff to a salary of \$1800.00 a year. In other words does a change in the population reducing the salary of an officer entitle him to continue the draw the salary the statute gave him when elected to office."

Honorable Chas. B. Butler

Section 57.400, RSMo 1949, provides for the compensation for sheriffs in counties of the fourth class, and, in part, reads:

"The sheriff in counties of the fourth class shall receive annually for his official services in connection with the investigation, arrest prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: * * * in counties having a population of ten thousand and less than eleven thousand five hundred, the sum of one thousand eight hundred dollars; in counties having a population of eleven thousand five hundred and less than thirteen thousand, the sum of one thousand nine hundred dollars; * * *

The above statute was enacted by the Sixty-third General Assembly, Laws of Missouri, 1945, page 1548. It was approved April 10, 1946, and became effective sometime prior to 1948 when the sheriff to which you refer in your opinion request was elected.

Under the above statute the compensation for sheriffs in counties of the fourth class is set up on a population basis, and inasmuch as it was in effect at the time the sheriff to which you refer was elected, said statute would fix the sheriff's salary or compensation for his whole term. However, if the population of the county would change, it could have the effect of changing the amount of salary or compensation that the sheriff could legally receive.

The case we have found to be the closest in point on this question is that of State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 S.W. 466. In that case a proceeding in mandamus was instituted by the Clerk of the Circuit Court of Crawford County against the judges of the county court to compel them to issue a warrant for salary to which he claimed he was entitled for the last two years of his term of office. The statute applying to circuit clerks classified them according to the population of their respective counties with regard to the fixing of salaries. It provided that, for the purposes of the act, the population of any county was to be determined by multiplying by five the total number of votes cast in such county at the last

persidential election. The law further provided that in counties having a population of fifteen thousand and less than twenty thousand the annual salary would be \$1,600, and in counties having a population of twenty thousand and less than twenty-five thousand the salary would be \$1.950 per year. The circuit clerk had been elected for a four-year term in November, 1918. The presidential vote in Crawford County for the year 1916 was such as would give the population of the county for salary purposes as between fifteen and twenty thousand. Consequently, for the first two years of the clerk's term of office he received an annual salary of \$1,600. 1920 the presidential vote increased so as to make the population of the county for salary purposes between twenty and twenty-five thousand, which would put the county in a population bracket that would require paying the clerk \$1,950 per year. For the last two years of his office the clerk had been paid \$1.600 per year, and this lawsuit was brought to compel the payment of the difference between \$1,600 and \$1,950 for the last two years in his term. The principal contention was that, due to the increase in population in the middle of his term, he was entitled to the higher salary. In ruling on the question the court, at S.W. 1.c. 469, 470, said:

> " * * * This act of 1915 was in effect when relator was elected. Under it, relator's salary was fixed for his whole term, but was not in named dollars and cents for the whole The effect of this act of 1915 was to term. say to relator, 'Your salary shall be determined upon the presidential vote of 1916, until there is another presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the presidential vote. The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too, if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher, but it was definitely

fixed at the date of his election. * * * *
The salary of each class was fixed, and as said no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed too, at a time long prior to relator's election. * * *" (Emphasis ours.)

While in the above case the court was considering whether or not a county officer could receive an increase in salary for the last two years of his term as a result of a change in population, it also declared what would be the result with respect to a change in salary if there was a decrease in population.

In the situation you have presented the statute fixing the salary of sheriffs in counties of the fourth class was in effect prior to and at the time the sheriff was elected, and under the authority of the above case would be applicable for determining the salary of the sheriff for his entire term of office based on a population classification of the county. However, if the population of the county changed so as to put the county in a different population classification, it would operate to change the amount the sheriff could legally receive as determined by Section 57.400, supra.

According to the facts which you have presented, the census of 1950 showed a reduction in population of your county so as to put the county in a lower population classification and under the salary statute would reduce the sheriff's salary from \$1,900 to \$1,800 per year.

Under the authority of the above case we believe that the change in population would require a reduction of the salary of the sheriff for the years 1951 and 1952.

To further sustain this position, your attention is directed to Section 1.100, RSMo 1949, which provides as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the

basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January first of each tenth year after 1951."

(Emphasis ours.)

The above statute declares the effective date of the 1950 decennial census to be January 1, 1951, and said statute is applicable in ascertaining the salary of any county officer for any year.

CONCLUSION

In the premises, it is the opinion of this department that the salary of a sheriff in a county of the fourth class who was elected in November of 1948 is reduced for the years 1951 and 1952, as a result of a reduction in population as shown by the 1950 decennial census which placed the county in a lower population bracket.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Frank Thompson.

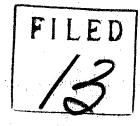
Yours very truly,

JOHN M. DALTON Attorney General

FT:ml

EXTRADITIONS:

A finding by a juvenile court that a person under seventeen years of age is a juvenile delinquent is not the basis for extradition and such person cannot be extradited on the basis of the delinquency charge.



March 5, 1953

Hon. Donald W. Bunker Executive Secretary Board of Probation and Parole Jefferson City, Missouri

Dear Mr. Bunker:

We have your recent letter in which you request an opinion of this department. Your letter reads as follows:

"I have been requested by a circuit judge to ask you whether, in your opinion, a juvenile delinquent may be extradited from another state.

"The case in point is that of Russell York, Missouri Probationer 742113-10, who was charged, and pleaded guilty to delinquency under the Juvenile Law. The offense was Larceny of a Motor Vehicle. On January 29, 1951, he was sentenced to the Missouri Training School for Boys at Boonville for an indexterminate period. He was fifteen years of age at the time. Parole was granted from the sentence by the court, who permitted him to return to his home in Peoria, Illinois, in the custody of his parents, Mr. and Mrs. Forrest York.

"The Board of Probation and Parole accepted supervision from the court for transfer to the supervision of the Illinois parole authorities. He has been under the supervision of the State of Illinois since January 29, 1951.

"Russell York recently committed a new offense in the State of Illinois. He is now being held in Peoria on a new charge. The Illinois authorities have recommended and requested revocation of the parole of this juvenile delinquent. The question is whether this juvenile delinquent can be extradited from Illinois and returned to the court for the execution of the sentence to the Boys Training School, Boonville, Missouri."

Hon. Donald W. Bunker

Your question is generally whether a juvenile delinquent can be extradited from another State and specifically whether Russell York the person mentioned in your letter, a juvenile delinquent, can be extradited from the State of Illinois to the State of Missouri.

Sections 211.010 RSMo 1949 to 211.300 RSMo 1949, pertain to neglected and delinquent children in counties of the first and second classes. The words "delinquent child" are defined both in Section 211.010 RSMo 1949, applicable to first and second class counties and the City of St. Louis and Section 211.310, RSMo 1949, applicable to third and fourth class counties. The definitions in the two said sections are substantially the same and for the purposes of your inquiry the definition in either section is applicable. We, therefore, quote paragraph three of Section 211.310 RSMo 1949 as follows:

"The words 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill repute or any place where any gaming device is operated; or any saloon or dramshop where intoxicating liquors are sold: or who is either habitually truant from -any day school or who, while in attendance at any school. is incorrigible, vicious or immoral. Any disposition of any delinquent child under sections 211.310 to 211.510, or any evidence given in such cases shall not in any civil. criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases under sections 211.310 to 211.510."

We call attention to the fact that said section lists numerous and varied acts or courses of conduct which may constitute a basis for a declaration by a Juvenile Court that a person under the age of seventeen years is a delinquent child and among those acts or courses of conduct is listed the violation of any law of this State.

Russell York a boy under seventeen years of age mentioned in your letter was charged with and pleaded guilty to delinquency under the Juvenile Law. The offense seems to have been Larceny of a Motor Vehicle, which offense constituted ground for the court to designate him as a delinquent child and the court accordingly sentenced him to the Missouri Training School for Boys at Boonville for an indefinite period. The court then according to your letter paroled York who was fifteen years old at the time and permitted him to return to his home in Illinois in the custody of his parents. York has since committed an offense in Illinois and the Illinois authorities suggest

Hon. Donald W. Bunker

that his Missouri parole be revoked and you desire to know whether York who has been convicted of nothing but juvenile delinquency can be extradited.

In order to answer this specific question we must consider the question as to whether or not an affidavit or an indictment charging a person under seventeen years of age with the commission of a orime, which charge has been adjudicated and disposed of by a finding of the Juvenile Court to the effect that the person charged is guilty of juvenile delinquency constitutes such a charge by affidavit or indictment of the commission of a crime as comes within the provisions of the Extradition Law of the United States, as set forth in Title 18, Section 3182 U.S.C.A., and the further question as to whether a person who has been peroled by a Missouri Court to the custody of persons in another State, and is in that other State in the custody prescribed by the said Missouri Court is a fugitive from justice within the meaning of the last hereinabove cited statute.

Said Title 18, Section 3182 U.S.C.A., is quoted as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic, by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

Answering the last above mentioned question first, we comment that it is apparent that under the above quoted Federal Statute that in order to be subject to extradition the person sought to be extradited must be a fugitive from justice. In this connection we quote as follows from the opinion of the court in Ex parte Tanner, 128 P. 2d 338 1.c. 341:

** * * * * * * * * * * * * * * * It has been held that a convict whose parole has been revoked is a fugitive from justice within the meaning of this statute, even though he entered the asylum state with the consent of the paroling authorities, and is subject to return to the demanding state by extradition proceedings. In re McBride, 101 Cal. App. 251, 281 P. 651; for cases from other jurisdictions see notes in 78 A.L.R. 419, 8 A.L.R. 903.

Accordingly we deduce from these holdings the conclusion that the mere fact that Russell York was paroled to his parents in Illinois and went to Illinois pursuant to the provisions of the parole order does not keep him from being extraditable as a fugitive from justice upon the revocation of the parole by the Missouri Court.

We must now consider the question whether an affidavit charging a boy under seventeen years of age with the commission of a crime in Missouri is the basis for extradition from another state, when as a matter of fact he was not prosecuted pursuant to that charge but was pursuant to the lawful exercise of the discretion vested in the Judge of the Juvenile Court proceeded against as a delinquent child and held to be such by said court.

It is obvious that the purpose of the extradition under consideration is to accomplish the return of the juvenile delinquent to Missouri in order that he may be given the benefit of the corrective measures provided in this state for juvenile delinquents in accordance with the court's sentence and that he is not wanted in Missouri for the purpose of prosecuting him for the crime of larceny with which he was charged.

While the charge that the juvenile delinquent committed a crime may have been a contributing factor or in fact the only factor in his conviction of juvenile delinquency he was nevertheless not convicted of crime and the criminal charge against him was disposed of by the court through the court's exercise of the discretion vested in it by law pursuant to which discretion the court instead of trying him for a crime tried him and convicted him on the charge of juvenile delinquency and held him to be a juvenile delinquent. The criminal charge was thereby disposed of and there is no charge of crime now pending against said juvenile delinquent in the State of Missouri. In this connection we quote as follows from State v. Rutledge, 13 SW 2d 1061, 1.c. 1066 as follows:

Hon. Donald W. Bunker

"When a delinquent child is brought before a juvenile court charged with the violation of a criminal statute, the judge of that court must determine insthe first instance whether such child shall be proceeded against as a delinquent, or prosecuted under the criminal law. * * * * * * *

A person convicted of juvenile delinquency has not been convicted of a crime. In this connection we again quote as follows from State vs. Rutledge, supra, 1. c. 1064:

CONCLUSION

We are accordingly of the opinion that, since the only criminal charge against Russell York has been disposed of by a finding that he is a juvenile delinquent, and, since a conviction of juvenile delinquency does not amount to a conviction of a crime, he cannot be extradited from another state, and we are further of the opinion that no juvenile delinquent can be extradited on the basis alone of his conviction of juvenile delinquency even though that conviction resulted from a charge of violation of a criminal statute.

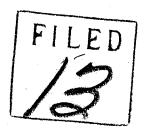
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Samuel M. Watson.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

SMW: A

NEPOTISM: PUBLIC OFFICER: Receiving personal service from wife does not violate Section 6, Article VII Constitution of Missouri 1945, where the wife does not occupy an official position nor render service to the State.



May 15, 1953

Honorable Charles B. Butler Prosecuting Attorney of Ripley County Doniphan, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"Under the nepotism act does the County Collector have the authority to employ his wife in the office, even if not paid a salary?"

This office has held on numerous occasions that a public officer receiving personal service from his wife or other relative in the discharge of his official duties did not violate Section 13 of Article XIV of the 1875 Constitution, where the wife was not appointed to an official position. Typical of such opinion was one directed to Mr. W. D. Ross, October 4, 1933, wherein it was stated:

"We believe, however, that the proper construction to be placed upon the constitutional provision is that such persons must be appointed to hold an official position existing under the laws or constitution of this State. We can see a distinction between a person rendering service to the State in an official capacity and rendering service to an individual official because of their

relationship. The test, as we understand it, is whether or not the person is appointed to fill an official position and as such to render service to the State. Where a public officer has in his office a member of his family who does not occupy an official position; nor as such render service to the State, but whose services are rendered personally, without expense to the State, to the officer by reason of the family relationship, we do not believe that such situation comes within the provision of Section 13 of Article XIV."

Section 13 of Article XIV of the Constitution of Missouri 1875 provided as follows:

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdividion thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Section 6 of Article VII of the Constitution of Missouri 1945 provides:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

While the provision of the 1945 Constitution differs somewhat in terminology from the provisions found in the Constitution of 1875, we believe that in substance it remains the same. By virtue of this fact, we adopt as our view the statement of this office in the prior opinion noted. In addition thereto, we wish to state in reference to the term "employment" as found in the present Constitution that the mere fact that a relative within

Honorable Charles B. Butler

the prohibited degree is assisting an officer in his official duties does not place such person in the employ of the State (or political subdivision) as we comprehend the use of the term. Likewise, the fact that the wife receives no compensation from the State, would not of itself prevent her from being in the employ of the State, since an employer-employee relationship may be obtained in the absence of compensation.

You do not state in your request, and therefore we must assume for the purpose of this opinion, that the person to whom you refer is not to be employed as a statutory clerk or deputy in any sense. We assume that such person will merely be assisting the officer personally; that she will not take an oath of office or perform, either in her own name or in the name of the officer, any of the duties of a statutory clerk or deputy. In view of the foregoing, it is our opinion that the provisions of Section 6 of Article VII of the Constitution of Missouri 1945, are not violated by a public officer who has in his office a member of his family who does not occupy an official position nor render service to the State in an employer-employee relationship, but who by virtue of such relationship renders service personally to the officer and at no expense to the State.

CONCLUSION

It is therefore the opinion of this office that a county collector is not guilty of violating Section 6 of Article VII, Constitution of Missouri 1945, by permitting his wife to render to him personal service where the wife is not holding an official position nor rendering service to the State.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

PUBLIC OFFICERS: Offices of County Judge and Deputy Sheriff incompatible, and one person cannot hold both offices simultaneously.



May 28, 1953

Honorable C. M. Buford Prosecuting Attorney Reynolds County Ellington, Missouri

Dear Mr. Buford:

In your letter of May 23, 1953, you request an official opinion of this department as follows:

> "Will you please let me know if a County Judge can legally hold the office of Deputy Sheriff."

An examination of the Constitution and statutory laws of Missouri has disclosed no prohibition against one person holding the offices of County Judge and Deputy Sheriff simultaneously. It is the common law rule that a person may hold two or more public offices at the same time so long as the duties of each are not inconsistent or incompatible. This rule, and a test for determining incompatibility is stated in State vs. Grayston, 163 S.W. (2d) 335, 1.c. 339:

> "* * * The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

Section 57.250, RSMo 1949, provides for appointment of deputy sheriffs in class three and four counties.

Honorable C. M. Buford:

The County Court has no power to approve appointments of deputies or to fix their salaries. Such power is vested with the Circuit Court. The power to appoint deputies is vested with the sheriff. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment. Since the sheriff has the power to appoint and remove his deputies, there can be no question of his control of their activities.

This power of removal would place a deputy who is a county judge in a subordinate position to the sheriff, and, of course, might tend to improperly influence the deputy sheriff in the discharge of his duty as judge of the County Court. That the County Court and the sheriff may in many instances conflict is obvious. One of the more obvious being the settlement which the sheriff is required to make to the County Court by Section 50.390, RSMo 1949:

"All county officers and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court in the manner and at the time prescribed by law."

and by Section 50.370, RSMo 1949:

"In all counties of classes three and four, every county officer who receives any fees or other remuneration for official services which is payable to the county, except recorders of deeds whose offices are separate from that of circuit clerks, shall, at the end of each month file a verified report with the county court of his county showing all fees charged, and accruing to his office and the act or service for which each such fee was charged, together with the names of persons paying or liable for same. Upon the filing of such report, each said county officer shall forthwith pay over to the county treasurer all fees and other moneys collected by him which belong to the county and shall take two receipts therefor, one of which shall be filed with the county court and the other shall be kept on file in his office. Every such officer

Honorable C. M. Buford:

shall be liable personally and on his official bond for all fees collected by him and not accounted for and paid into the county treasury as herein provided."

Another glaring instance where conflict may arise is the reimbursement to the sheriff and his deputies for travel and other expenses as provided by Section 57.430, RSMo 1949:

"In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

The above example indicates the amount of conflict that a person may have who attempts on one hand to collect his expenses from the county, and who on the other hand must determine whether such reimbursements are valid. The Supreme Court of Missouri in State ex rel. McAllister vs. Dunn, 209 S.W. 110, 1.c. 112, made this comment about the incompatibility of such situations:

"* * * What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? * * *."

That a county judge is a public officer is so unquestionable that we feel it unnecessary to cite authority. However, to refute any contention that a deputy sheriff is a mere employee, rather than a public officer, the following statement of the Supreme Court of Missouri in State ex rel. Walker vs. Bus, 135 Mo. 327, l.c. 332, is quoted:

"* * * he (deputy sheriff) is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers."

(Words in parenthesis ours.)

Honorable C. M. Buford:

In addition to the accounting which the sheriff must make to the County Court, and the payment of money which must be made by the County Court to the sheriff, there is the further incompatibility in that the sheriff's office is subordinate to the County Court on those occasions when the sheriff must execute an order of the County Court.

CONCLUSION

It is, therefore, the opinion of this office that in view of the incompatibility between the offices of county judge and deputy sheriff, one person may not hold both offices at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:MM:irk

CO-OPPRATIVE ASSOCIATIONS:

TAXES:

The Pure Milk Producers Assoc. of Kahsas City, Missouri, is not exempt from payment of a merchant's tax levied by the County Court of Jackson County Missouri.

xxxxxxxx

July 13, 1953

John M. Dalton



XXXXXXX

John C. Johnsen

Honorable Hilary A. Bush County Counselor Suite 202, Courthouse Kansas City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The County Court of Jackson County has requested that I ask your opinion on the following set of facts:

"The Pure Milk Producers Association of Greater Kansas City, Inc., has requested that a Merchant's Tax assessed against them in this county be abated by reason of Section 274.180 R.S.Mo. '49.

"The Court requests your opinion as to whether or not the provisions of this section exempts such a corporation from Merchant's Tax."

While you do not so state, we assume from the nature of your inquiry, and from your reference to Section 274.180, RSMo 1949, which section relates only to co-operative associations, that the Fure Milk Producers Association of Greater Kansas City, Inc., is a co-operative association within the meaning of Chapter 274,RSMo 1949. Section 274.180, to which you refer, reads as follows:

"Each association organized hereunder shall pay an annual fee of ten dollars only, in lieu of all franchise or license or corporation or other taxes, or taxes or charges upon reserves held by it for members." The question before us is whether, in view of the above section, and in view of the further fact that the Pure Milk Producers Association is a co-operative association, the Pure Milk Producers Association is exempt from paying a merchant's tax in Jackson County.

On this point, we would call attention to the fact that a merchant's tax is a property tax. In the case of American Manufacturing Company v. City of St. Louis, 192 SW 402, the court held that an ad valorem tax levied under the laws of Missouri upon merchants and manufacturers was a tax upon property as distinguished from a tax upon business.

In the case of State ex rel. v. Carelton Dry Goods Co. v. Alt, 123 SW 882, the court held that the taxation of merchants and manufacturers, though in form a license tax, was in fact a property tax and not merely an occupation or license tax.

In the case of State ex rel. St. Louis Public Schools v. Tracy, 6 SW 709, the court held that a merchant's tax was a personal property tax. Numerous other cases could be cited to substantiate this point, but we do not feel that such is necessary as it is well established in Missouri law that a merchant's tax is a property tax.

Section 274.180, supra, clearly states that the "annual fee of ten dollars", is "in lieu of," or substitution for, "all franchise or license or corporation * * * taxes." In other words, the statute states that when the annual fee of ten dollars is paid, the co-operative association shall not pay a franchise, license, or corporation tax. But the statute goes further than that, and states that after payment of the annual fee of ten dollars, the co-operative association shall not pay "other taxes, or taxes or charges upon reserves held by it for members."

The question which we now have before us is whether the term "other taxes", in the exemption part of the statute, includes property taxes, which we held above a merchant's tax, to be. On its face it would appear that the term "other taxes" was all inclusive. However we do not believe that actually it is so. It will be noted that the term "or other taxes" follows immediately after the listing of "franchise or license or corporation" taxes. We believe, therefore, that the rule of ejusdem generis is applicable in this instance. That rule, as stated at 1. c. 398 in the case of Zinn v. City of Steelville, 173 SW (2) 398, is:

"* * * where general words in statute or ordinance follow specific words, designating special things, general words will be considered as applicable to things of same general character as those which are specified."

In our situation, of course, the "specific words" designated are "franchise or license or corporation", and the "general words" are "or other taxes." If, therefore, "franchise or license or corporation" taxes are not "property taxes", then the general words "or other taxes" could not refer to property taxes, and the Pure Milk Producers Association would not, by reason of those words, be exempt from paying a merchant's tax, which, we have pointed out, is a property tax.

We do not believe that the specified taxes, i. e., franchise, license, and corporation, are property taxes, but that they are excise taxes. In this regard, we direct attention to the case of General American Life Insurance Company v. Bates, 249 SW (2d) 458, which at 1. c. 462, states:

"We consider the nature of the tax before taking up respondents' cases most directly in point. Taxes fall into three natural classifications: capitation or poll taxes, taxes on property, and excises. State ex rel. Missouri Portland Cement Co. v. Smith, 338 Mo. 409, 413 /I,27, 90 S. W. 2d 405, 406 27; State ex rel. Tompkins v. Shipman, 290 Mo. 65, 75 (III), 234 S. W. 60, 62 (III). The instant case involves a property tax expressly so designated in the constitution, Art. 10 § 4, quoted supra, and made subject to specific constitutional inhibitions. Excises include *** * * every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation."' State ex rel. Missouri Portland Cement Co. v. Smith, supra 7338 Mo. 409, 413 /1,27, 90 S W 2d 4077; State ex rel. Tompkins v. Shipman, supra; Viquesney v. Kansas City, 305 Mo. 488, 495 (I-V), 266 S. W. 700, 702 /I-107; 51 Am. Jur. 61, § 33; 33 C. J. S., Excise, page 110."

Also, to Section C, page 446, Vol. 53, Corpus Juris Secundum, which states:

"A 'license fee' or, as it is otherwise called, a 'license tax,' the two terms generally being regarded as synonymous, since the requirement of payment for a license is only a mode of imposing a tax on the licensed business, is the sum exacted for the privilege of carrying on a particular occupation or business. The term has been used indiscriminately to designate impositions exacted for the exercise of privileges of all kinds, and has been held to include an occupation tax, privilege tax, and excise tax, although, as discussed infra § 3, it is in strict usage distinguishable from such other taxes.

"Consumption or use tax. A 'consumption' or 'use' tax is an excise tax on the consumption or use of property, which is imposed on the user.

"Excise tax. The term 'excise tax' as used within the scope of the subject of licenses has generally been defined as a tax laid on a license to pursue certain occupations, corporation privileges, sales, or consumption of commodities, although it may also have the broader meaning of any tax which is not a burden laid directly on persons or property, as discussed in the definition Excise, 33 C. J. S. p 110 note 4-p 111 note 7, in Internal Revenue \$ 1, and in the C. J. S. title Taxation \$ \$ 121-124, also 61 C. J. p 242 note 74p 244 note 3. * * *

In the case of Commonwealth v. Quaker Oats, 350 Penn. 253, it was held that a franchise tax imposed on a foreign corporation was an excise tax. In the case of Shannon V. Streckfus Steamer, 279 Ky. 649, it was held that the term license tax was synonymous with the term excise tax.

In view of the above, we believe that it is clear that franchise, license and corporation taxes are not property taxes; that by reason of the manner of its use in Section 274.180, supra, the rule of ejusdem generis applies to the words "or other taxes", which means that the words "or other taxes" do not refer to property taxes, and that since a merchant's tax is a property tax, that the words "or other taxes" as used do not create an exemption as to the payment of a merchant's tax.

We may say further that even if the rule of ejusdem generis did not apply to the words "or other taxes" in Section 274.180, supra, and that if the words "or other taxes" did refer to property taxes, that it would be our opinion that such portion of Section 274.180 would be void because contrary to the Constitution of Missouri. Section 6 of Article X of the Missouri Constitution states:

"Exemptions from Taxation.--All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation: and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

In the light of the above, in order for a law exempting property from taxation to be valid, such exempted property would have to fall into at least one of the classifications set forth in Section 6 of Article X, supra. The only class into which the Pure Milk Producers Association, a co-operative association, could possibly fall would be "agricultural and horticultural societies."

In this regard we call attention to Section 11, page 388, Vol. 3, Corpus Juris Secundum, which reads:

"An agricultural society is a society for promoting agricultural interests, such as

the improvement of land, of implements, or of livestock. It is, in a sense, an educational institution, but may furnish harmless amusement as well.

"The nature of an agricultural society depends on the statute creating it. It may be a public, quasi-public, or a private, corporation. An agricultural society is not necessarily a public corporation or organization because it exists for a public purpose and not for private profit and may be aided by public money or is subject to certain public duties, where the society is free to manage its own affairs; on the other hand, although in the form of a society, it may be a public institution, because of the duty to make certain reports. An agricultural society, it has been held, may be a public organization, somewhat similar to a school district or other municipality, or, on the other hand not a 'municipality,' as the word is generally understood, although supported in part by public revenue; an agency of the state or, on the contrary, not an agency of the state, in this sense; nor an agency of the county but a separate legal entity; a corporation of public character or benefit; in its essential elements, a charitable organization or, on the contrary, not to be classed as such."

We would further call attention to the case of Exposition Driving Park v. Kansas City, 174 Mo. 425. At 1. c. 433, the court stated:

"The exemption of plaintiff's property must, if at all, be authorized by section 6 of article 10 of the Constitution of Missouri, which provides that 'such property, real or personal, as may be used exclusively for agricultural or horticultural societies' may be exempted, and the statute, section 7505, Revised Statutes 1889, then in force, which provides that 'the real estate and personal property which may be used exclusively for agricultural or horticultural societies heretofore organized, or which may hereafter organized in this State, shall be exempted from taxation for State, county, city, or other municipal purposes."

"Is the plaintiff an agricultural or horticultural society within the meaning of this constitutional provisions, and was this land used exclusively for such a society? The contention of plaintiff is that a business corporation organized as it was under article 8 of chapter 21, Revised Statutes 1879, section 929, for the purpose, among others, of encouraging agricultural and horticultural pursuits and to establish and maintain a race course and promote athletic and other sports and amusements, is an agricultural and horticultural society within the meaning of the Constitution.

"In the ascertainment of the meaning of any law, fundamental or statutory, it is legitimate and even necessary to trace the history of the terms used herein in order to gather their significance. Prior to the adoption of the Constitution of 1875 the Legislature was forbidden to pass any law exempting any property, real or personal, from taxation, except such as should 'be used exclusively for public schools, and such as belonged to the United States, to this State, to counties, or to municipal corporations within this State.' Constitution of 1865, art. 11, sec. 16.7

"As early as 1853 the General Assembly of this state incorporated the Missouri State Agricultural Society. Act February 24, 1853.7 By an act of the Legislature, approved September 13, 1855, that law was repealed, and a new act adopted dividing the State into agricultural districts, and establishing a society for each, and designating the counties that should constitute such district agricultural society. Their powers were defined by the act.

"Later in 1863 the Missouri State Board of Agriculture was created a body corporate and it was made the duty of all agricultural and horticultural societies to make reports to such State Board.

"The scheme of promoting county agricultural societies will be found in the General Statutes of 1865, pp. 321 to 324. These societies were intended to promote agriculture, manufacturers and raising stock.

"The county courts were authorized to vote money for premiums and they were adjuncts of the State Board of Agriculture and the presidents of said county socieites were ex-officio members of the State Board of Agriculture, and they were required to make reports of their transactions to the State board."

From the above, we believe that it is clear that the Pure Milk Producers Association is not an "agricultural or horticultural society", within the meaning of Section 6 of Article X of the Missouri Constitution. If, therefore, Section 274.180 attempts to exempt from a property tax the Pure Milk Producers Association, it is void as being in conflict with Section 6 of Article X of the Missouri Constitution which holds that a law cannot be passed exempting from a property tax any property unless such property falls within one of the classifications set forth in said Section 6 of Article X.

In this regard we direct attention to a paralled situation discussed in the case of General American Life Insurance Co. v. Bates, 249 SW (2d) 458. At l. c. 464:

"Section 6, Art. 10, Mo. Const. 1945, effects two constitutional classes of property: (1) taxable, and (2) exempt. The 'in lieu' statute, Laws 1945, p. 1023, exempts from the intangible personal property tax act, Laws 1945, p. 1914, the intangible personal property of respondents; and in so doing is an unauthorized attempt to reclassify as exempt property not enumerated in said \$ 6 as exempt but which is there constitutionally classified as taxable property. This, it has been held, the lawmaking power may not do. State ex rel. Tompkins v. Shipman, 290 Mo. 65, 234 S.W. 60, 62 (II-IV). See Life Association of America v. St. Louis Board of Assessors, 49 Mo. 512, 519, 521, which is construed in State ex rel. Missouri State Life Ins. Co. v. Gehner, 320 Mo. 691, 8 S. W. 2d 1068, 1069 (1), as holding a statute providing for the annual payment by certain life insurance companies of \$150 to \$200 for the support of the insurance department 'in lieu' of all taxes whatsoever contravened the 1865 constitutional provision, Art. 11, \$ 16. against the exemption of property from taxation."

We do not feel that the Association is exempt by reason of Section 137.100, RSMo, 1949.

CONCLUSION

It is the opinion of this department that the Pure Milk Producers Association of Greater Kansas City, Inc., is not exempt from the payment of a merchant's tax levied by the County Court of Jackson County, Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/mv

Compensation of assessor who takes office September 1, 1953, determined under Senate Bill No. 40 of the 67th General Assembly.

JOHN M. DALTON



August 5, 1953

John C. Johnsen

Honorable C. M. Buford Prosecuting Attorney Reynolds County Ellington, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"I am requested by our county assessor to get an opinion from you on Senate Bill No. 40, as to when he can the raise granted him in said bill."

Senate Bill No. 40 of the 67th General Assembly, which was approved by the Governor on May 8, 1953, repeals and re-enacts Section 53.130, RSMo 1949, relative to the compensation of the county assessor in third class counties, and Section 53.140, RSMo 1949, relative to compensation of the county assessor in fourth class counties. Inasmuch as Reynolds is a fourth class county, only the latter section will be of concern to you. This section reads as follows:

"The compensation of the county assessor in counties of the fourth class shall be sixty cents per list, and each county assessor shall be allowed a fee of six cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one half of which shall be paid out of the county treasury and the other one half out of the state treasury. The assessor in counties of

the fourth class shall place the street address or rural route and post office address opposite the name of each tax-payer on the tangible personal property assessment book; provided, that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

The present compensation is forty-five cents per list in counties having a population of 7,500 or more and forty-five cents for each personal assessment list and resident land list and twenty cents for each nonresident real estate assessment list in counties having a population of less than 7,500. This is the only change made in the section by Senate Bill No. 40.

Under Section 53.010, RSMo 1949, assessors are elected at the general election for a term of four years and take office on the first day of September next after their election. Under this section the person elected in your county at the last general election will take office on September 1, 1953. Under the provisions of Section 29 of Article III of the Constitution of Missouri, 1945, Senate Bill No. 40 will become effective ninety days after the adjournment of the last General Assembly, or August 29, 1953.

In view of the fact that the bill will become effective prior to the assessor's taking office, it will, as to the assessor who assumes office on September 1, be immediately applicable to him.

The person holding the office for the present term has undoubtedly completed his duties in preparing the assessment lists for the current year, and, inasmuch as the bill will be effective only for the last three days of the current term, probably no question would arise as to his right to compensation under the bill. In any event, under the provisions of Section 13 of Article VII of the Constitution of Missouri, 1945, which prohibits the increase in the compensation of county officers during the term of office, the increase provided by this bill could not become effective during the term of the present incumbent.

CONCLUSION

Therefore, it is the opinion of this office that the county assessor in fourth class counties who takes office on September 1, 1953, will be entitled to the compensation as provided in Section 53.140 of Senate Bill No. 40 of the 67th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRWsml.

STATE MERIT SYSTEM LAW: SECRETARY BOARD OF PROBATION AND PAROLE:

That the provisions of the State Merit System Law do not apply to the Secretary of the Board of Probation and Parole.



Honorable Donald W. Bunker Executive Secretary Board of Probation and Parole Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

> "May I please have your opinion on the following question: Do the provisions of The State Merit System Daw, Chapter 36, R. S. Mo. 1949 apply to the position of the 'secretary, who shall be the chief administrative and executive officer of the board' of probation and parole as described in Section 549.220 R. S. Mo. 1949?"

Section 549.200, RSMo 1949, paragraphs 1 and 4, states:

"l. There is hereby created and established a 'Board of Probation and Parole, which shall consist of three members appointed by the governor, by and with the advice and consent of the senate, no more than two of whom shall be of the same political party. Only persons of recognized integrity and honor, known to possess ability, experience and other qualifications, fitting them for the successful performance of their official duties, shall be eligible for appointment to this board.

"4. Members of this board shall reside in Jefferson City during their terms of office and shall devote their full time to the duties of their office."

Section 549.220, RSMo 1949, states in part:

"The board of probation and parole shall appoint a secretary who shall be the chief administrative and executive officer of the board."

From the above we see that the secretary of the board of probation and parole is the secretary of a board, the members of which are required to be appointed by the governor.

Section 36.030, RSMo 1949, states in part:

- "l. There is hereby established for certain employees of the state, a system of personnel administration based on merit principles and designed to secure efficient administration. system shall govern the appointments, promotions, transfers, lay-offs, removal, and discipline of certain employees, and other incidents of state employment. Except as herein specified, all appointments and promotions to positions covered by this chapter shall be made on the basis of merit and fitness, to be ascertained by competitive examinations. The personnel division created under this law shall be responsible for administering the provisions of this chapter, and it shall also render such services to the departments and divisions covered hereunder as may be necessary and desirable to assist the officials thereof in discharging their responsibility for maintaining and increasing the effectiveness of personnel administration.
- "2. The provisions of this chapter shall apply to all offices, positions and employees of the state department of public health and welfare, the state department of corrections, and the division of employment security of the department of labor and industrial relations, except such offices, positions and employees within the above named agencies as are herein specifically exempted.
- "3. The following offices, positions and appointments in the agencies covered by this chapter are hereby exempted from the operation of this law and may be filled without regard to those provisions hereof which relate to the selection, appointment, pay, tenure and removal of persons employed in such agencies:
- "(1) Members of boards and commissions and heads of departments required by law to be appointed by the governor, except the personnel director;

- "(2) One secretary for each board or commission the members of which are appointed by the governor, except the personnel advisory board;
- "(3) One secretary for each director, division head and each member of boards and commissions the members of which devote their full time to the business of the board or commission the members of which are appointed by the governor, except the personnel director; * * *."

From the above we see that the secretary of the board of probation and parole is exempt from the application of the state merit system law.

CONCLUSION

It is the opinion of this department that the provisions of the state merit system law do not apply to the secretary of the board of probation and parcle.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/ld

SHERIFFS: COUNTY COURTS: DEPUTIES: County court of a first class county has authority to authorize the appointment of deputy sheriffs in addition to statutory number and to appropriate money for their compensation regardless that the sheriff has voluntarily stated to the court that he proposes to have such additional deputies attend a full-time, two-month training course while employed as deputy sheriff.

FILED /

October 28, 1953

Honorable Hilary A. Bush County Counselor Suite 202, Courthouse Kansas City, Missouri

Dear Mr. Bush:

We render herewith our opinion based on your request of September 24, 1953, which request reads as follows:

"The Sheriff has requested that the County Court authorize the appointment of fifteen additional deputies. He stated in open court that he intended to appoint these fifteen men from the list of qualified applicants for positions in the State Highway Patrol; that some, and perhaps most of them, would not be residents of Jackson County at the time of the appointment; that he intended to send these men, immediately upon placing them upon the payroll, to a two month school for peace officers about to be conducted by the State Highway Patrol in Sedalia, Missouri; that upon their graduation from that school he intends to discharge fifteen of his present deputies and use the fifteen new men in their place and assign them to patrol duty.

"The County Court has requested that I ask your opinion as to whether or not the County Court has the power to appropriate

money to pay the salaries of these deputies while they are attending school and not performing normal duties of the Sheriff's office?"

The precise question presented by your request is a novel one, and so far as our research has revealed, has never confronted any court. We believe, however, that the statement of the sheriff to the county court as to his intention to have the deputies attend a training course for the first two months of their employment would not take from the county court the authority to appropriate funds for payment of their salaries. The order of the court would, we assume, simply fix the number of deputies allowed to the sheriff (above the number authorized by statute without county court approval) and appropriate the money for payment of their salaries. It would not include any reference to the activities in which such deputies were to be engaged for any given time.

Certainly the fixing of the number of deputies above the statutory number and the budgeting and appropriation of money for their compensation is within the power of the county court. Section 57.200, Mo. R. S., Cum. Supp., 1953, (Senate Bill No. 373, 67th General Assembly); Section 50.550, RSMc 1949.

We do not see that the voluntary statement of the sheriff that he intends to send these deputies to a training course for two months after they have been employed makes any difference as to the county court's power to appropriate the money.

The county court, before making its appropriation order, need not inquire precisely what are the duties of the sheriff and his deputies, how or whether they will perform them properly, or how much latitude they have in such matters as taking time from their routine duties for training. The court is bound to assume, so far as the order we are considering is concerned, that the sheriff's office will be conducted in compliance with law.

As to the propriety of one's attending a two-month training course while employed as a deputy sheriff, we specifically reserve our opinion. But it is the sheriff and his deputies for that; the county court before making its appropriation order need not inquire into it.

We think, too, that a different question might be presented should the court's order authorizing appointment of additional deputies and appropriation of money for their pay

make reference to attendance on the training course by the deputies authorized to be used. On this question, too, we reserve our opinion.

CONCLUSION

It is the opinion of this office that the county court of a first class county has authority to authorize the appointment of deputy sheriffs in addition to the statutory number and to appropriate money for their compensation regardless that the sheriff has voluntarily stated to the court that he proposes to have such additional deputies attend a full-time, two-month training course while employed as deputy sheriff.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General

WDK :hr

COUNTY COURTS: PLANNING COMMISSION: JACKSON COUNTY:



The Planning Commission of Jackson County is not authorized to appoint attorneys to represent it; the Planning Commission of Jackson County, the Board of Zoning Adjustment of Jackson County, and the County Court of Jackson County, are to be represented by the county counselor of Jackson County.

November 17, 1953

Honorable Hilary A. Bush County Counselor Suite 202 Courthouse Kansas City, Missouri

Dear Sir:

I am in receipt of your recent request for an official opinion. You thus state your request:

"At the request of the Jackson County Court, I am writing you in regard to a legal question which has arisen as to the authority of the Planning Commission to appoint attorneys to represent it, as well as the Board of Zoning Adjustment and the County Court in zoning matters which may arise from time to time.

"The Planning Commission has taken the position that under Section 64.030, RSMo. '49, it is authorized to appoint such employees as may be deemed necessary. The Commission has construed the word 'employees' as being all inclusive, thus authorizing it to appoint attorneys. The County Court has taken the position that under Section 56.640 RSMo. '49, the County Counselor is the proper legal officer to represent the Planning Commission, the Board of Zoning Adjustment and the County Court, in all zoning matters.

"In view of the above conflict, I would appreciate an opinion from your office as to whether or not the Planning Commission is authorized to employ attorneys by reason of Section 64.030. The Planning Commission has, since the adoption of the Zoning Order in 1943, appointed its own attorneys to represent it as well as the Board of Zoning Adjustment and the County Court in all zoning matters, and as a result

these attorneys have now in litigation eighteen cases which are being presented for trial and disposition. Since this office is not acquainted with any of these cases it becomes necessary that an opinion from your office issue without delay, so that the litigants will not be jeopardized by the aforesaid conflict of opinion."

Section 56.640, RSMo 1949, reads as follows:

"The county counselor and his assistants under his direction shall represent the county and all departments, officers, institutions and agencies thereof, except as otherwise provided by law, and shall commence, prosecute or defend, as the case may require, and exercise exclusive authority in all civil suits or actions in which the county or any county officer, commission or agency is a party, in his or its official capacity, draw all contracts relating to the business of the county and shall represent the county generally in all matters of civil law, and shall upon request furnish written opinions to any county officer or department."

It will be noted that the above section states that the county counselor shall represent "the county" and "all departments of the county," "offices," "institutions and agencies."

Section 64.010 RSMo 1949, creates a county planning commission, one of whose members shall be one of the judges of the county court. That section reads:

"In all counties of the first class the county court is authorized and empowered to provide for the preparation, adoption, amendment, extension or carrying out of a county plan and to create by order a county planning commission with the powers and duties as set forth in sections 64.010 to 64.160."

Section 64.120 RSMo. 1949, creates a county board of zoning adjustment, which is composed entirely of the three judges of the county court.

It would seem to be clear that the county planning commission

and the county board of zoning adjustment are departments of the county, institutions of the county, and agencies of the county, since they are brought into existence by the county to perform county functions. If this is true, then by Section 56.640, supra, the county counselor is their proper legal adviser, since by that section he is charged with representing "the county and all its departments, officers, institutions and agencies."

Likewise, it would seem clear that the county counselor should represent the county court, since it is composed of "officers" of the county.

You state that the planning commission takes the position that under Section 64.030 RSMo 1949, it has the authority to appoint attorneys to represent it. That section reads:

"The county planning commission may create and adopt rules for the transaction of its business and shall keep a public record of its resolutions, transactions, findings, and recommendations. The commission may appoint such employees as it may deem necessary for its work, and may contract with planners and other consultants for such services as it may require and may incur other necessary expenses, all subject to the approval of the county court; provided, however, the expenditures of county funds, by the commission shall not be in excess of the amounts appropriated for that purpose by the county court. The commission shall have such other powers as may be appropriated to enable it to perform its duties."

No doubt the words relied on by the planning commission for its authority are "the commission may appoint such employees as it may deem necessary * * *."

It would appear that the issue here is whether or not attorneys would be classified as "employees" within the meaning of the section.

In regard to this we direct attention to the case of American Trucking Associations v. United States, 31 Fed. Supp. 35. At l.c. 38 of that opinion the court stated:

"* * *The commission's fear that it may be called upon to establish qualifications

for executive officials, solicitors, and lawyers, is overstrained. None of these classes is within the category of 'employees' as that word is used in public service or labor legislation. * * *

We believe that the above is determinative of the issue in this case, since the "employees" provided for in Section 64.030, supra, is used "in public service." We believe, therefore, that when the above section uses the word "employees" it does not include lawyers.

CONCLUSION

It is the opinion of this department that the Planning Commission of Jackson County is not authorized to appoint attorneys to represent it, but that the Planning Commission of Jackson County, the Board of Zoning Adjustment of Jackson County, and the County Court of Jackson County are to be represented by the county counselor of Jackson County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW:1d

BOARD OF ELECTION COMMISSIONERS:

Board of Election Commissioners of City of St. Louis has authority to provide for an additional magistrate district by virtue of the 1950 census and is vested with sole authority to create such new district.

February 6, 1953



Honorable Paul C. Calcaterra, Chairman Board of Election Commissioners 208 South 12th Street St. Louis, Missouri

Dear Sir:

This office is in receipt of your request for an official opinion. You state your opinion request as follows:

"At present the City of St. Louis has nine Magistrate Districts. These were established in 1946 on the basis of the 1940 United States population census which was \$16,048.

"Section 482.010, R. S. 1949, provides that in Counties of 100,000 inhabitants or more there shall be two Magistrates and one additional Magistrate for each additional 100,000 inhabitants, or major fraction thereof.

"The preliminary figures of the population of the City of St. Louis under the 1950 United States Census is 852,623. The question arises whether the City is entitled to another Magistrate District. If so, does the Board of Election Commissioners have sole authority in establishing such new District, or, must hearing be held to determine if redistricting is necessary so that no district varies by more than one-fourth from the quotient thereof as provided by Section 482.040, R. S. 1949."

Honorable Paul C. Calcaterra

The general provision in regard to magistrate courts as found in Chapter 482, Section 482.010, et seq., 1949, are applicable to magistrate courts in the City of St. Louis insofar as they are not inconsistent with specific provisions set forth in Section 482.220 and following.

Section 1.080, RSMo 1949, provides:

"Wherever the word 'county' is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city; and whenever, under the provisions of any law which shall be applicable to the city of St. Louis, as to the counties of this state, any act or duty shall be authorized or required to be performed by the clerk of the county court, such act or duty shall be performed by the register of the said city of St. Louis, so far as the same relates to any act or duty required to be performed in said city similar in character to that required of such county clerk in the respective counties of this state."

Section 482.040, RSMo 1949, by its language was specifically intended to apply to the City of St. Louis. Paragraph 5 of said section states:

"Forthwith after making the same, the board or boards of election commissioners, or if none, the county court, shall file the divisions or alterations and the names and descriptions of the districts with the county clerk of said county and with the circuit clerk in the city of St. Louis."

(Emphasis ours.)

Section 482.010, RSMo 1949, providing for the number of magistrates in each county follows Section 18, Article V, of the Missouri Constitution, and provides:

> "* * *In counties of one hundred thousand inhabitants or more there shall be two magistrates and one additional magistrate for each additional one hundred thousand inhabitants, or major fraction thereof."

Honorable Paul C. Calcaterra

The 1950 Census of Population, Advance Reports Series, PC-8, No. 24, published October 3, 1951 by the United States Department of Commerce, Bureau of Census, shows the population of St. Louis to be 856,796.

In answer to your question as to whether the City of St. Louis is entitled to another magistrate by virtue of this publication, we refer you to Section 1.100, RSMo 1949, which is as follows:

"The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he shall be allowed to pay for deputies and assistants shall be determined on the basis of the last previous decennial census of the United States. For the purpose of this section the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January first of each tenth year after 1951."

(Emphasis ours.)

Therefore, by virtue of this section, the 1950 Census of Population may be used to determine the necessity for additional magistrates as provided in Section 482.010, RSMo 1949 and, the City of St. Louis is now authorized to have ten magistrates.

Constitutional and statutory provisions regulating the rights and duties of the board of election commissioners in regard to creating magistrate districts are as follows:

Article V, Section 19, Missouri Constitution of 1945 states:

"After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. * * *"

Section 482.040, RSMo 1949, paragraph 2, provides:

"In counties where under the last preceding decennial census of the United States or by order of the circuit court as provided by law,

Honorable Paul C. Calcaterra

they are entitled to more than one magistrate, the board or boards of election commissioners, or if none, the county court shall on or before April 1, 1946, and thereafter within sixty days after such board or boards, or if none, the county court shall be officially informed that the duty has arisen for them to divide such county into magistrate districts, divide such counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected, who shall be a resident of the district in which he is elected."

It is noted that these provisions direct the board of election commissioners, or if none, the county courts to divide counties into magistrate districts without regard to public hearing. Section 482.040, RSMo 1949, paragraph 4, provides:

"On its own motion, or on petition of five hundred or more qualified voters of the county, the board or boards of election commissioners, or if none, the county court shall hold a public hearing to determine the necessity for altering any such district. The population of the county shall be divided by the number of magistrate districts in the county, and proof at such hearing that by the last decennial census of the United States taken after the last redistricting was made the population of any one district varies from the quotient by more than one-fourth thereof shall be prima facie evidence that the administration of justice requires that such redistricting be made. If the board or boards of election commissioners, or if none, the county court shall find that the administration of justice requires such redistricting to be made, they shall by an order entered of record redistrict the county into magistrate districts in the manner prescribed by the constitution of such districts."

(Emphasis ours.)

It is believed that this section providing for a public hearing, with which you are concerned, pertains only to altering existing districts and does not apply when by the last decennial census a county is entitled to a change in the number of magistrates.

We are concerned here with creating an additional magistrate district and it is believed that the sole authority to create such new district is vested in the board of election commissioners as provided by Section 19, Article V, of the Constitution of Missouri and Section 482.040, RSMo 1949.

Although Article V, Section 19, Missouri Constitution 1945, provides that after each census of the United States, the boards of election commissioners shall divide counties having more than one magistrate into districts, no time is specified in which this shall be done. Looking then at Section 482.040, paragraph 2, we see that the first districts were to be created on or before April 1, 1946. 1946 being an election year for magistrates as provided by Section 482.010, which is as follows:

"1. Magistrates, as provided for in this chapter, shall be elected at the general election to be held in 1946, and every four years thereafter, and shall hold their offices for four years, or until their successors are elected or appointed, commissioned and qualified."

Therefore, it is the opinion of this office that the division of the county into districts was intended only for the purpose of elections. Since the next election for magistrates will be 1954, the new district created will have no effect until then.

CONCLUSION

Therefore it is the opinion of this office that the City of St. Louis is entitled to an additional magistrate based on the 1950 census and that the board of election commissioners is vested with sole authority to establish such new district without regard to public hearing to determine the necessity although such new districting will not be effective until the next election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General COUNTY COLLECTOR:
PROSECUTING ATTORNEY:
TAXATION:



In suit to collect delinquent tangible personal property taxes in Class 2 counties:

1) Collector should institute necessary proceedings; 2) Prosecuting Attorney should prosecute such suits without additional compensation to himself, and, 3) Such suits should be in the name of the State of Missouri at the relation, and to the use of the Collector.

April 28, 1953

Honorable J. T. Campbell
Representative of Buchanan County
Third District
House of Representatives
Jefferson City, Missouri

Dear Mr. Campbell:

In your letter of April 21, 1953, you requested an official opinion of this office on the following:

"Buchanan County is a county of the second class and in the Collector's Office of Buchanan County, there are many people who fail to pay their personal taxes and become delinquent.

My questions are as follows:

"When persons owing a personal property tax in Buchanan County becomes delinquent in the paying of such a tax, is it the duty of the county collector to institute a suit against such a person to collect this delinquent tax?

"If suits are to be filed, is it the duty of the Prosecuting Attorney to handle such suits in the courts or is it the collector's responsibility to employ other council to handle such suits?

"If the Prosecuting Attorney handles such suits, is he entitled to any fee from the county for handling such a suit?

"In case that suits are filed for collection of delinquent taxes, should that be filed in the name of the county collector or in the name of the State of Missouri?"

Honorable J. T. Campbell:

Sections 140.730; 140.740 and 140.750, RSMo 1949, as amended by 1952 Session of the General Assembly, set forth the procedure for collection of delinquent tangible personal property taxes. In answer to your inquiry as to how suits to collect delinquent taxes of this nature are styled, your attention is invited to Section 140.730, Paragraph 2, which reads as follows:

"2. All actions commenced under this law shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, * * *."

There is no specific statutory provision (except as herein-below noted) authorizing the Collector in a second class county to retain an attorney to assist him in the collection of delinquent tangible personal property taxes. However, Section 56.070, RSMo 1949, which deals with the general duties of Prosecuting Attorneys, reads as follows:

"56.070. To represent county, civil suits etc .-- He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or

Honorable J. T. Campbell:

counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

(Underscoring ours.)

Suits to collect such delinquent taxes are of the type which the Prosecuting Attorney is required to represent the county in collecting, viz: they are civil suits in which the county is interested. The exception, above mentioned, provided in Section 151.240, RSMo 1949, is in the collection of delinquent taxes from railroad and street car companies:

"151.240. Duty of prosecuting attorney -additional attorneys -- fees . -- It shall be the duty of the prosecuting attorney of each county to prosecute all suits for taxes under this chapter. County collectors shall have power, with the approval of the county court, or in St. Louis city, the approval of the mayor thereof, to employ such attorneys as may be deemed necessary to aid and assist the prosecuting attorney in conducting and managing such suits; and the court in which suit is brought shall, if plaintiff obtain judgment, allow such attorneys a reasonable fee for bringing and conducting such suit which shall be taxed against the defendant and paid as other costs in the case. At the request of the collector, the governor may direct the attorney general to assist in the prosecution of any such suits."

There is no provision for additional compensation to the Prosecuting Attorney for rendering this service. The Prosecuting Attorney of a second class county receives

a salary as total compensation for his services, and any or all fees which accrue to his office must be paid to the County Treasurer at the end of each month. Section 56.270, RSMo 1949, provides the salary for Prosecuting Attorneys of second class counties:

"56.270. Prosecuting Attorney, class two counties--salary.--The prosecuting attorney, in all counties of the second class, shall receive for his services, an annual salary of five thousand dollars, to be paid in twelve equal monthly installments, by the county, by warrants drawn on the county treasury."

Section 140.740, enacted by the 1951 Session of the General Assembly makes allowance for the collection of a fee for the attorney for the Collector on a percentage basis as follows:

"2. In each such action a fee in the amount of ten per cent of the taxes due, but in no event less than five dollars, shall be allowed the attorney for the collector. Such attorney fee and all collector's fees shall be included in the judgment for taxes in such action."

This provision alone does not seem to be sufficient authority for the Collector to retain an attorney other than the Prosecuting Attorney, but instead, is for the purpose of requiring delinquent taxpayers to bear at least a portion of the burden of expense to furnish him to pay his taxes. If such percentage fee is allowed in a case, it is of the type mentioned in Section 56.340; that is, a fee that accrues in the office of Prosecuting Attorney, which fee must be paid over to the county treasury at the end of each month:

"56.340. Fees, class two, three and four counties--records--collection.-The prosecuting attorney, in counties of the second, third and fourth classes, shall charge upon behalf of the county every fee that accrues in his office and

Honorable J. T. Campbell:

receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he will immediately file with the clerk of the county court, and shall at the same time make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified by affidavit, and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

The person to institute proceedings to collect delinquent tangible personal property taxes must, of necessity, be the County Collector since he is the only person who is aware whether persons have, or have not, paid such taxes as are owed by them. Of course, the Prosecuting Attorney cannot proceed with the prosecution of such cases without notification to him by the Collector of the persons who are delinquent in paying such taxes, and the amount thereof.

CONCLUSION

It is, therefore, the opinion of this office that:
The County Collector must institute proceedings to collect
delinquent tangible personal property taxes; except that the
Collector may, with the approval of the County Court, hire
an attorney to aid and assist the Prosecuting Attorney in
collecting delinquent taxes from railroad and street car
companies, the Prosecuting Attorney must prosecute such
cases without additional compensation to himself; and that
such cases should be styled in the name of the State of Missouri
at the relation and to the use of the Collector.

Honorable J. T. Campbell:

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMCG:irk

DEPARTMENT OF CORRECTIONS: Department of Corrections has no authority to charge off items due Penitentiary Industries Revolving Fund. Unpaid sums due Pentitentiary Industries Revolving Fund for Auto License plates furnished other departments of State Government.

January 12, 1953

Honorable B. M. Casteel, Director Department of Corrections Division of Penal Institutions Jefferson City, Missouri



Dear Mr. Casteel:

We have your recent letter requesting an opinion of this department which reads as follows:

"The 'Accounts Receivable' ledger of the Penitentiary Industries Revolving Fund contains the following accounts:

"1942 plates	- Secretary of State	\$19,549.98
	- Secretary of State Motor Vehicle Dept.	158.06
"1946 plates	- Motor Vehicle Unit	543.96
"1947 plates	Dept. of Revenue	
	Motor Vehicle Unit	9,709.06 \$29,961.06

"These figures are balances remaining in the accounts at the end of the years stated above and for automobile license plates furnished the State which apparently exceeded the amount of the funds left in their account for paying their invoices for the years stated.

"Efforts have been made to see if appropriations could be gotten through the Legislature to take up these accounts and not result in a charge-off to the Industries Revolving Fund but without any apparent success, and it seems quite evident that there is no way in which the funds for paying these old accounts can be or will be appropriated and it seems that the only way of clearing our "Accounts Receivable" ledger is to charge the above amounts against the surplus earnings of the Revolving Fund.

"The above amounts have been set out in previous state audits in which it was suggested that efforts be made to clear the ledger of these amounts which have been carried for the past years. "I shall appreciate your opinion as to the authority to write off these items at this time."

Your letter indicates that in 1942 the Office of the Secretary of State then having the responsibility of administering the automobile license law fell \$19,549.98 short of paying the Penitentiary Industries Revolving Fund for license plates furnished by the Penitentiary and it again fell short in the amount of \$158.06 in 1945, and that in 1946 the Motor Vehicle Unit of the Department of Revenue then charged with the same responsibility fell \$543.96 short of paying said Revolving Fund for license plates furnished during that year and that in 1947, said Motor Vehicle Unit fell short \$9,709.06 of paying for plates furnished during that year. The above mentioned sums amount to a total of \$29,961.06.

You state that efforts have been unsuccessfully made by the departments in question to procure appropriations by the Legislature which would enable them to pay these sums to said Revolving Fund and that there is no probability that such appropriations will ever be made.

You also state that said amounts have been set out in previous State Audits in which it has been suggested that efforts be made to clear the ledger of these amounts. You inquire whether or not your department has authority to charge off these items at this time.

In response to your questions we suggest the fact no office of the State has authority to charge off items due a department of the State without express statutory authorization so to do.

We have examined the statutes and we are of the opinion that there is no existing statute which vests such authority in your department.

CONCLUSION

We are accordingly of the opinion that you have no authority to charge off the items above mentioned.

Respectfully submitted,

SAMUEL M. WATSON Assistant Attorney General

APPROVED:

JOHN M. DALTON ATTORNEY GENERAL MOTOR VEHICLES: DEPARTMENT OF REVENUE:

. . .

Reciprocity between Missouri and Illinois.

February 16, 1953

Honorable John F. Carmody Prosecuting Attorney Randolph County Moberly, Missouri



Dear Mr. Carmody:

This department is in receipt of your request for an official opinion which reads as follows:

"I would like an official opinion upon the following question.

"Is a truck which is leased by an Illinois corporation to a resident of Illinois required to be registered in the State of Missouri under the provisions of Chapter 301, RSMo 1949?"

The question presented is whether a truck which is leased by an Illinois corporation to a resident of the State of Illinois is required to be registered in the State of Missouri.

Section 301.020, RSMo 1949, provides, in part, as follows:

"Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, * * * shall file, * * * an application for registration * * *."

"Owner" is defined in Section 301.010, Subsection (19), Mo. R. S. 1951 Supplement, as follows:

"'Owner,' the term owner shall include any person, firm, corporation

or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law;"

The above definition of "owner" recognizes only two exceptions to the requirement that the legal title holder is the person who must register in Missouri. These exceptions are: (1) when the vehicle is subject to agreement for conditional sale with the right of purchase upon the performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee; or (2) when the vehicle is subject to a lease with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the conditional lessee. Under all other circumstances, the person holding the title to the vehicle is the owner within the meaning of the Motor Vehicle Law. Therefore, if a person or corporation owning the legal title merely leases a truck to another person and said lease does not include the right of purchase, then the legal title holder is the owner and he must be the person who must register the vehicle.

The question next arises, does this same rule apply to an Illinois truck that is leased by an Illinois corporation to an Illinois lessee, said lease not being subject to the right of purchase.

Section 301.270, RSMo 1949, provides as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such

vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The above statute extends to nonresident owners the right to operate in this state without being registered if the state in which the person is a resident extends like favors to the resident of this state under the same conditions and circumstances.

We must look, therefore, to the laws of Illinois to determine whether a truck leased by a Missouri lessor to a Missouri lessee is entitled to operate in Illinois without the payment of a registration fee.

Chapter 95 1/2, Section 1, Smith-Hurd Illinois Annotated Statutes, defines "owner" in exactly the same terms as does the Missouri statute, which definition reads as follows:

Whenever the word 'owner' is used in this Act it shall be construed to mean the person who holds the legal title of a motor vehicle or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a motor vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this Act. As amended by act approved July 17, 1945. L. 1945, p. 1059."

Therefore, under the Illinois Act, it is the same as Missouri insofar as it defines who is the owner so as to register the motor vehicle.

Chapter 952, Section 2, Smith-Hurd Illinois Annotated Statutes, designates those vehicles which are designed and used for pulling or carrying freight and those vehicles which are used for carrying more than seven persons as vehicles of the second division.

Chapter 95%, Section 9, Smith-Hurd Illinois Annotated Statutes, provides that all owners of vehicles of the second division must be registered.

Chapter 952, Section 22, Smith-Hurd Illinois Annotated Statutes, provides as follows:

"Except as herein provided for foreign corporations, the provisions of sections 8, 9, 10, 14, 17, and 27 of this Act, shall not apply to any motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence: and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act: Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this State, operating upon the

highways of such city, state, foreign country or province, territory or Federal district are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall com-ply with the provisions of sections 8, 9, 10, 14, 17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned.

"In order to effectuate the purposes of this section, the Secretary of State of Illinois shall have authority to enter into reciprocal agreements with the responsible officers of other states as to licenses, permit fees and flat taxes under which motor vehicles, trucks, tractors, trailers or semi-trailers properly licensed or registered in other states may be operated in this State without an Illinois registration or the payment of permit fees or flat taxes; provided like privileges are accorded to vehicles owned by Illinois citizens when operated in such other states. As amended by act approved July 9, 1951. L. 1951, p. ___, S. B. No. 96, effective Jan. 1, 1952."

(Underscoring ours.)

Under the above section, it will be seen that reciprocity is granted by the State of Illinois to non-resident owners who have leased trucks to nonresident

lessees unless the foreign corporation, partners or individuals own, maintain or operate places of business in Illinois and use motor vehicles in connection with such places of business.

CONCLUSION.

Therefore, it is believed that the State of Missouri should grant reciprocity and not require a nonresident lessor who leases trucks to a nonresident lessee to register if the nonresident owner does not maintain a place of business in this State and use vehicles in connection with such place of business.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Frank W. Hayes.

Yours very truly,

JOHN M. DALTON Attorney General

FWH:fms:irk

MOTOR VEHICLE
OPERATORS' LICENSES:

Licenses not revocable for conviction of three offenses of careless driving within two years, when offense occurred prior to effective date of Section 302.271, V.A.M.S.

JOHN M. DALTON



March 12, 1953

Jazz zzzz

Honorable Charles B. Cash Magistrate Fifth District 415 East Twelfth Street Kansas City 6, Missouri

Dear Sir:

You have requested an official opinion of this office as follows:

"This office desires an opinion from your office regarding the construction of Section 302.270 (6) of the new Motor Vehicle Law, which reads as follows:

"Sec. 302.270. The director shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final: (6) Conviction or forfeiture of bail not vacated upon three charges of careless or reckless driving committed within a period of two years.

"The point that is in question is whether or not these three convictions are to be considered ONLY IF COMMITTED AFTER the effective date of this new section which was January 1, 1952, or if convictions prior to said date can be considered."

We take your reference of Section 302.270 to have

Hon. Charles B. Cash

been taken from the original bill as approved by the governor. This has now been renumbered by the reviser of statutes and is Section 302.271, V.A.M.S., and appears in Laws of Missouri, 1951, page 688, again as Section 302.270, as it was in the original bill. It is quoted in your letter.

Since we find no such law in effect prior to January 1, 1952, requiring the revocation of operators' licenses for conviction or forfeiture of bail not vacated upon three charges of careless or reckless driving committed within a period of two years, we believe that the applicable doctrine of law may be found in State ex rel. v. Wright, 158 S.W. 823, 251 Mo. 325, 1.c. 344, which is as follows:

"The act by its terms in no wise purports to look backward or to be designed as a matter of law to be curative in its intent. This law bears none of the outward earmarks of a retrospective statute. Unless it bears such indicia, a discussion in the light of the rules of construction would seem to be but 'weary, stale, flat and unprofitable,' for our court has said in the case of State ex rel. v. Dirckx, 211 Mo. 1.c. 577:

"The settled rule of construction in this State, applicable alike to the constitutional and statutory provisions, is that, unless a different intent is evident beyond reasonable question, they are to be construed as having a prospective operation only. (State ex rel. v. Greer, 78 Mo. 1.c. 190; State ex rel. v. Frazier, 98 Mo. 426; Leete v. Bank, 141 Mo. 574; Shields v. Johnson County, 144 Mo. 76; Cooley on Constitutional Lim. (6 Ed.), page 77; Shreveport v. Cole, 129 U.S. 36.)"

We believe that offenses committed prior to the effective date of the law cannot be made grounds for revocation of an operator's license.

CONCLUSION

It is, therefore, the opinion of this office that the provision of Section 302.271, V.A.M.S., for revocation of a

Hon. Charles B. Cash

motor vehicle operator's license, does not direct revocation of license for convictions of careless driving which occurred prior to the effective date of the act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. James W. Faris.

Respectfully submitted,

JOHN M. DALTON Attorney General

JWF: lrt

FEED:

AGRICULTURE:

) "Custom-mixed feeds" do not come within provisions of Missouri Feed Law, Sections 266.150-266.280, RSMo 1949. Feeds compounded by ingredients in proportions representing the average requested by various feeders and offered or exposed for sale to customers in the ordinary course of business as a "custom-made cattle feed" is a "commercial-feeding stuff" within the provisions of the Missouri Feed Law.



April 21, 1953

Honorable L. C. Carpenter Commissioner Department of Agriculture Jefferson City, Missouri

Dear Mr. Carpenter:

We render herewith our opinion based on your request dated April 7, 1953, which request is as follows:

"Many small dealers have facilities for mixing feeds in small batches, but do not register any products as commercial feeding-stuffs, claiming that all such mixing is done on a custom basis. In many instances the dealer furnishes all the ingredients that go into these mixed products.

"The Missouri Feed Law makes no reference to 'custom-mixed feeds' and our interpretation has been that such mixes were outside the scope of the law. This interpretation is based on the provision that a product must be sold, offered, or exposed for sale before it is considered a commercial feeding-stuff.

"Will you please give us an opinion as to whether 'custom-mixed feeds' come under the provisions of the Missouri Feed Law, and secondly, what should be considered as coming within the meaning of a custom-mixed product.

"As reference, we are attaching a summary of a case which reflects the need for

defining custom-mixing as it is to be considered in the administration of the Missouri Feed Law."

Attached to your request is a factual situation pointing up the problem of interpretation under the Missouri Feed Law. (Sections 266.150-266.280, RSMo 1949.)

"The Moran Milling Company, Bonne Terre, Missouri, recently began making a cattle feed containing ground corn cobs. Since the Missouri Feed Law prohibits the mixing of any commercial feed with ground or crushed corn cobs, this company mixed this product on a 'custom' basis. The ingredients were supposedly added in amounts to represent the average of the requests of different feeders for such a product and then sold with the bags bearing a tag designating the material as 'custom made cattle feed.' This tag also included a list of the ingredients together with the percent added."

Your first question is whether custom-mixed feeds are included in the term "feed" as used in the said feed law. You state that your department has interpreted the law not to include custom-mixed feeds. In this view we believe you are correct.

The act itself furnishes very little aid in this respect. Section 266.150 provides in part as follows:

"For the purposes of sections 266.150 to 266.280 the following words are defined as follows:

* * * * * *

"(5) 'Feed' shall mean commercial feeding-stuffs."

Section 266.160 then provides:

"The term 'commercial feeding-stuffs' shall be held to include all feeding-stuffs used for feeding livestock and poultry, except whole seeds or grains, the unmixed meals made directly from the entire grains of corn, wheat, rye, barley, oats, buckwheat, flaxseed, kaffir, and milo, whole hays, straws, cotton seed hulls and corn stover, pure corn chops and pure ground ear corn, when the same are not mixed with other materials, but the term shall not apply to other materials containing sixty per cent or more of water."

We believe, however, that other provisions of this act indicate a legislative intent not to include custommixed feeds. Sections 266.180-266.220 provide for registration of feeds before the same may be sold. Sections 266.240-266.250 provide for taking of samples and analysis, by the Commissioner of Agriculture or his representatives. These sections contemplate that large quantities of feed of the same formula are to be placed on the consumer's market and are to be offered or exposed for sale to the public generally. Section 266.170 provides for packages of feed to be in standard weights therein specified. It is readily apparent that these provisions would be altogether impracticable as applied to custom-mixed feeds, which would be made up in small quantities on individual order from varying formulas and not placed on the market for sale to the public generally. There would never be any custom-mixed feed on hand, exposed for sale, from which samples of said feed could be taken for analysis as provided in Section 266.240 and Section 266.250.

Secondly, you request some guide by which you can determine what is "custom-mixed feed" and what is "commercial feeding-stuffs" which would be covered by the act. These two phrases have never been judicially defined so that we have any guide lines by which we can separate them. "Custom" is thus defined in Webster's New International Dictionary, Second Edition:

"CUSTOM, adj. 1. Made or done to order; as custom clothes. 2. Dealing in things made to order, or doing work only when it is ordered; as, a custom shoemaker; a custom mill."

It is difficult to lay down any rule of thumb which will solve every problem arising out of the many possible factual situations.

We believe that the basic test would be: what is being sold--a mixed feed, the end product of ingredients, mixing and grinding; or ingredients, mixing and grinding separately, making separate charges for each? In applying this test various factors, no one of them conclusive, would enter into consideration.

Who furnishes the ingredients? If the miller, this would point toward "commercial feeding-stuffs" -- but certainly the customer could purchase the ingredients from the miller to be put into the feed.

Who furnishes the formula? If the miller, this would point definitely to "commercial feeding-stuff," as opposed to "custom-mixed feed." However, the miller might have a formula which he could recommend to a customer or which a customer might know about and request, which would not necessarily make the feed a "commercial feeding-stuff." On the other hand should the miller advertise and promote his formula, this would tend to indicate that feed mixed in accordance with such formula would not be custom mixed.

Is the feed prepared in advance of the customer's order, in bags or in bulk, and exposed for sale to customers in the ordinary course of business? This would tend most strongly to show that the feed was not custom mixed and would in our opinion be well-nigh conclusive that it was not custom-mixed feed -- although the absence of this feature would not be conclusive that the feed was custom mixed.

Is there a separate charge for ingredients, grinding and mixing where the ingredients are furnished by the miller? An affirmative answer would indicate that the feed was custom mixed; a negative answer that it is commercial feeding-stuff.

Applying these tests to the factual situation submitted to us, we believe that you were correct in your advice that the feed made by the Moran Milling Company, not compounded on order of a customer, is a "commercial feeding-stuff" within the meaning of the Missouri Feed Law. The ingredients are furnished by the miller, the formula (regardless of the source of the formula or how it was arrived at) was his. The thing being sold was a mixed feed, the end product of ingredients, grinding and mixing, for which no separate charge was being made. It was already ground and mixed, in sacks, in advance of the customers coming into to buy. Presumably, it was offered or exposed for sale to any one coming into the miller's place of business. The fact of the tags being appended showing the ingredients and labelling as a "custom-mixed cattle feed," which one would not expect to find on a sack or sacks of feed prepared on an individual customer's order, also militates against the feed's actually having been prepared on a custom basis.

CONCLUSION

It is the opinion of this office that "custom-mixed feeds" do not come within the provisions of the Missouri Feed Law, Sections 266.150-266.280, RSMo 1949; and that feeds compounded by ingredients in proportions representing the average requested by various feeders and offered or exposed for sale to customers in the ordinary course of business as a "custom-made cattle feed" is a "commercial feeding-stuff" within the provisions of the Missouri Feed Law.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

AGRICULTURE:

STATE ENTOMOLOGIST:



Notice to a resident of an area found by the State Entomologist to be infested with the Japanese beetle, stating that on a given date the area would be treated with DDT, and advising such resident to take certain measures to protect his property, is not authorized or required by law, has no legal effect, and its service upon the resident is merely a matter of courtesy.

August 5, 1953

Honorable L. C. Carpenter Commissioner Department of Agriculture Jefferson City, Missouri

Dear Sir:

We render herewith our opinion based on your request of July 9, 1953, which request reads as follows:

"We would appreciate receiving an opinion on the enclosed 'Notice' to be used in connection with our Japanese Beetle Control Program in St. Louis. This was written up in accordance with the Missouri Plant Law, R. S. Mo., 1949, Chapter 263, Sec. 263.090."

In connection therewith you have submitted the following proposed notice:

"This area has been found to be infested with the Japanese beetle. The Japanese beetle is a well known pest which is extremely destructive to plants and other vegetation. If allowed to remain it will not only destroy the foliage on the trees and plants, but also the grass, as the grub, or young beetle, feeds on the roots of the grass thus destroying it permanently.

"The Federal and State governments have recognized the destructiveness of this insect and have declared it a public nuisance by placing it on the quarantine lists. Thus authorized agents of the

Department of Agriculture have the right of inspection of private and public grounds and to use the necessary methods in the eradication of this pest.

"Failure to comply with the provisions of the MISSOURI INSECT PEST AND PLANT DISEASE LAW will result in prosecution.

"The DDT will be applied in dust form which is harmless to humans and animals unless taken in large quantities. Therefore, the area will be habitable immediately after the application.

"Thanks for your cooperation.

"L. C. Carpenter, Commissioner, "State Department of Agriculture."

Section 263.090, RSMo 1949, to which you refer, reads as follows:

"Notice to property owners--eradication by state entomologist -- state has lien for costs. -- 1. Whenever such inspection discloses that any places, or plants or plant products, or things and substances used or connected therewith, are infested or infected with any insect pest or disease listed, as required by section 263.080 in the rules and regulations made pursuant to this law, written notice thereof shall be given the owner or other person in possession or control of the place where found, and such owner or other person shall proceed to control, eradicate or prevent the dissemination of such insect pest or disease, and to remove, cut or destroy infested and

infected plants and plant products, or things and substances used or connected therewith, within the time and in the manner prescribed by said notice or the rules and regulations made pursuant to this law.

"2. Whenever such owner or other person cannot be found, or shall fail, neglect or refuse to obey the requirements of said notice and the rules and regulations made pursuant to this law, such requirements shall be carried out by the inspectors or other employees of the state ento-mologist, and the state entomologist shall have and enforce a lien for the expense thereof against the place in or upon which such expense was incurred in the same manner as liens are had and enforced upon buildings and lots, wharves and piers for labor and materials furnished by virtue of contract with the owner."

The notice provided for in such section partakes of the nature of an order, requiring the owner or person in possession or control of the infested area himself to take such measures to control or eradicate the insect pest or disease as the notice may prescribe. If no such person can be found or if he refused to obey the order, the State Entomologist may take the measures prescribed in such order, having a lien on the premises for the expense thereof. We understand that the DDT treatment is not being made under the second portion of the statute.

The notice which you have submitted to this office for consideration, however, does not order or contemplate that the person to whom it is directed will himself do anything. It only notifies him that on a certain day the area will be treated with DDT, advising him to take certain measures for the protection of his property. It is not authorized or required by the law and has no legal effect whatever. It is simply an act of courtesy on the part of the State Entomologist and his staff, for the benefit of the residents of the area to be treated.

There is no provision of the law requiring any notice to be served prior to treatment by the Department of Agriculture. We note the Department has promulgated no rules with reference to such treatment. We reserve our opinion whether the Department is authorized to make this treatment except under the provisions of Section 263.090, supra.

CONCLUSION

It is the opinion of this office that a notice to a resident of an area found by the State Entomologist to be infested with the Japanese beetle, stating that on a given date the area would be treated with DDT, and advising such resident to take certain measures to protect his property, is not authorized or required by law, has no legal effect, and its service upon the resident is merely a matter of courtesy.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

SCHOOLS:

SCHOOL DISTRICTS:

JOHN M. DALTON

Public meeting must be held in order to effect valid dissolution of reorganized school district in accordance with Sec. 165.310, RSMo 1949. Attempt to organize school districts from territory included in reorganized school district following invalid attempt at dissolution of reorganized school district is void and officers of such common school districts have no authority or legal standing as such.

August 17, 1953

John C. Johnsen



Honorable William J. Cason Prosecuting Attorney Henry County Clinton, Missouri

Dear Mr. Cason:

This is in response to your request for an opinion dated July 27, 1953, which, omitting caption and signature, reads as follows:

"In Henry County, Missouri, there is a reorganized school district, 'R-9'. On April 7, 1953, the regular election for that reorganized school district was held for the purpose of electing two members to the Board of Education and for the purpose of voting on a proposed \$2.40 levy. Previous to this time there had been posted within the district notices to the effect that on April 7, 1953, there would also be a public meeting as provided by statute for the purpose of considering the dissolution of the school district. Apparently the notices were in proper form and posted properly in the required number of places in the school district.

"On April 7 and during the regular school election ballots were handed out by the election judges and clerks which asked the voters to vote for or against the dissolving of the reorganized school district. There was no public meeting within the usual sense of that word, but, the voters merely voted

on the dissolution at the time of voting on the proposed levy and selection of the members of the Board of Education. The voting on all proposals was from 6:00 AM to 7:00 PM on the day mentioned. The vote on the question of disorganization was - for disorganization - 149 - against disorganization - 50.

"Since the purported disorganization certain areas of what was previously Reorganized District 9 have organized as common school districts, have elected their school boards and voted levies. No legal action has been taken by any group to have the purported disorganization declared either valid or invalid.

"My questions are as follows:

- 1. Assuming all other requirements were met was the procedure of voting at the polls on the question of disorganization sufficient and proper compliance with the appropriate statute to effect the disorganization?
- 2. If no legal action is taken by any group to have the disorganization declared void or valid will the common school districts that have been organized be in fact organized and recognized by the State Board of Education? Will the officers of these common school districts have full authority as all officers in common school districts properly organized?

"Since the time is nearly at hand when the reports and estimates of the various school districts must be filed with the assessors and other officers, your earliest reply would be sincerely appreciated."

Section 165.707, RSMo 1949, with regard to the disorganization of reorganized or enlarged districts, provides as follows:

> "Changes of boundary lines and disorganization of enlarged districts may be effected as now or hereafter provided by sections 165.263 to 165.373."

Therefore, your first question involves an interpretation of Section 165.310, RSMo 1949, which deals with the dissolution of town, city or consolidated school districts. That section reads as follows:

"Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under sections 165.163 to 165.260."

This office had occasion to construe the language of that section in an opinion directed to Honorable Robert E. Crist, Prosecuting Attorney of Shelby County, Missouri, under date of September 22, 1952. Specifically, the question presented there was whether a regular election at which the question of dissolution would be voted upon was sufficient compliance with the provisions of the above statute calling for a public meeting. The conclusion was that a regular election was not sufficient but that a public meeting governed by ordinary and orderly parliamentary usage must be held in order to effect a valid dissolution of the district. We hereby adopt that opinion by reference insofar as it is applicable to the question presented, and we enclose a copy herewith.

Honorable William J. Cason

Since in the case presented by you no public meeting was held at which the question of dissolution was presented, it is our conclusion that the attempted dissolution was a nullity and, therefore, the district still exists as Reorganized School District R-9.

Your next question is whether, in the absence of any legal action being taken to have the attempted disorganization declared valid or void, the common school districts organized in the territory in question would be in fact organized and recognized by the State Department of Education.

As to whether these common school districts would be recognized by the State Board of Education, we are not in position to say. However, it follows that if the attempted dissolution of the reorganized district was invalid because of the technical defect above mentioned, and the reorganized district is still in existence, the attempted organization of the territory included in the reorganized district into common school districts would be a nullity.

In State ex inf. McKittrick ex rel. Martin et al. v. Stoner et al., 146 S.W. (2d) 891, 1.c. 894, the court said:

"From respondents' return we conclude that the election of September 23, 1939, to dissolve the consolidated district was fraudulent and void. It follows the proceedings to organize a common district and elect directors are also void. * * *"

Therefore, the common school districts in question do not exist either de facto or de jure and the officers have no authority or legal standing as such.

CONCLUSION

It is the opinion of this office that in order to effect the valid dissolution of a reorganized school district a public meeting must be held in accordance with provisions of Section 165.310, RSMo 1949.

It is the further opinion of this office that an attempt to organize common school districts from territory included in the reorganized school district following an invalid attempt Honorable William J. Cason

at dissolution of the reorganized school district is void; that the common school districts so organized have no existence; either de facto or de jure; and that the officers of such common school districts have no authority or legal standing as such.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml Enc. AGRICULTURE:



Under Section 266.080, Mo. R.S., Cum. Supp. 1951, a farmer or seed producer selling seed of his own production, who delivers such seed to a purchaser via a common carrier, or who advertises same in a newspaper published outside the county of his residence, is a seedsman and must comply with all the requirements of the Missouri Seed Law. The membership of such producer in the Missouri Seed Improvement Association, an organization which tests and certifies seed produced by its members, does not take such producer outside the purview of such statute.

September 1, 1953

Honorable L. C. Carpenter Commissioner State Department of Agriculture Jefferson City, Missouri

Dear Sir:

We have your opinion request of August 19, 1953, which request reads as follows:

"The Missouri Seed Improvement Association, incorporated as a non-profit association under the State Law of Missouri, concerns its self with the production and distribution of certified seed. This association, as a group, holds a seedsman's permit, the number (4800) of which appears on all containers bearing certified seed labels. These labels carry the information as to seed identification required by the Missouri Seed Law (sections 266.010 to 266.130) and in addition the growers declaration and the growers signature. The apparent intent of this association is that a joint responsibility for the seed is assumed by the grower and the Missouri Seed Improvement Association.

"The growers of certified seed are farmers selling seed of their own production, however, advertisements of this seed will appear in publications outside of the county in which the growers
reside; also common carriers would be used in
delivering this seed in some cases.

"Section 266.080 of the Missouri Seed Law provides that under certain conditions farmers are not required to comply with sections 266.050, 266.050 and 266.070 of this act.

"Will you please give us an opinion as to whether the growers and sellers of certified seed come within the farmer-exemption clause or if these growers would be termed 'seedsmen' as defined in the Missouri Seed Law.

"A booklet entitled 'Missouri Seed News' is enclosed as reference material in regard to the Missouri Seed Improvement Association."

The Missouri Seed Improvement Association does not, we understand from your letter and from a pamphlet you have enclosed, buy or sell seed. We understand that it merely tests seed produced by members of the Association, and, if found to measure up to its quality standards, certifies such seed to measure up to such standards. The grower then sells the seed.

The answer to the question raised in your request is answered by a portion of Section 266.080, Mo. R.S., Cum. Supp. 1951, reading thus:

"(3) * * * except farmers and seed producers shall be classed as seedsmen and must comply with all the provisions of sections 266.011 to 266.120 when such farmers or seed producers

* * * * * * * *

"(b) Sell and deliver seed to a purchaser by way of common carrier.

"(d) Advertises seed for sale by any of the recognized advertising media, provided this shall not prohibit the insertion of notices or advertisements in newspapers or publications published in the county in which such farmer or seed grower resides or the posting of notices in the county in which he resides, provided that in such notices or advertisements no statement is made of the quality, purity, or cleanliness of the seed."

The obvious meaning of this section is that farmers and seed producers shall be classed as seedsmen and must comply with all

the provisions of the Missouri Seed Law, when they deliver seed of their own production to a purchaser via common carrier, or when they advertise it by newspapers published outside the county in which the grower resides.

Their membership in the Missouri Seed Improvement Association cannot serve to take such seed producers out of the purview of this statute.

CONCLUSION

It is the opinion of this office that under Section 266.080, Mo. R.S., Cum. Supp. 1951, a farmer or seed producer selling seed of his own production, who delivers such seed to a purchaser via a common carrier, or who advertises same in a newspaper published outside the county of his residence, is a seedsman and must comply with all the requirements of the Missouri Seed Law. It is further our opinion that the membership of such producer in the Missouri Seed Improvement Association, an organization which tests and certifies seed produced by its members, does not take such producer outside the purview of such statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK:fh, lw

AGRICULTURE:

FILED 15 A statement in an advertisement that seed has been "cleaned" or "recleaned" is not a "statement of the quality, purity, or cleanliness of the seed" within the contemplation of Subsection (3) (d) of Section 266.080, Cum. Supp. 1951; and that a farmer selling seed of his own production is not, by reason of use of such description in advertising, deprived of the exemption provided him by said section.

September 3, 1953

Honorable L. C. Carpenter Commissioner State Department of Agriculture Jefferson City, Missouri

Dear Sir:

We have your opinion request of August 17, 1953, which request reads as follows:

"Section 266.080 of the Missouri Seed Law provides that under certain conditions, farmers are not required to comply with Sections 266.050, 266.060, and 266.070 of this act.

"Among these provisions is the right to advertise in newspapers or publications published in the county in which the farmer resides, provided that such advertisements do not contain any statements with reference to quality, purity or cleanliness of the seed.

"The following notices are examples of local advertising found by our inspectors:

"'Balboa Rye: Re-cleaned and sacked. \$2.10 bushel. Kentucky 31 Fescue cleaned. 15d pound. Ray Swisher, 4 miles west of Warrensburg on Highway 50."

"'For Sale: Recleaned Balboa rye seed \$3.00 per bushel. James M. Eppright, Warrensburg.'

"'For Sale: Good recleaned Balboa Rye, plenty of it. \$1.75 per bu. W. B. Skidmore, Knob Noster, Mo. Route 1.'

"It is our interpretation that the use of the word 're-cleaned' is a reference to quality and cleanliness of the seed and therefore should not be used in advertising; and that when such word is used in local advertising the person inserting such notice becomes a 'seedsman' as defined in this act, and must comply with all provisions of the act.

"Will you please give us an opinion as to whether the word 're-cleaned' can be used in advertising by farmers claiming exemption from the provisions of the Missouri Seed Law."

Subsection (3) of Section 266.080, Mo. R. S., Cum. Supp. 1951, exempts farmers who sell seed of their own production from the operation of Sections 266.051, 266.061 and 266.071, Mo. R. S., Cum. Supp. 1951, unless they do any one of a number of things described in Subsections (3)(a), (3)(b), (3)(c) and (3)(d) of Section 266.080, Mo. R. S., Cum. Supp. 1951. Subsection (3)(d) reads as follows:

"(3)(d) Advertises seed for sale by any of the recognized advertising media, provided this shall not prohibit the insertion of notices or advertisements in newspapers or publications published in the county in which such farmer or seed grower resides or the posting of notices in the county in which he resides, provided that in such notices or advertisements, no statement is made of the quality, purity, or cleanliness of the seed."

This portion of the statute will permit a farmer to advertise seed of his own production in a newspaper published in the county of his residence, if in such advertisement "no statement is made of the quality, purity, or cleanliness of the seed," and still be exempt from the operation of Sections 266.051, 266.061 and 266.071, Mo. R. S., Cum. Supp. 1951.

We do not believe that a statement in an ad, describing advertised seed as "recleaned" or "cleaned" is such a statement of cleanliness, quality or purity as will deprive the farmer of the exemption provided by Section 266.080, Subsection (3), Mo. R. S., Cum. Supp. 1951.

The statement that seed has been "cleaned" or "recleaned" conveys to a farmer the thought that the seed has gone through a mechanical process, the object of which is to separate weed seeds and chaff. The statement that seed has been "cleaned" or "recleaned," then, is equivalent to a statement that such seed has been subjected to this mechanical separation process. Notice that there is no statement as to the effectiveness of the process, no statement that the seed is "clean." We do not believe it is a "statement of the * * * cleanliness of the seed," within the contemplation of the statute.

It is not a statement of the "quality" or "purity" of the seed. This refers, we believe, to something other than the presence or absence of extraneous matter in the seed in bulk (which is covered by the use of the word "cleanliness" in the statute), but refers instead to such qualities as percentage of germination, and physical size of the individual seed.

CONCLUSION

It is the opinion of this office that a statement in an advertisement that seed has been "cleaned" or "recleaned" is not a "statement of the quality, purity, or cleanliness of the seed" within the contemplation of Subsection (3)(d) of Section 266.080, Mo. R. S., Gum. Supp. 1951; and that a farmer selling seed of his own production is not, by reason of use of such description in advertising, deprived of the exemption provided him by said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

AGRICULTURE:



A farmer offering unlabeled seed for sale by a public sales service violates Section 266.071, Paragraph 1, Subsection (2), RSMo, Gumulative Supplement, 1951, and the operator of a "community sales service" may also be held criminally liable for selling unlabeled seed in violation of the above section.

September 22, 1953

Honorable L. C. Carpenter Commissioner Department of Agriculture Jefferson City, Missouri

Dear Mr. Carpenter:

By your letter of April 7, 1953, you request an official opinion of this Department as follows:

"Section 266.080 of the Missouri Seed Law (1951), provides that the provisions of this law shall not apply 'to a farmer sho sells seed of his own production, except farmers and seed producers shall be classed as seedsmen and must comply with all the provisions of this law when such farmers or seed producers sell seed by any public sales service."

"Will you please give us an opinion as to whom is considered the responsible party for seed sold through our so-called 'Community Sales', the person offering the seed for sale through the sales barn, or the operator of the sales barn?"

You subsequently stated that the particular offense to which you had reference was the sale of unlabeled seed, in violation of Section 266.071, RSMo, Cumulative Supplement, 1951, Subsection 1 (2).

We assume the "Community Sales", referred to in your request, to be a public community auction sale, conducted as a regular business, to which the public is invited to bring articles for sale at public outcry. The sale being conducted on premises owned or under control of the proprietor of the business. At any given sale there may be sold many articles of a sundry nature. The public is invited to attend the auction sale and buy the articles

Honorable L. C. Carpenter:

offered. The articles are sold at auction; the auctioneer being the proprietor himself, or in the employ of the proprietor. Section 266.071 requires that agricultural or vegetable seed be labeled:

"1. It shall be unlawful for any person to sell, offer for sale, or expose for sale any agricultural or vegetable seed within this state

"(2) Not labeled in accordance with the provisions of sections 266.011 to 266.120 or having a false or misleading labeling."

Penalty for violation of the above is provided by Section 266.111:

- "1. Every violation of the provisions of sections 266.011 to 266.120 shall be deemed a misdemeanor.
- "2. When the commissioner of agriculture shall find that any person has violated any of the provisions of sections 266.011 to 266.120, he or his duly authorized agent or agents may institute proceedings in the circuit court or court of common pleas of the county or city in which the violation occurred, to have such person convicted therefor; or the commissioner of agriculture may file with the attorney general with the view of prosecution, such evidence as may be deemed necessary. shall be the duty of the prosecuting attorney or circuit attorney for the county or city in which the violation occurred, or the attorney general, as the case may be, to institute proceedings at once against any person charged with a violation of sections 266.011 to 266.120 if, in the judgment of such officer, the information submitted warrants such action. After judgment by the court in any case arising under sections 266.011 to 266.120. the commissioner of agriculture may publish the complete facts pertinent to the issuance of the judgment by the court in such manner as he may deem best."

Exemptions to the provisions of Section 266.071 are provided by Section 266.080, the exemption here pertinent, being Subsection (3) (c):

"The provisions of sections 266.051, 266.061 and 266.071 shall not apply:

"(3) To a farmer who sells seed of his own production, except farmers and seed producers shall be classed as seedsmen and must comply with all the provisions of sections 266.011 to 266.120 when such farmers or seed producers

"(c) Sell seed by any public sales service."

To determine whether a farmer who sells seed under the circumstances presented in your request, we must determine whether said farmer does "expose for sale" such seed "by any public sales service."

The Springfield Court of Appeals in State vs. Hogan, 252 S.W. 90, 1.c. 91, approved this definition of "expose for sale":

"* * An instruction in that case defined 'expose for sale' as the keeping and showing for the purpose of selling, and again defined the term in another instruction to mean 'to place in view with the purpose and intention of selling.' These definitions are not approved or disapproved in the opinion, but we think them correct. * * *."

It is clear this type of selling is by a "public sales service", since the sale is open to the general public, both as sellers and buyers. Therefore, we conclude that a farmer selling agricultural seed through a community auction must comply with Section 266.071, Paragraph 1, Subsection (2), RSMo Cumulative Supplement, 1951.

Honorable L. C. Carpenter:

Your second question is whether the operator of the "community sales" must determine that seed sold through his service is labeled in accordance with Section 266.071, Paragraph 1, Subsection (2). Because such person does "offer for sale or expose for sale" such seed, and does not fall within the exemptions allowed by Section 266.080, he must not sell unlabeled seed.

CONCLUSION

It is, therefore, the opinion of this office that a farmer offering unlabeled seed for sale by a public sales service is in violation of Section 266.071, Paragraph 1, Subsection (2), RSMo 1949, Cumulative Supplement, 1951, and that the operator of a "community sales service" may also be held criminally liable for selling unlabeled seed in violation of the above section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

COUNTY COURT: STATUTES:

SPECIAL ROAD DISTRICT: Construction of Section 233.320 and 233.325 RSMo. 1949 relative to the formation of special road districts.

December 4, 1953

Honorable William J. Cason Prosecuting Attorney Henry County Clinton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

> "I would like an opinion on certain portions of Section 233.320 and 233.325 of Missouri Revised Statutes of 1949 with reference to the formation of a special road district.

"The first question is as to the meaning of the word 'owners' as used in sub-section one of Section 233.325. Specifically, does a tenant in common holding a one-third interest in approximately 180 acres have a right to sign the petition mentioned in the statute as 'owners' for the full 180 acres, 60 acres, or for any acres?

"Does one who holds land as one of two tenants by the entirety have a right to sign as owner of the full acreage owned by both, one-half, or of any of the acres?

"Again with reference to Section 233.325: assuming there to be 640 acres included in the purposed district and that 40 acres is public land and that 200 acres are owned by persons who are non-residents of the purposed district, is it only necessary to have a majority of the acres owned by residents of the purposed district or in the above hypothetical 201 acres?

"Assuming all requirments have been met and the petition to be in proper form does the County Court have the power in its discretion to refuse to form the special road district under the above statutes. "Sub-section three of Section 233.320 states that the purposed district shall include at least 640 acres of contiguous territory, if public land is included within the purposed district does it count as a portion of the 640 acres of contiguous territory?

"There is at present a petition for the formation of a special road district pending in the Henry County Court, for this reason, your prompt attention will be sincerely appreciated."

This request contains some five questions of law construing sections 233.320 and 233.325 RSMo. 1949. We shall answer these questions in order in which they appear in your request for an opinion.

You first inquire if a tenant in common holding a one-third interest in approximately 180 acres has a right to sign the petition mentioned in Section 233.325, supra, as owner for the full 180 acres.

Section 233.325 reads in part:

"When ever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within the district proposed to be organized, and setting forth the proposed name of the district, and giving the boundaries thereof and the number of acres owned by each signer and the names of other owners of land residing within such boundaries so far as known, and the number of acres owned by each so far as known, * * *

"On the first day of said term of court, or as soon thereafter as its business will permit, the court shall hear such petition and remonstrance, and may make any change in the boundaries of such proposed district as the public good may require and make necessary, and if after such changes are made it shall appear to the court that such petition is signed or in writing consented to by the owners of a majority of all the acres of land owned by residents of the court shall make an order incorporating such public road district, and such order shall set out the boundaries of such district as established.

"If no remonstrance shall have been filed, or all remonstrances filed are overruled by the court, the court shall determine whether such petition has been signed by the owners of a majority of the acres of land owned by residents of the county residing within the district, and, if so, shall make an order incorporating the district with the boundaries given in the petition, or such boundaries as may be set forth in an amended petition signed by the owners of a majority of the acres of land owned by residents of the county residing within district, affected thereby; * * *"

Owner has been defined in many different ways depending upon its particular use in a statute. As stated in volume 42 Am.J.P. Section 39, page 217 which reads in part:

"* * *The term 'owner' is frequently used in statutes relating particularly to matters which form the subject of specific articles in this work, and its meaning in such cases is discussed in the particular article, as illustrated by the references below."

We are unable to find any decisions in this State construing the word "owner" as used in Sections 233.320 and 233.325 RSMo. 1949. However, we do find such decisions of courts in other states which under rules of statutory construction are not conclusive but are persuasive. In Merritt vs. City of Kewanee, 51 N.E. 867, 870 and 872 the court in construing a statute concerning local elections for improvements, one of the prerequisites for said improvement being that a majority of the owners of the abutting property must petition for such local improvement, held that a tenant in common could not sign a petition in behalf of co-tenants and in so holding the court said:

" * * So far as the tenants in common are concerned, there is no claim that they had any authority, either oral or written, to sign the names of the other tenants in common of each lot which they represented. Neither is it claimed that there was any ratification by the tenants in common not signing of the acts of those who did sign. It must, therefore, of necessity be true that the signature of one tenant in common of a lot was not the signature of the owners of the other undivided interests in the lot. It follows that each tenant in common who signed the petition only signed for the individual part of the lot which he owned, and not for the undivided portions thereof which he did not own. * *"

"The word 'owner' as here used in the statute, means owner in fee. Cases cited."

In Warren v. Borawski, 37 Atlantic 2d, 364 Local Cite 366, 130 Conn. 676 the Court held that a tenant in common of an undivided one-half interest in a lot affected by a proposal and

amendment to a zoning ordinance, was not an owner within the provisions of an ordinance requiring three-fourth vote of the common council to change an ordinance if the owner of twenty per cent of the property affected protested against the change, it being necessary for those owning the entire interest in said lot to join in order to make his valid protest. In so holding the Court said:

"On the other hand, in holding that one tenant in common could not sign a petition for an improvement, the court, in 21, 73 A. 984, 985, said: 'The position of the appellee in regard to this matter (that the part of the frontage proportionate to the interest of a signing tenant in common should be counted) cannot be sustained upon any theory either of law or common sense. The law requires the petition (for street paving) to be signed by the owners of the property. This means by all of the owners in any given piece of property. To hold otherwise would be to hold that, if all the property on any block were owned by tenants in common, the holder of an undivided 1/100th interest in the same might cause the block to be paved and the lien, therefore, to attach to the property, although the owners of the other 99/100th interest were opposed to it. The position that the proportionate part of the frontage representing the proportion of the co-tenant's interest may be counted upon his signature is equally untenable. The petitioner in this case does not own 25 feet of this property. His interest an undivided interest in every foot of it, and no particular foot frontage may be set aside for him, because in every foot so set aside his co-tenant would be an equal owner.' To the same effect are California Borough v. Powell, 50 Pa. Super. 521, 523; Marcus v. Board of Street Commissioners, 252 Mass. 331, 335, 147 N.E. 866; Mulligen v. Smith, 59 Cal. 206, 225; People ex rel. Brownell v. Board of Assessors, Sup., 109 N.Y.S. 991, 994; Merritt v. Kewanee, 175 Ill. 537, 544, 51 N.E. 867.

"The purpose of the statute in requiring a three-fourths vote of the council if a protest is filed by owners of 20 per cent of the property affected is to give some protection to those owners against changes to which they object. A petition for an improvement is positive and a protest against a change in zone, negative, but both involve changes in existing conditions and the reasoning of the remsylvania court applies, in substance, to both situations. It is more practical and logical to give the same meaning to the word 'owner' in both cases. As shown above, the cases are nearly unanimous in holding that a cotenant is not an 'owner' when a petition for improvement is involved, and we hold that, as well, within the meaning of the ordinance in question those owning the entire interest in the property must join in order to make a valid protest.

In view of the foregoing decisions, we conclude that one tenant in common signing said petition cannot be construed as being an owner under the foregoing statutory provisions unless all of the tenants in common owning said property sign said petition.

You next inquire if one who holds land as one of two tenants by the entirety has a right to sign as owner of the full acreage owned by both, one-half, or of any of the acreage.

The law is well established that tenants by the entirety have but one title, each owns the whole and neither without concurrance of the other has the power to convey to any third person and thus sever the tenancy. Furthermore, neither have an interest in an undivided portion thereof, Kennedy v. Rutter, 6 Atlantic 2d 17, 21, 110 V.T. 332. In other words, a tenant by the entirety is the same as tenants in common except that a tenant by the entirety has the right of survivorship, MacFarlane v. State, 29 N.Y. Supp. 2d 996, 997.

In view of the foregoing decision, we hold like in the case of tenants in common the signature of only one owning as tenants by the entirety would be of no effect but it will require signature of both husband and wife since they have the one title, survivor take all, neither have an undivided interest in any particular portion of said property and furthermore, neither can convey any part thereof without the signature and approval of the other party.

Your next request is whether or not public land located in such proposed district, shall be classified as land owned by a non-resident or is it such as might be considered owned by a resident of the county residing within the district. This raises a rather difficult point of law and one which we have been unable to find any decisions in point. We are assuming that by public land you have reference to such land that might be taken in the name of the State of Missouri for the benefit and use of some particular department or agency of the State and that the State of Missouri owns the Fee to said land. So in rendering this decision we shall consider land referred to as public land in your request only land held by the State or the United States of America in Fee Simple.

In view of the particular wording of the statute in organizing such special road districts, requiring the signature of owners of a majority of the acres of land owned by residents of the county residing within the district, we believe that in determining who owns the majority of acreage in said proposed road district, that you need not consider such public land as owned by residents of the county residing within the district. In some instances for certain purposes only, such public land might be considered as being owned

by a resident of the county; however, we cannot conceive of any public entity as being considered residing within the county.

You next inquire if assuming all requirements have been met and the petition is in proper form, does the county court have the power within its discretion to refuse to form the special road district under the foregoing mentioned statutes.

In answer to this particular inquiry, we are enclosing a copy of an opinion rendered by this department under date of July 17, 1951 to Hon. Don Kennedy, Nevada, Missouri, holding that the County Court has some discretion when and if remonstrances are filed in opposition thereto. However, if no remonstrances are filed, then the only duty the County Court has is to determine whether the petition has been signed by the owner of a majority of acres within proposed district. (Page 4 and 5, enclosed opinion.)

You next inquire if public land is included within a proposed district, does it count as a portion of the 640 acres of contiguous territory as provided under section 233.320 RSMo. 1949.

We assume that you make this inquiry by reason of the fact that owners of such public land may not be considered as resident owners residing within the proposed district under section 233.325, supra. Section 233.320, supra, makes no distinction as to the requirement of 640 acres of contiguous territory in said proposed district. This may include land owned by non-residents and public owned land.

CONGLUSION

- (1) It is the opinion of this department that one tenant in common is not an owner as provided under section 233.320 and 233.325 RSMo. 1949 and authorized to sign a petition for forming a special road district for the reason he does not have an interest in any undivided portion of the whole. However, such tenant in common may along with all other co-tenants sign said petition for the formation of said road district as provided by statute.
- (2) Neither the husband or wife alone owning property by the entirety are authorized to sign such petition for the formation of such a road district, for the same reason that one tenant in common cannot sign said petition and further for the reason that in the case of tenants by the entirety the right of survivorship exists. However, both tenants by the entirety are under the statute as owners authorized to sign such a petition.

Honorable William J. Cason

- (3) In determining who owns the majority of acreage in said proposed district, it is not necessary to take into consideration land owned by the State of Missouri or by the United States of America in said proposed district for the reason that if either owns such land it cannot qualify under the law as a resident of the county and residing within said district.
- (4) The County Court has some discretion in ordering a proposed district incorporated if remonstrances are filed in opposition thereto. However, if none are filed then the only duty the County Court has is to determine whether the Petition has been signed by the owners of a majority of acres within the proposed district and if it so finds, it has the absolute duty to issue an order incorporating said road district. (See enclosed opinion pages 4 and 5.)
- (5) Public land included within a proposed road district may be considered as a portion of the 640 acres of contiguous territory as provided under Section 233.320, supra.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH: lw

Enclosure

GARNISHMENT: MAGISTRATE COURTS: In Magistrate Court only money owed to the defendant, by the garnishee, at time of answer of interrogatories is subject to garnishment.



June 6, 1953

Honorable Joseph P. Collins Chief Magistrate The Magistrate Court of the City of St.Louis Civil Courts Building 12th and Market Streets St. Louis, Missouri

Dear Judge Collins:

In your letter of May 13th, 1953, you requested an official opinion of this office as follows:

> "Under the garnishment law applicable to Magistrate Courts, an Execution and Garnishment may be issued returnable within ninety days after service of the same. In several instances, a garnishee, immediately upon being served with the Summons of garnishment, made return in writing and in such return admitted the indebtedness to the employee of the amount due at the time of the service of the garnishment and paid the same into the registry of the Magistrate Court, although the garnishment was not returnable until ninety days after date of service. The plaintiff who ordered the garnishment insists that the Magistrate Court may, at the end of the ninety-day period and after the filing of interrogatories by the plaintiff and the service of the same upon the garnishee, bring the garnishee into court for the purpose of ascertaining its indebtedness to the employee during the entire ninety day period even though the employer had answered within a day or two after

Honorable Joseph P. Collins:

being served with the Summons of garnishment. The employer (garnishment. The employer (garnishee) on the other hand claims that having filed its answer to the garnishment upon being served with a Summons of garnishment, that this Court has no jurisdiction to inquire as to the earnings of the employee during the remainder of the period until the expiration of the ninety days from the date of the execution and garnishment."

Section 525.320, RSMo 1949, makes provision for summoning a garnishee before a Magistrate as follows:

"If there be not sufficient goods and chattels whereon to levy an execution, the sheriff shall summon in writing, as garnishees, such debtors or other persons having in their possession or under their control money, property or effects of the defendant in the execution, as may be named to him by the plaintiff or his agent, to appear before the magistrate at a time and place to be specified in the summons, not more than nine ty days from the service of the same, to answer such interrogatories as may be exhibited against them touching their indebtedness, or their possession or control of money, property or effects belonging to such defendant, and like proceedings shall be had thereon before the magistrate to final judgment and execution, as in suits instituted by attachment in magis-trate courts."

(Underscoring ours.)

However, although the summons must specify a time and place for appearance of the garnishee, such garnishee may, at his option, appear before the return date under authority of Section 525.340, RSMo 1949:

"Any garnishee, being summoned, may, at his option, appear and answer the interrogatories before the return day of the attachment."

Honorable Joseph P. Collins:

Section 525.330, RSMo 1949, specifically states that only indebtedness at the time of answer may be inquired into:

"The following interrogatories, and none other, shall be propounded to a garnishee summoned in a suit before a justice of the peace, which he shall answer on oath: First, at the time of service of the garnishment, had you in your possession, or under your control, any property, money or effects of the defendant? If so, state what property, how much and of what value, and what money or effects; second, at the time of service of the garnishment, did you owe the defendant any money, or do you owe him any now? If so, how much, on what account, and when did it become due? If not yet due, when will it become due?"

(Underscoring ours.)

That the above section is applicable to Magistrates, is made clear by House Bill No. 281, appearing in Laws of Missouri, 1945, page 1079 (this section dropped in the 1949 Revision):

"Whenever, in any statute, the word 'justice' (referring to justice of the peace) or the words 'justice of the peace' appear, said word or words shall hereafter be deemed to include and refer to 'magistrate,' unless there be something in the subject or context repugnant to such construction."

Since the Magistrate Court is prohibited from inquiry as to indebtedness incurred subsequent to garnishee's answer, the Court is, of course, unable to make any order touching upon any such indebtedness, and can only deal with subsequent indebtedness by issuance of further summons.

CONCLUSION

It is, therefore, the opinion of this office that a garnishee may, at his option, appear and make answer

Honorable Joseph P. Collins:

before return day specified in the summons; and that the Magistrate may only make order concerning indebtedness to the defendant at the time of answer of interrogatories by the garnishee.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

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GRAND JURY:
CRIMINAL LAW:
EVIDENCE:
CIRCUIT COURT:

Authority of member of a grand jury to testify in trial on an indictment as to a confession made before said grand jury by the defendant. Official court reporter who took testimony before grand jury unauthorized to testify at the trial on an indictment returned by the grand jury.

JOHN M. DALTON

March 5, 1953

J. C. JOHNSEN

Honorable Frank D. Connett, Jr. Assistant Prosecuting Attorney Buchanan County St. Joseph, Missouri



Dear Sir:

This will acknowledge receipt of your recent request for an official opinion, which reads:

"We would like to have your opinion as to the law on the following set of facts:

"A certain defendant appeared before the Buchanan County Grand Jury and voluntarily confessed to having committed certain crimes. Present at that time was an official reporter of the Circuit Court, pursuant to Section 540.105, R.S.Mo., 1949. The Grand Jury presented an indictment charging said defendant with having committed the crime confessed to before them.

"Our questions are these:

"During the trial of this defendant, on the said indictment, may the State put into evidence the confession of the defendant by (1) putting on a Grand Juror and having him testify as to what he heard the defendant say while before him, (Section 540.300 R.S.Mo.,1949 seems to permit this, (2) if one (1) above is permissable, then may the witness refresh his memory from a transcript made by the court reporter present at the time of the confession, Honorable Frank D. Connett, Jr.

(3) may the official court reporter take her transcript and testify as to what the defendant stated before the Grand Jury?"

You state that a defendant appeared before a grand jury in Buchanan County, Missouri, and confessed to having committed a crime and that the confession was made in the presence of the official Circuit Court reporter, who, we assume for the sake of this opinion, was directed by the judge of the Circuit Court to take down and transcribe testimony for the use of the prosecuting attorney as provided by law.

You first inquire if the state may put into evidence the confession of the defendant by putting on a gram juror and having him testify as to what he heard the defendant say while testifying before the grand jury.

Section 540.300, RSMo 1949, is the only statutory authority permitting a member of any grand jury to testify, and it reads:

"Members of the grand jury may be required by any court to testify whether the testimony, of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offense."

Under the foregoing statute, it is provided that members of a grand jury can testify in only two instances. First, when required to testify by a court and then only as to whether testimony given by a certain witness appearing before a grand jury was consistent with or different from the evidence given by same witness in the court, and also a grand juror may be required to disclose testimony given before them by any person upon a complaint against such person for perjury or upon such person's trial for such offense.

As stated in Conway v. Quinn, 168 S.W. 2d 445, the old common law rule preserving the secrecy of a grand jury proceedings has been modified only to the extent that may be allowed by an act of the legislature. In so holding, the court said, 1.c. 446:

"The law is further stated as follows:

'All of its proceedings should be legally sealed against divulgence. The policy is to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may deliberate and decide without apprehension of any detriment from an accused or any other person; * * to prevent perjury and subornation of perjury by withholding the knowledge of facts testified to before the grand jury, which, if known, would be for the interest of the accused or his confederates to attempt to disprove by procuring false testimony; and also to save the citizen the trouble, expense, and disgrace of being arraigned and tried in public on a criminal charge, unless there is sufficient cause for it. 24 Am. Jur. 865, Sec. 47."

The oath of the members of the grand jury requires secrecy of the proceedings by said jury. See Section 540.080, RSMo 1949.

In State v. McDonald, 119 S.W.2d 286, 1.c. 288, 342 Mo. 998, the court had this to say about the secrecy required of a grand jury proceedings and the only time when such proceedings may be revealed:

"Impeachment of witnesses for variations in testimony before a grand jury and at the trial is usually accomplished through some member of the grand jury or other person lawfully in attendance thereon, and not from the minutes kept by said body. Consult State v. Thomas, 99 Mo. 235, 258 (IV), 12 S.W. 643,650(4); State v. Whelehon, 102 Mo. 17, 23, 14 S.W. 730, 731. Sec. 3522, R.S. 1929, Mo.St.Ann. Sec. 3522, p. 3138, provides for the appointment of one of the grand jurors as clerk to preserve minutes of the proceedings and of the evidence given before them, and for the delivery of said minutes to the prosecuting official. Sec. 3516, R.S. 1929, Mo.St.Ann. Sec. 3516, p. 3136, gives a form of oath for grand jurors, embracing secrecy. Sec. 3535, R.S. 1929, Mo.St.Ann. Sec. 3535, p. 3142,

prohibits grand jurors disclosing any evidence adduced before the grand jury, except when lawfully required to testify as a witness in relation thereto * * * . Section 3533, R.S. 1929, Mo.St. Ann. Sec. 3533, p. 3141, in so far as material authorizes grand jurors to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court * * * . So far as here involved the common law rule preserving the secrecy of grand jury proceedings has been modified by statute in this state only to the extent indicated. * * * * *

A primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. State ex inf. Rice ex rel. Allman v. Hawk, 228 S.W.2d 785, 360 Mo. 490. Another well established rule of statutory construction is that statutes applicable to the subject involved must be read and construed together and, if possible, be harmonized. State v. Taylor, 40 S.W.2d 1074, 328 Mo. 335.

Section 540.310, RSMo 1949, provides that no member of any grand jury shall be obligated or allowed to testify or declare in what manner he or other members voted on any question before them. Section 540.320, RSMo 1949, further provides that no grand juror shall disclose any evidence given before the grand jury except when required to lawfully testify as a witness in relation thereto and as shown above, Section 540.300 is an exception to this statute.

In none of the cases which have been decided in Missouri has this identical question presented by the prosecutor been passed upon. The case of Tindle v. Nichols, 20 Mo. 326, appears to be the case in which the idea has arisen that a member of a grand jury is not permitted to testify concerning statements made to the grand jury except in cases provided under what is now known as Section 540.300, RSMo 1949. In that case the action was for slander and one of the witnesses called by the defendant was a member of the grand jury who was called for the purpose of testifying to what the plaintiff's wife had testified to before said grand jury. The court held that such testimony of the grand juror was inadmissible. In so holding the court said:

Honorable Frank D. Connett, Jr.

"The only question for our consideration arises upon the ruling of the court below, in regard to the admissibility of the grand jurors as witnesses. This is a grave question, and it has had the serious consideration of the court; and we are of the opinion that these witnesses should not have been required or permitted to disclose the evidence given before them as grand jurors; that the court below erred in this matter and its judgment must be reversed.

* * * * * * *

"Thus stands the statute law. In what cases. then, can a grand juror be lawfully required to testify as a witness in relation thereto? Such as are embraced in the fifteenth section cited above, and such only. This fifteenth section specifies these cases, and the bare specification excludes all other cases not enumerated. These cases are, first, Whether the testimony of a witness examined before such grand jury is consistent with or different from the evidence given by such witness before such court; and, secondly, may be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for perjury. 1

"These are the cases where a grand juror may be lawfully required to testify in relation thereto.

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" * * * From all that is said on this subject in the books, it may be laid down that grand jurors are not permitted or required to testify to what has been given in evidence before them, unless it be in the cases similar to those pointed out in the provisions of our statute above cited. Applying this doctrine to the acts of the Circuit Court in this case, and it will Honorable Frank D. Connett, Jr.

be seen that its judgment cannot stand. I do not find any error in the refusal to give the second instruction asked for by the plaintiff."

The general rule does appear to be that such confessions may be testified to by a member of the grand jury. See: Annotation 27, A.L.R. 151, Whitmore on Evidence, Sec. 2363. In the last mentioned work, the Missouri rule as represented by the Tindle case, holding that members of a grand jury cannot testify as to statements made to said grand jury, except as those provided for under Section 540.300, supra, is severely criticized.

In view of the foregoing statutes and decisions, we must conclude that you may not have a grand juror testify as to what he heard the defendant testify to relative to his confession before said grand jury. However, said grand juror may be required by the court to testify after said defendant has testified in the Circuit Court; however, then only as to whether the testimony of said defendant before said grand jury is consistent with or different from the evidence of said witness at the trial.

Your second inquiry, if a grand juror is permitted to testify, then may said grand juror refresh his memory from a transcript prepared by a court reporter containing testimony before such grand jury?

We find very little authority on this question, however, we find State v. Thomas, 99 Mo. 235, l.c. 261, wherein the Supreme Court did at least indicate that the minutes of the proceedings of a grand jury as prepared by one of the members of said grand jury, duly appointed by said grand jury, as provided by statute, might perhaps be used to refresh a grand juror's memory. In so holding the court said:

"The minutes of the evidence kept by one of their number, unsanctioned by the oath of anybody, cannot be made a substitute for this fair, just and orderly way of getting at the evidence that was actually given before the grand jury.

"While the statute permits 'every grand jury to appoint one of their number to be clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall

be given to the prosecuting attorney!
(sec. 1780, supra), it has nowhere
authorized the admission of these minutes
as evidence, anywhere, or for any purpose.
They are not required to be signed, and
are not sworn to by anybody. They are
not the statement, deposition or affidavit
of the witness, but simply a memorandum,
by which, perhaps, a grand juror's
memory might be refreshed, but upon which
could not be shifted the responsibility
of the juror's oath as to what the
witness did actually testify. * * * "

The general rule is that for a witness to refresh his memory it does not ordinarily have to be from a writing of his own but it may be anything that he would recognize as having heard or seen. Especially is this true where he is shown an exact transcript of the evidence, as in this case where of his own knowledge the testimony was taken down and transcribed by a court reporter as required by law. Furthermore, this comes within the discretion of the trial court. See: Voiles v. Columbia Terminals Co., 233 S.W.2d 870; State v. Henson, 234 S.W. 832; and State v. Patton, 164 S.W. 233, 255 Mo. 245.

In view of the above holding that a member of the grand jury may testify under certain conditions as provided in Section 540.300, supra, and further that the court in State v. Thomas, supra, strongly indicated that even the minutes of the proceedings and evidence before a grand jury preserved by a member of the grand jury might be used to refresh the memory of a grand juror so testifying, and certainly the evidence before the grand jury preserved as provided by law by a court reporter could be used to refresh the memory of a grand juror, we are of the opinion that only that part of the transcript relative to the matter that said juror is allowed to testify to may be used to refresh his memory.

You further inquire if the court reporter may take her transcript of the testimony of the defendant before the grand jury and testify before the Circuit Court as to what defendant said before the grand jury.

There is no statutory authority for the official court reporter to testify at the trial from her transcript of notes taken before the grand jury as to what the defendant said before said grand jury. Section 540.105, RSMo 1949, provides that before a said court reporter shall take down any evidence before a grand

Honorable Frank D. Connett, Jr.

jury that said reporter must be sworn that he shall not divulge any of the proceedings or testimony before said grand jury except to the prosecuting attorney of the county or anyone assisting said prosecuting attorney in the prosecution of an indictment brought by said grand jury.

Therefore, in the absence of statutory authority for said court reporter testifying, we must conclude that it would be violating the secrecy of the grand jury to allow said reporter to testify at the trial as to what the defendant stated before said grand jury.

CONCLUSION

Therefore, it is the opinion of this department that a member of a grand jury cannot testify as to what he heard a defendant say before the grand jury relative to his confession, but a member of the grand jury may testify at the trial on the indictment returned by the grand jury after the defendant at the trial who made the confession before the grand jury has testified, as to whether the testimony given by said defendant before the grand jury was consistent with or different from the evidence given by said defendant at his trial on the indictment.

Furthermore, that only that part of a transcript relative to the matter that a grand juror is allowed under the law to testify to, as provided in Section 540.300, supra, may be used to refresh his memory.

Also, in the absence of statutory authority, an official court reporter may not take her transcript of the hearing before the grand jury and testify as to what the defendant stated before said grand jury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Sincerely yours,

JOHN M. DALTON Attorney General

ARH:1rt

DEPARTMENT OF BUSINESS AND ADMINISTRATION: No appropriation may be made for Bi-State Development Agency subsequent to December 31, 1951.



March 10, 1953

XXXXXXX

J. C. Johnsen

Mr. Bert Cooper, Director
Department of Business and
Administration
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The Bi-State Development Agency was created by an act of the General Assembly in 1949; Session Acts 1949, Page 587. An identical bill was passed in the General Assembly of Illinois. However, the Legislature in Missouri attached the following amendment to the compact in Section 4, 'Provided, that no appropriation of moneys from state funds in support of the Bi-State Agency herein created or in support of the project provided for in the compact herein set out shall ever be made by the State of Missouri after December 31, 1952. The Bi-State Agency requested an appropriation by the 66th General Assembly. A token of the amount was passed but had a clause attached requiring its expenditure prior to December 31, 1952. An interpretation by the Attorney Ceneral held that the prohibition of the law specified above, 'Shall ever be made' referred to appropriation and not to the expenditure of the funds.

"As a result of the above interpretation, a second appropriation request made by the Bi-State Agency and an appropriation was passed by the House. The Senate did not act on the measure until after January 31, 1952, consequently turned the appropriation down due to the prohibition clause. The agency has raised funds by donation to match the funds from Illinois

to operate for the past year.

"When the Statutes were revised in 1949, the prohibition clause in the law was inadvertently omitted. The agency now has requested an appropriation of \$28,430.00 for the biennium 1953-55.

"As director of the Department of Business and Administration, I would appreciate having the answer to the following questions to guide us in our procedures:

- "1. Does the prohibition clause in the 1949 act of the General Assembly now legally stand repealed?
- "2. Does a new bill have to be introduced and passed to clarify and legalize the deletion of the prohibition clause?
- "3. If an appropriation bill is now introduced after the Governor has acted on the regular budget, can it be considered along with the hearing on the regular budget of the other agencies in the department?

"In other words, does Section 25, Article 4 of the Constitution require separate hearings by committees as well as action on the bill to be delayed?"

Provision for the Bi-State Development Agency was made by two acts of the 65th General Assembly. Senate Bill 99 of that General Assembly, which is found Laws of Missouri, 1949, p. 558, authorized the creation of a compact between the State of Missouri and the State of Illinois. The act sets forth at length and in detail the form of the compact to be entered into between the signatory states and enumerated the powers, duties and authority of the agency to be created. This act was of a more or less temporary nature involving as it did only the organizational steps to be taken in creating the Bi-State Development Agency. However, Section 4 of the act contained the following significant provision:

[&]quot; * * * Provided, that no appropriation of

moneys from state funds in support of the Bi-State Agency herein created or in support of the project provided for in the compact herein set out shall ever be made by the State of Missouri after December 31, 1951."

Senate Bill 100 of the same General Assembly provided for the permanent working organization in so far as the State of Missouri is concerned of the Bi-State Development Agency. This act is permanent in nature and will continue to serve as the statutory authority of the Bi-State Development Agency to carry out its official functions.

In the 1949 revision, portions of the two acts mentioned here were combined and appear as Sections 70.370 to 70.440, inclusive. Section 4 of Senate Bill 99 of the 65th General Assembly, a portion of which has been quoted supra, was deleted in the Revised Statutes of 1949 as they appear in the official publication. Such action was taken presumably by the revisor of statutes pursuant to statutory authority delegated to such officer by the Committee on Legislative Research. It therefore becomes pertinent to ascertain the extent of the power conferred upon such committee and under such delegated power to the revisor of statutes. Your attention is directed to Section 3.040, RSMo 1949, relating to the powers of the committee on Legislative Research and reading in part as follows:

"* * But all such laws and provisions now in force or passed at the 1949 session, and not expressly repealed by or repugnant to the provisions of the revised statutes, shall continue in force or expire, according to their respective provisions or limitations."

(Underscoring ours)

Your attention is further directed to a portion of Section 3.060, RSMo 1949, reading as follows:

- "1. The committee, in preparing editions of the statutes, shall not alter the sense, meaning, or effect of any legislative act, . . .
- "2. It shall have power:

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(3) To transfer sections or to divide or

combine sections so as to give to distinct subject matters a section number, but without changing the meaning; * * *

(Underscoring ours)

We have examined the acts of the 65th General Assembly and do not find that Section 4 of Senate Bill 99 of that General Assembly, appearing Laws of Missouri 1949, p. 558, has been expressly repealed. Neither do we find that such section is repugnant to any other acts of the same General Assembly as exemplified by the Revised Statutes. From the foregoing, we are of the opinion that the published edition of the Revised Statutes of 1949 does not correctly exemplify the status of the law as it exists with respect to appropriations to be made on behalf of the Bi-State Development Agency subsequent to December 31, 1951.

With the limitation still remaining in force upon the power of the present and subsequent General Assembly to make any appropriation to the Bi-State Development Agency, it is, of course, necessary that in order to delete such limitation a specific bill must be passed having that effect.

What we have said heretofore discloses that it is not necessary to pass upon the question which you have proposed as No. 3.

CONCLUSION

In the premise we are of the opinion that:

- (1) That the proviso contained in Section 4 of Senate Bill 99 of the 65th General Assembly, Laws of Missouri, 1949, p. 558, remains in full force and effect and prohibits the appropriation by the current General Assembly or any subsequent General Assembly of moneys to the Bi-State Development Agency; and,
- (2) That such limitation on the authority of the current General Assembly or any subsequent General Assembly may be removed only by the passage of an act specifically repealing such proviso.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

WFB:mm

CONSTITUTIONAL LAW:

GENERAL ASSEMBLY:

Members of General Assembly privileged from arrest except for cases of treason, felony or breach of the peace, during the session of the General Assembly and for the fifteen days next before the commencement and after the termination of each session.

FILED

April 8, 1953

Representatives Russell Corn and Pascal G. Bryant Room 314, House Post Office Capitol Building Jefferson City, Missouri

Gentlemen:

Reference is made to your request for an official opinion of this department, reading as follows:

"We want to know if a member of the Missouri Legislature can be arrested for speeding or if a stop light is run. This is going to and from the session of the Legislature, and we also want to know if the exemption is just while the Legislature is in session or for our term."

Your attention is directed to Section 19 of Article III of the Constitution of Missouri, 1945, which reads as follows:

"Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and for the fifteen days next before the commencement and after the termination of each session; and they shall not be questioned for any speech or debate in either house in any other place."

It is apparent from the foregoing constitutional provision that members of the General Assembly are privileged from arrest for the period mentioned therein, except in Representatives Corn and Bryant

cases involving the enumerated offenses.

You have mentioned "speeding" and what is commonly called "running a stop light" in your letter of inquiry. Of course, neither of these offenses amounts to "treason" or "felony." It, therefore, remains to be determined whether or not either of such offenses constitutes a "breach of the peace."

The meaning of the phrase "breach of the peace" as used in statutes and constitutional provisions similar to that under consideration, and under the common law, has been enunciated by the appellate courts repeatedly. In particular we direct your attention to City of Louisiana v. Bottoms, 300 S.W. 316, l.c. 317, from which we quote:

"In general terms, a breach of the peace is a violation of public order and decorum, or a disturbance of the public tranquillity, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. City of St. Louis v. Slupsky, supra; City of Plattsburg v. Smarr (Mo. App.) 216 S.W. 538; 9 C.J. 386; 8 R.C.L. page 284, Sec. 305. * * * "

With this definition of the phrase in mind, we are led to believe that neither of the offenses mentioned in your letter of inquiry amounts to a "breach of the peace."

CONCLUSION

In the premises, we are of the opinion that members of the General Assembly are privileged from arrest except for cases of treason, felony or breach of the peace, for the period during which the General Assembly is in session and for fifteen days next before the commencement and after the termination of each session.

We are further of the opinion that "speeding" and "running a stop light" are neither offenses comprehended within the phrase "breach of the peace." Representatives Corn and Bryant

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

CRIMINAL LAW: BOXING: WRESTLING:

ATHLETIC COMMISSION: Sponsorship of private wrestling show by unlicensed organization not criminal. "Booking" of professional wrestlers for wrestling show, either public or private not criminal.



June 11, 1953

Honorable Bert Cooper Director Department of Business and Administration State Office Building Jefferson City, Missouri

Dear Mr. Cooper:

You requested an official opinion on the following factual situation:

> A group of Shriners in Kansas City scheduled a wrestling show to be held May 8, 1953. The participating wrestlers were to be paid for their services, and were professional wrestlers. Only Shriners were to be admitted to the show. There was no admission charge.

This particular group had not been licensed by the Athletic Commission. The "booker" had not been licensed. The Athletic Commission had not been consulted in any manner about this show.

The specific questions to which you request an answer are:

- "1. In the event of injury sustained during this match is the Commission responsible?
- Does the Commission have jurisdiction over a match to which no admission is charged? (This would include the setting of dates, assigning of doctors, inspectors, etc.)

- "3. Does the Commission have grounds for the arrest of for operating as a booker in the state of Missouri without a license?
- "4. Does the Commission have grounds for action against participants if such a match, without Commission sanction, is held?

"Especially are we interested in question 3. I find that _____ has not only been booking talent for this particular case but for definitely public matches without a license."

Prior to 1927, all public boxing or sparring exhibitions were prohibited, and persons engaging or assisting in such exhibitions were deemed guilty of a misdemeanor. In 1927, what is now Chapter 317, RSMo 1949, was enacted. This chapter created the Athletic Commission, and gave it these powers:

"317.020. Commission to supervise boxing, sparring and wrestling matches--rules--fees

"That the athletic commission of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and it shall have the power, and it shall be its duty:

- "(1) To make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admission thereto;
- "(2) To accept application for and issue licenses to any bona fide patriotic, benevolent, fraternal or religious organization or local unit thereof, desiring to promote boxing, sparring and wrestling exhibitions, which has been in existence and has held meetings at regular intervals during the

year immediately preceding the granting of the license, and to revoke the
same at its pleasure; said application
shall designate the city in which the
organization or local unit thereof intends to operate, and the license
granted shall entitle said organization, or local unit thereof, to conduct such boxing, sparring and wrestling exhibitions in that city, and no
other.

"(3) To charge fees for such license of ten dollars for every license issued and to charge five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held. Such funds to be paid to the division of collection in the department of revenue, which shall pay said funds into the state treasury to be set apart into a fund to be known as the athletic commission fund."

(Emphasis ours.)

Section 317.030, RSMo 1949, makes certain amateur wrestling matches exempt from the provisions of Chapter 317:

"* * * provided further, that the provisions of this chapter shall not apply to amateur wrestling matches which are held by patriotic, benevolent, fraternal, educational or religious organizations where the contestants do not receive a monetary consideration for their services."

Since the wrestlers appearing in this show were paid for their services, they are not amateurs, and thus the exemption provided by Section 317.030, do not apply to the match in question.

An examination of the first paragraph of Section 317.020, supra, indicates that the Athletic Commission shall have general charge and supervision of all wrestling

exhibitions in this State. However, in determining the intent of the Legislature in enacting any legislation, the whole enactment must be scrutinized. In the numbered subparagraphs of Section 317.020, it should be noted that in paragraph (1) the Commission is given the power to regulate the admission charges for any match. It is further noted that subparagraph (3) directs the Commission to charge five per cent of the gross receipts of every exhibition. Thus, in reading and construing the whole statute, it becomes clear that the legislative intent was to remedy the evils connected with unsupervised professional exhibitions for which the only purpose was to profit the promoter and participants.

Therefore, since the provisions of Chapter 317 apply only to those matches at which an admission fee is charged, the instant match does not fall under the supervision of the Athletic Commission.

Since the Commission does not have supervision over this match, your question as to liability of the Commission becomes moot, and will not be further discussed.

The only penal provision by which the Commission may command obedience to the authority given them by Chapter 317 is Section 317.050, RSMo 1949:

"Any person who shall engage in any public boxing, sparring or wrestling exhibition, or who shall aid, abet or assist in any such exhibition, or who shall furnish any room or other place for such exhibition, unless a license for holding such exhibition has been granted by the athletic commission of the state of Missouri, shall be deemed guilty of a misdemeanor."

(Emphasis ours.)

It should be noted that the above-quoted section makes criminal prosecution possible only in public exhibitions. Thus, before we can determine criminal liability we must determine whether the subject show was "public." The real test of whether an exhibition is public or private should be whether admission is open to any person or persons who may have the price of an admission

ticket, or whether the exhibition may be viewed only by members of a closed and select group.

In the case of State ex rel. Wear vs. Business Men's Club, 178 Mo. App. 548, the Prosecuting Attorney brought a Que Warranto proceeding to oust a corporation of its franchise for misuser. The club had been formed ostensibly for the purpose of providing for education and entertainment of its members. The only requirement for members was that an applicant fill out an application blank and pay a fee of one dollar. Of a large number of applicants only eight were rejected, two because the membership fee was not paid, and six because the application blank was not signed. All other applications were accepted. At the time of the proceedings the club had only a room wherein a boxing ring was erected with chairs to seat spectators. The Court decided that the corporation was formed to evade the prohibition against public sparring and boxing exhibitions and ousted the corporation of its franchise. FARRINGTON, J. in a concurring opinion gave this discussion of what is a public exhibition, 1.c. 575, 576:

"Enough has been shown to lead to but one conclusion and that is that the sparring exhibitions given under the auspices of this club were accessible to all who cared to witness them and who were able to sign their name to an application and could raise the small amount of money required. This constituted the exhibitions in law and in fact public sparring and boxing exhibitions, and hence unlawful. * * *."

Black's Law Dictionary, third edition, defines "public" and "private" as follow:

Public -- "Pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; Open to common use.

Private -- "Affecting or belonging to private individual, as distinct from the public generally * * *."

In view of these definitions and interpretations, the subject match, at which no admission was charged, and admittance was restricted to a small and highly select group was not a public exhibition within the meaning of Section 317.050.

In your letter you indicated that the "booker" has been booking matches that are definitely public matches. You inquire whether he may be prosecuted for that. Section 317.020, subsection 1, gives to the Commission the power and the duty to make and publish rules and regulations governing, in every particular, the conduct of wrestling matches. Pursuant to this statutory mandate, the Commission has issued a pamphlet entitled "Laws, Rules and Regulations for the Governing of Boxing and Wrestling in the State of Missouri", which rules were to be effective November 1, 1951. Said rules under Section XXIV, "Miscellaneous", page 47, makes provision for licensing persons booking wrestlers:

"26. It is hereby required that any group, individual or organization engaged in the business of booking wrestlers and boxers, professional and amateur, in the State of Missouri. is hereby required to be licensed by this commission. Fee for said license is \$100.00 per year or any part thereof. Any booker licensed by this commission must file with this commission a copy of the contract with each principal stating therein the fee or percentage the booker is charging for such service. The booker shall furnish this commission with a list of all names of those engaged as his assistants, agents and employees.

"By booker is meant any group, individual or organization engaged in furnishing boxing and wrestling contestants to organizations, promoters or match makers."

You inquire whether an unlicensed person, who acts in a capacity for which he is required to be licensed by the

Honorable Bert Cooper:

rules of the Commission, may be prosecuted. It must be noted that Chapter 317 makes specific provision for issuance of licenses to organizations desiring to sponsor boxing and wrestling exhibitions. However, there is no statutory provision for licensing bookers. Therefore, any prosecution must be based on the premise that violation of the rules promulgated by the Commission is criminal. However, the Commission is prohibited by Article I, Section 31, Constitution of Missouri, 1945, from fixing a fine or imprisonment for violation of their rules:

"Sec. 31. Fines or Imprisonments Fixed by Administrative Agencies. -- That no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation."

Therefore, because Section 317.050 makes it criminal to engage in public exhibitions only when the sponsoring organization has no license, and since the Commission cannot provide punishment for booking by an unlicensed person, there can be no criminal prosecution for unlicensed booking.

CONCLUSION

It is, therefore, the conclusion of this office that the Athletic Commission has jurisdiction and general supervision over only professional wrestling exhibitions to which an admission fee is exacted; that an organization which presents a private wrestling exhibition without a license does not violate any criminal law; and that an unlicensed person booking professional wrestlers for participation in either a private or public wrestling exhibition cannot be criminally punished.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

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APPROPRIATIONS:

Appropriation for the payment of salary of "other necessary employees" may not be used for payment of salary increase of the Director, Department of Business and Administration.



September 2, 1953

Honorable Bert Cooper Director, Department of Business and Administration Jefferson Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"May I have your opinion in the answers to the questions indicated below?

"The Director of the Department of Business and Administration was given a salary increase of \$1,000 per annum to be paid monthly by the passage of Senate Bill No. 325 in the 67th General Assembly.

"In H. B. No. 363 Section 4.390 only \$10,000 was appropriated for 'Salary of director' and \$6,500 for 'Salaries, wages and per diem of other necessary employees'

"The salary increase does not become effective until 8-29-53 and the amount of money needed for the biennium would be approximately \$1,758.

- "(1) Could the \$1,758 for the additional statutory salary be paid from the \$6500 appropriation in H. B. 363?
- "(2) In case the answer to question 1
 is 'no' and inasmuch as the law provides
 that the salary increase shall be paid

monthly would it be necessary or advisable to submit a requisition monthly to the comptroller for the payment of the amount of statutory salary increase due that they may accumulate as an obligation of the state?

"A reply before September 20 will be appreciated."

In the following opinion, we have assumed the validity of the salary increase granted the Director of the Department of Business and Administration under the provisions of Senate Bill No. 325 of the Sixty-seventh General Assembly and this opinion is not to be construed as ruling upon any question with respect thereto.

Your attention is first directed to the provisions of Section 28, Article IV, Constitution of Missouri, 1945, reading in part, as follows:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unemcumbered balance sufficient to pay it. * * *"

Your attention is further directed to the provisions of Section 23, Article IV, Constitution of Missouri, 1945, reading in part, as follows:

"* * *Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

further, to Section 21.260, RSMo 1949, which reads as follows:

"Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriation shall be made for each item of extraordinary operation and maintenance expenditure and for each

major capital expenditure. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Keeping the foregoing constitutional and statutory provisions in mind, we have considered Section 4.380 of House Bill No. 363 of the Sixty-seventh General Assembly, This appropriation act reads, in part, as follows:

"Section 4.380. There is hereby appropriated out of the state treasury, charge-able to the General Revenue Fund, the sum of Eighteen Thousand Seven Hundred Fifty Dollars (\$18,750.00) for the use of the Director of the Department of Business and Administration for the payment of salaries, wages and per diem of the Director and necessary employees; for the original purchase of property; for repairs and replacements of property; and for the operating and general expenses; for the period beginning July 1, 1953 and ending June 30, 1955, as follows:

"Personal Service:

* * * *

(Emphasis ours.)

It is apparent that in the enactment of this portion of House Bill No. 363, the Sixty-seventh General Assembly has followed the constitutional and statutory directives found in the provisions of the Constitution and of the Revised Statutes of Missouri, quoted supra, in that the appropriation act has itemized the "purposes" for which the money appropriated thereof may be expended.

You will note that the appropriation made for the payment of the salary of the Director of the Department of Business and Administration was in the exact amount required to pay the then statutory salary of such officer for the en-

suing biennium, namely \$5,000 per year or a total or \$10,000 for the biennium. The excess was limited to the use of payment of salaries of "other necessary employees." In Webster's New International Dictionary, Second Edition, we find the following definition for the word "other":

"A different or additional one; -- the substantive use of OTHER, adj.; * * *"

it, therefrom, appears that in stating the "purpose" of the additional appropriation made under the provisions of the section quoted, the General Assembly has seen fit to limit such "purpose" to one in connection with the payment of the salaries of the "other necessary employees" of the Department of Business and Administration.

We do not pass upon the second question which you propounded. In the event of any controversy arising with respect to subsequent payment of the proportionate part of the salary increase contained in Senate Bill No. 325 of the Sixty-seventh General Assembly, it will be our constitutional and statutory duty to represent the comptroller and we do not desire to be placed in the position of advising any potential adverse party with respect to private rights.

In the premises, we are of the opinion that the appropriation made under Section 4.380 of House Bill No. 363 of the Sixty-seventh General Assembly, of the designated portion to pay the salaries, wages and per diem of "other necessary employees", may not be used for the payment of the increased salary granted the Director of the Department of Business and Administration under the provisions of Senate Bill No. 325 of the same General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Very truly yours,

CONSERVATION COMMISSION:

Form denoted "Special Use Permit" is in proper legal form and, when duly executed, will be enforceable as to the provisions thereof.



September 19, 1953

Missouri Conservation Commission Monroe Building Jefferson City, Missouri

Attention: J. D. Beets, Acquisition Agent

Gentlemen:

This will acknowledge receipt of your recent request to examine the attached form denoted "Special Use Permit" and render an opinion as to whether it is in proper legal form and, when properly executed, will be enforceable as to its provisions.

We have examined said permit form and in rendering this opinion, are assuming as stated in your request, that there will be nothing inserted under paragraphs 9 and 18 of said permit which will, in any manner, conflict with all the other provisions contained therein.

CONCLUSION

It is the opinion of this department that said "Special Use Permit" is in proper legal form and, when duly executed, will be enforceable as to the provisions thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

Damages:

Conservation Commission: Proposed form of easement for flood rights is in proper legal form and, when auly executed, will protect the Conservation Commission from claims for all damages resulting from the construction and maintenance of a dam on Big Lake in Holt County, Mo.



September 19, 1953

Mr. I. T. Bode, Director Missouri Conservation Commission Monroe Building Jefferson City, Missouri

Dear Mr. Bode:

This will acknowledge receipt of your recent request to examine the enclosed form denoted "Easement for Flood Rights" and render an opinion as to whether the Conservation Commission is protected thereunder against any claims for damages arising from the construction and maintenance of a dam at Big Lake, Holt County, Missouri, which will, in effect, tend to raise the water level of said lake approximately two feet and may possibly flood some of the land described in said proposed easement.

The owners of said land may waive any and all rights to any damages that may accrue to them by reason of said construction. See Lucas Hunt Village Co. v. Klein, 358 Mo. 1054, 218 S. W. (2d) 595, 599 and Sartin v. Hudson, (Texas) 143 S. W. (2d) 817, 1.c. 823. We believe that when the owners of said land and the commission duly execute this agreement, that said owners waive any claims to damages caused by the construction of said dam.

CONCLUSION

Therefore, it is the opinion of this department that this proposed form of easement for flood rights is in proper legal form and, when duly executed, will protect the Conservation Commission from claims for all damages resulting from the construction and maintenance of a dam on Big Lake in Holt County, Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours.

MERCHANDISE: ASSESSMENT: TAXATION: Merchant's stock of goods should be taxed

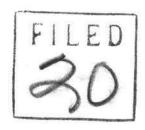
at the place where it is located.

JOHN M. DALTON

January 29, 1953

1-29-53

Honorable James E. Curry Prosecuting Attorney Douglas County Ava, Missouri



John C. Johnsen

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"I am writing this letter to you at the request of the Douglas County Court. which has asked me to advise them with reference to the taxation of merchants' stock. More specifically, we have a merchant who owns and operates his business within the city limits of Ava, Missouri, but he resides outside the city limits and in an adjoining school district. Of course, personal property is assessed at the residence of the owner, and the rate applied is that existing at the residence of the owner. If a merchant's stock is classified for tax purposes as personal property, then the taxing situs would be the residence of the owner. Would you please advise."

In regard to this matter, we would first direct your attention to Section 150.040, RSMo 1949, which section reads:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than

his commission."

The above section establishes the fact that merchants shall pay a tax upon their stock of goods, which is generally referred to as merchandise.

Furthermore, it is definitely established that such a tax is a personal property tax. American Law Reports, Annotated, Vol. 173, page 1332, Section 9, states:

"According to the statements contained in a group of Missouri cases, a so-called merchants' license tax imposed by a statute requiring a merchant to apply for a license to trade as such, to give a bond conditioned for the payment of the tax, and to pay an ad valorem tax equal to that which was levied upon real estate, on the highest amount of all goods, wares, and merchandise which he might have in his possession at any time between certain dates, constituted a tax upon the stock in trade as personal property, and not upon the occupation pursued. See State ex rel. St. Louis Public Schools v. Tracy (1887) 94 Mo. 217, 6 SW 709; Aurora v. McGannon (1897) 138 Mo. 38, 39 SW 469; State ex rel. Carleton Dry Goods Co. v. Alt (1909) 224 Mo. 493, 123 SW 882; and American Mfg. Co. v. St. Louis (1917) 270 Mo. 40, 192 SW 402."

Our next concern is in regard to the place where personal property is taxed. The general rule on this point is stated in the case of State ex rel. v. Shepherd, 218 Mo. 656. At 1.c. 663, the court states:

"It is conceded by counsel for both appellant and respondent that personal property is taxable at the domicile of the owner and in the school district in which he resides.

(Stephens v. Mayor of Boonville, 34 Mo. 323; State ex rel. v. McCausland, 154 Mo. 185; State ex rel. v. Brown, 172 Mo. 374.)

"And it is equally well settled that if a person is taxed in the wrong district or county, then it is illegal and its collection cannot be enforced. (State ex rel. v.

Brown, supra, 1.c. 380; State ex rel. v. Railroad, 135 Mo. 1.c. 630; State ex rel. v. Railroad, 110 Mo. 265.)"

However, the courts of Missouri have distinguished between personal property generally and that kind of personal property which is merchandise. In the case of State ex rel. v. Alt, 224 Mo. 493, at 1.c. 507, the court states:

" * * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied.

In the case of State ex rel. v. Timbrook, 145 Mo. App. 368, at 1.c. 371, the court stated:

" * * * The question of the place where personal property may be assessed for taxation has given rise to much perplexing litigation. In the absence of statutory regulations, the presumption is indulged that the situs of personal property is that of the domicile of the owner, but this presumption, it is said, must give way when the truth appears that the personalty has an actual situs apart from the domicile of the owner. * * *

In the instant case, the personal property, which was merchandise, was not, as we note by your letter, located at the domicile of the owner.

Paragraph 1 of Section 137.115, RSMo 1949, states:

"After receiving the necessary forms the assessor or his deputy or deputies shall, except in the city of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation."

The above section would appear to be in conformity with Section 150.040, supra.

In the case of City of Monett v. Hall, 128 Mo. App. 91, at 1.c. 94, the court stated:

" * * * It has been frequently adjudged to be perfectly competent for the State to collect an ad valorem tax on property used in a calling and at the same time to impose a license tax on the pursuit as a condition to the right to carry it on, and this power may be delegated to municipal corporations, as was done by the Statutes above referred to. (City of Springfield v. Smith, 138 Mo. 645, 40 S.W. 757; City of Aurora v. McGannon, 138 Mo. 38, 39 S.W. 469; City of St. Joe v. Ernst, 95 Mo. 360, 8 S.W. 558; City of Troy v. Harris, 102 Mo. App. 50, 76 S.W. 662; City of Farmington v. Rutherford, 94 Mo. App. 328, 68 S.W. 83.)

In the case of State ex rel. v. Kingsbury, 105 Mo. App. 22, at l.c. 25, the court stated:

"Chapter 129, Revised Statutes 1899, provides that merchants shall be licensed and prohibits them from doing business as such until they have obtained a license therefor, and in order to obtain such license they must give bond with approved security for the payment on the first day of November, next thereafter, to the collector of the county, of all taxes which may then be due from them for the twelve months ending on the first day of November, next, upon his license as such merchant. Section 8542 provides that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods which they may have on hand at any time between the first Monday in March and the first Monday in June, in each year. The ordinances of the city have a similar provision. Section 8 thereof provides that, the ad valorem tax equal to that which is levied upon real estate on the amount of goods on which merchants shall be required to pay shall be ascertained from the sworn statements filed in the office of the clerk of the county court of Howard county. And it is made the duty of the city clerk, 'to produre a list of all the names of the merchants of the city from said clerk together with the amount of the stock as shown by the statements and enter the same on a merchants' tax book and extend the same upon the calculation as shown by his statement at the rate per cent fixed by the board of aldermen on real and personal property.

"Section 8546 of the statutes requires each merchant on the first Monday of June of each year, as stated, to furnish to the assessor of the county a statement of the highest amount of merchandise he may have had on hand at any one time between the first Monday of March and the first Monday of June, next preceding, which statement the assessor is required to enter in a book kept for the purpose and that said book shall be returned by the assessor to the county board of equalization on the first Monday in September in each year for the purpose of equalizing the

valuation of merchants' statements. Section 8542 fixes the rate of taxation as equal to that which is levied upon real estate.

"Thus, we see merchants are assessed, their assessments are equalized and their taxes are levied. And that is not all, for in order to do business as such merchants they are required to give bond to pay the taxes. It is true that the method pursued in the assessment of their goods and the levying of their taxes is different from that pursued in the imposition of taxation upon other property, but the result is the same."

Upon this point, we note the following in Corpus Juris, Vol. 61, page 524, Section 637:

"In view of statutory provisions fixing the place of taxation, personal property constituting the stock in trade of a merchant or the raw or finished material of a manufacturer or tradesman is not necessarily taxable at the place of domicile or residence of the owner, and, in giving effect to varying statutory provisions, it has been held or recognized that personal property such as is here considered is taxable at the place where it is located or stored, where the owner's business is carried on, where the owner is doing business, where the property is kept for sale, or where it is employed in trade or in the mechanical arts, where stock in trade involved is employed, where real property, in connection with which the personal property involved is connected in a business enterprise, is taxable, where the owner hires or occupies manufactories, stores, hotels, offices, shops, or wharves, * * *

Since a merchant is required to pay a tax on his merchandise, and is also required to obtain a license to do business, it would appear to be an empty gesture if his merchandise were not assessed for taxation in the place where the license to do business was obtained, otherwise the license would be meaningless.

CONCLUSION

It is the opinion of this department that a merchant's stock of goods should be taxed at the place where it is located.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

COSMETOLOGY:
PRACTICE OF:
STATE BOARD OF
COSMETOLOGY:
COMPENSATION:
TIPS, LICENSE:
JOHN M. DALTON

A person who dresses hair and receives nothing for such service is not required to obtain a certificate of registration from the State Board of Cosmetology. What constitutes the occupation of hairdressing, cosmetology and manicuring is set forth in detail in Section 329.020, supra, and where the things enumerated are done for tips regularly given they constitute compensation and a license must be secured.



2-3-53

February 3, 1953

XXXXXXXX

J. E. Johnsen

Honorable Robert E. Crist Prosecuting Attorney Shelbina, Missouri

Dear Sir:

Your request for an opinion of this office has been referred to me for answer and the pertinent part of said request is as follows:

"Will you please advise if under Sections 329.041 and 329.250, M.R.S., 1949, a person who dresses hair in her home, but who does not make any charge therefor, is required to obtain a certificate of registration from the State Board of Cosmetology.

"Would your opinion be any different if such person accepted tips from persons to whom she had given services, as a hairdresser.

"Will you please further advise as to what constitutes the occupation of hairdressers, cosmetologists or manicurists as stated in Section 329.041 and 329.250."

In answer to the question posed in the first paragraph of your letter quoted above with regard to Sections 329.250 and 329.041, RSMo. 1949, (Cumulative Supplement, 1951), we believe the answer to it to be found in Section 329.020, RSMo. 1949, which reads as follows:

"The following classifications of practices shall be adopted and understood to define practitioners within the meaning of this chapter:

"(1) Class A -- Any person who engages for compensation in any one or any combination of the following

practices, to wit: Arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means shall be construed to be practicing the occupation of a hairdresser. Any person who with hands or mechanical or electrical apparatuses or applicances, or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams engages for compensation in any one or any combination of the following practices, to wit: Massaging, cleaning, stimulating, manipulating, exercising, beautifying or similar work, upon the scalp, face, neck, arms, or bust or removing superfluous hair by means other than electricity about the body of any person shall be construed to be practicing the occupation of a cosmetologist or cosmetician:

"(2) Class B--Any person who engages for compensation in the manicuring of nails shall be construed to be practicing the occupation of a manicurist."
(Underscoring ours.)

As you see, the underscored part of the above statute makes it a violation for any person to practice cosmetology, hairdressing or manicuring for compensation of any kind whatsoever without first being licensed.

You say this woman does not receive compensation and therefore she could not be guilty of violating the Act.

With regard to the question posed in the second paragraph above set out we wish to state that our opinion would be different than in our answer given to your first question. If the person practicing cosmetology, hairdressing and manicuring received compensation of any kind whether the same was a charge made or tips given with regularity for the services performed, she must first have a license.

Our reason for holding that tips where regularly given to the operator for beauty work, hairdressing and manicuring by the recipient is compensation, is because of the holding of the court in Williams v. Jacksonville Terminal Co., 118 F. 2d. 324, where the court at 1.c. 325, 326 and 327, said:

"We will not stick upon the general meaning of the word 'tip'. Webster's International Dictionary makes the tip to be a gift, a fee; and defines a fee as a compensation for service rendered. The

Standard Dictionary says a tip is money given, as to a servant, to secure better or more prompt It would seem that a tip may range from a pure gift out of benevolence or friendship, to a compensation for a service measured by its supposed Most often value but not fixed by an agreement. the term is applied to what is paid a servant in addition to the regular compensation for his service, to secure better service or in recognition of it. But the Fair Labor Standards Act makes no reference to 'tips', and the notice given the red caps refers to 'tips or remuneration'. We are not concerned with the proper meaning of the word, but with the legal status of what the passengers paid these red caps, by whatever name called. Along with dictionary definitions, we put aside a number of decisions cited about the ownership of tips, somewhat conflicting, because each dealt with its own kind of tip and none from an appellate court dealt with money paid a red cap by a passenger.

"(1) This record makes no effort to prove or agree on the actual intention of passenger, red cap, or Terminal Company, when at any time a porter service was rendered and remunerated. It is left to common knowledge and reasonable inference. Railroad travel is so general and red cap service so familiar that it may well be considered, as it touches the passenger, a matter of common knowledge. We so deal with it. Before the day of red caps the passenger depended for assistance on the chance presence of some jobless person, and paid him for his help. The red caps took the place of the jobless ones at large terminals, and rendered a supervised service; but the railroad carriers were not bound to afford any such service to the passenger, and the reward of it was left a matter between red cap and passenger, with the stipulation that the amount should be left to the passenger and there should never be annoyance or embarrassment about it. It may be that the red caps were always employees of the Terminal Company in that it selected them and was probably answerable for their honesty and carefulness; but they were not employees for wages, their time and efforts were their own, and what they earned belonged to them. Passengers understood this; they knew that what they paid did not go to the Terminal Company, but was the meat and bread of the red cap. What they paid was influenced by the generosity and wealth of the passenger as well as by the number and weight of his bags, and at times by the needy

Hon, Robert E. Crist

appearance or the cheerfulness and promptness of the red cap. But in every case the tip was primarily a compensation for service, and not a gift. The red cap expected nothing unless he served. No passenger ever gave a red cap anything unless there was service. Every passenger paid for service unless he or she was very stingy or financially unable, or else ignorant that pay was expected. The acceptance of service carried an expectation of reward on both sides. What the red cap received was not gifts but earnings. If they amounted to enough he owed income taxes on them; and they belonged to him, either because the business was his, or fi an employee, because his employer conceded them to him.

"When it is clearly apprehended that red cap tips are not personal gifts, but compensation for service which since October 24, 1938, is rendered by the red caps for the Terminal Company, for a wage which the Terminal Company is absolutely bound to pay, it becomes plain that the tip money is the money of the Terminal Company, irrespective of the consent of the red caps; and when they are paid their wages in part or in whole out of it, they are not paid with their own but their employer's money."

In answer to the question posed in the third paragraph of your request as above set out, it is our opinion that what constitutes the occupations of hairdressers, cosmetologists and manicurists as mentioned in Sections 329.041 and 329.250, RSMo 1949 (Cumulative Supplement, 1951) is set out in detail in Section 329.020, supra, and that where the things done as mentioned therein are done for compensation of any kind whatsoever it constitutes the occupation of hairdressing, cosmetology or manicuring.

CONCLUSION

It is, therefore, the opinion of this department that a person dressing hair in her home not making a charge of any kind therefor, is not required to obtain a certificate of registration from the State Board of Cosmetology; that a person who dresses hair in her home who accepts tips given with regularity from persons to whom

Hon. Robert E. Crist

she has given service as a hairdresser is practicing as a hairdresser for compensation and must obtain a certificate of registration from the State Board of Cosmetology; that which constitutes the occupation of hairdressers, cosmetologists or manicurists is set forth and enumerated under Section 329.020, RSMo 1949, in detail where the same is done by any person for compensation of any kind whatsoever.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. A. Bertram Elam.

Yours very truly,

JOHN M. DALTON Attorney General

. ABE:mw

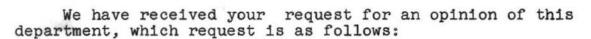
SCHOOLS: ELECTION: Proponents and opponents of school bond issue under Section 165.040, RSMo 1949, not entitled to challengers and checkers at election on said bonds.

February 19, 1953

FILED 20

Honorable Robert E. Crist Prosecuting Attorney Shelby County Shelbyville, Missouri

Dear Sir:



"Please advise if the opponents and proponents of a bond issue, which is held in pursuance to Section 165.040, Missouri Revised Statutes, 1949, are entitled to challengers and checkers at the election."

Section 165.040, RSMo 1949, provides, in part:

"1. For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written

or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets, 'For the loan;' those voting against the loan, the words 'Against the loan,' and if two-thirds of the votes cast on the proposition shall be for the loan, the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices aforesaid, subject to the restrictions of section 165.043."

Section 111.010, RSMo 1949, provides:

"The provisions of this chapter shall apply to all the election precincts in this state but shall not apply to township or village elections, to school elections, or to any city election in cities of the fourth class, or in cities of under three thousand inhabitants existing under any special law."

Section 111.290, RSMo 1949, provides:

"In all counties in this state in which a special election shall be held for the purpose of voting upon any proposition to issue bonds for any purpose, which, under the law, must be submitted to the vote of the qualified electors for determination, two judges and two clerks of such election shall be appointed by the county court for each special election precinct; provided, that the provisions of this law shall not apply when any such proposition is submitted to be voted upon at a regular primary election or a general election."

Section 111.300, RSMo 1949, provides:

"Such special election, except as provided in section 111.290, shall, as near as possible, be conducted in the same manner, and be governed by the same laws, as a general election."

In the case of Robinson v. Wiese, 210 S.W. 889, the court stated (210 S.W. 1.c. 892):

"The appellants contend that the election which authorized the issue of the bonds in question was not lawfully held, because the judges and clerks were appointed by the board of directors of the district, while the law required their appointment by the county court, under the provisions of the act 'providing for the appointment by county courts of judges and clerks for special elections, and for the making by county courts of special election precincts, and further providing for the repeal of inconsistent acts, with an emergency clause.' Laws 1913, p. 326.

"We see nothing in the act which tends to sustain this view. Its title implies that it is applicable to those municipalities in which elections are held in precincts established by the county courts. first section indicates plainly that it is intended to apply to special elections where regular primary elections or general elections are held, while section 4 states its object to be to avoid the expense of six judges and six clerks at each precinct. It has no reference whatever to any part of the machinery for holding general or special school meetings by section 10879 of the Revised Statutes of 1909. (Section 164.330, RSMo 1949). The board was right in their exact compliance with the terms of that section.

Under the holding of the court in this case, the general election laws do not apply to school bond elections. Inasmuch as there is no provision in the school election laws giving proponents and opponents of a school bond issue the right to have challengers and checkers, no such right exists. The question of right to be present at the polling place and at the counting of the ballots is governed solely by statute. 29 C.J.S. Elections, Section 200, p. 285.

Even though the general election laws might be held, in some respects, to be applicable to school elections, we feel that they would not entitle challengers and checkers to be present at special school bond elections. We find no authorization for the appointment of challengers in general elections, other than in counties having a population of between 200,000 and 450,000 inhabitants (Section 113.200, RSMo 1949), counties having a population of more than 450,000 (Section 113.870, RSMo 1949), cities of population between 300,000 and 700,000 (Section 117.590, RSMo 1949,) and cities of populations over 600,000 (Section 118.510, RSMo 1949). Shelby county, having a population of 9,730 by the last decennial census, does not come within such statutes.

Section 120.480, RSMo 1949, provides:

"The county, ward or township committeeman of each party in each county may appoint two party agents or representatives,
with alternates for each, who may represent
his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall
act as challengers and witnesses to the
count of the vote for their respective
parties and who shall have the power
prescribed by law."

This section by its terms, applies only to primary elections and operates through party committees.

Section 111.610, RSMo 1949, applicable generally to conduct of elections, provides, in part:

"No person or persons shall be admitted into the room or office when such ballots are being counted, except the judges and clerks of elections: provided, that any political party may select a representative man who may be admitted as a witness of such counting."

The purpose of this section is obvious. Machinery exists, in the form of legally recognized political organizations, for the selection of such witnesses. Such situation does not exist with regard to special school bond elections. Certainly there would be no object in the appointment of witnesses by political committees. Organizations formed to foster or oppose a bond issue have no legal basis and any attempt to recognize them would lead to complete confusion.

In the case of Easton City Election Overseers, 12 Pa. Dist. 526, the question presented was whether or not watchers should be appointed for a city bond election. The general election law called for the appointment of watchers who should be members of different political parties. The court refused to order the appointment, stating:

"If these statutes were applicable to an election in the city to determine whether there should be an increase of indebtedness, then the Act of 1874, if not repealed, would be complied with when the court should appoint in each district one Republican and one Democrat, both of whom were in favor of the increase of debt. This would be incongruous.

"If the appointments now petitioned for can be required, we give to the expression 'different political parties' a meaning which extends it to embrace those who are supposed to have opposing views upon the subject matter of the special election.

"Political parties are separate organizations well understood as objects of

discriminating legislation, but it is impossible to reach similar results in individual classification."

The reasoning of the court in that case is clearly applicable in the operation of our election laws.

CONCLUSION

Therefore, this department is of the opinion that proponents and opponents of a special school bond issue, to be voted upon under Section 165.040, RSMo 1949, are not entitled to challengers and checkers at the election to authorize such bonds.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW: lw/cs

SCHOOLS: Apportionment of "county foreign insurance tax fund" moneys referred to in Sec. 148.360, RSMo 1949, to be based on number of school children in each county. Where school district lies in two or more counties split enumeration must be considered according to rule announced in subparagraph 4 of Sec. 165.190.



May 11, 1953

Honorable James E. Curry Prosecuting Attorney Douglas County Ava, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

> "The County Treasurer has requested me to advise him with reference to the apportionment and distribution of the free text book fund, payable Section 148.360, RSMo 1949, which is received from foreign insurance companies operating within the State of Missouri. This money, of course, comes to the County Treasurer to be apportioned to each school district in the county. In our county, due to reorganization, there are a number of school districts in adjoining counties which overlap and include territory in Douglas County. My question is this: Are the children residing in the school districts overlapping into Douglas County to be claimed on the Douglas County Enumeration, or are they to be claimed on the adjoining county enumeration?

"If these children should be rightfully listed on the Douglas County Enumeration, of course, the money from the free text book fund would come to the Treasurer of Douglas County and then disbursed to these districts, but if these children should

rightfully be included on the enumeration list of the adjoining counties, then it occurs to the writer that the money from this fund should go to the Treasurer of the adjoining county."

Section 148.360, RSMo 1949, provides as follows:

"On or before the first day of October of each year, the state comptroller shall apportion to the counties and the city of St. Louis, on the basis of the number of school children in each, as shown by the last enumeration, certified by the commissioner of education, on which the school moneys are apportioned and distributed, all of the moneys to the credit of the county foreign insurance tax fund, and warrants shall be issued in favor of the treasurers of the counties and the city of St. Louis."

When moneys described in Section 148.360, RSMo 1949, quoted above, come into the hands of the treasurers of the various counties and the City of St. Louis, the duties of the county clerks in relation to the apportionment of such moneys to the various school districts in the counties are set forth in subparagraph 1 of Section 170.220, RSMo 1949, which provides as follows:

"1. When the money apportioned under the provisions of section 148.360, RSMo 1949, has been received by the treasurers of the various counties and the city of St. Louis, it shall be the duty of the county clerk of each county to apportion said money among the various school districts in each county in the following manner: The amount to be apportioned to each school district shall be determined by multiplying the number of children on the last enumeration list of said school district by the ratio used by the state auditor in making the distribution of said foreign insurance tax moneys among the counties of the state, and the county court shall order the county treasurer to

place to the credit of the free textbook fund of each such school district, the amount thus obtained, or shall draw its warrant in favor of the proper township treasurer or treasurers for the amount due the districts of the various townships, and shall also draw its warrant in favor of the treasurer of any school district organized as a city, town, or consolidated district for the amount due such district. The money thus received shall be known as the "Free Textbook Fund" for each such district, and the board of education or the board of directors of each such district shall, when so directed by a majority vote of the qualified voters of the district voting on such question at an annual or special election, with this fund purchase and provide textbooks free for the use of the pupils in the elementary grades and after free textbooks have been supplied to all children in the elementary grades, the balance remaining in said textbook fund may be expended for supplementary, library, and reference books."

"For many years, the statutory enumeration of school pupils has been made by school districts. Section 164.030, Mo. R. S. 1949" (State ex rel. School District of Fulton v. Davis, 361 Mo. 730, 1.c. 734, 236 S.W. (2d) 301). The duty to make such enumeration lists is placed by the statute, Section 164.030, RSMo 1949, on the board of directors of each school district and the enumeration is forwarded to the county superintendent of schools who examines and approves the same and then turns the lists over to the county clerk. Section 164.030, RSMo 1949, does not contain a directive informing the board of directors of a school district in what manner it shall certify its district's enumeration to the county superintendent of schools when such school district lies in two or more counties.

The rule to be followed in this instance may be drawn from Section 165.190, RSMo 1949, specifically applicable to common school districts, which reads, in part, as follows:

"4. In all school districts divided by county lines it shall be the duty of the clerk of such school district to report to the clerk of each county in which such

district is in part located the number of persons of school age residing in that part of said school district lying within the respective counties, together with the amount of money necessary to maintain the school. and such other funds as it is necessary to raise by taxation in the same manner as is provided in districts not so divided. And it shall be the duty of the county court and county clerk of each county in which such district is located to apportion to said district such part of the public school funds as the enumeration of such parts of said district shows it to be entitled to, and all moneys collected for school purposes as taxes on property within such district shall be paid to said district the same as if it lay entirely within one county."

No prohibition has been discovered which will not allow us to supplement the procedure outlined in Section 164.030, RSMo 1949, in regard to certifying enumeration, by applying the rule found in Section 165.090, RSMo 1949, so as to disclose a true enumeration by counties, which is the evident purpose of the enumeration statute. In reaching this decision we are not overlooking language, contained in Section 165.677, RSMo 1949, regarding reorganization of school districts, which provides:

" * * * If the plan includes any proposed district with territory in more than one county, the board shall designate the county containing the greater portion of such proposed district based upon the assessed valuation, as the county to which that district shall belong. * *"

The only purpose of the above quoted language from Section 165.677, RSMo 1949, is, we believe, to place the reorganized school district within a certain county for general administrative purposes, and not for the purpose of allocating all persons of school age in said school district to one certain county for enumeration purposes as provided in Section 164.030, RSMo 1949. The fact cannot be overlooked that the moneys referred to in Section 148.360, RSMo 1949, go first to the "county foreign insurance tax fund", and thereby become county moneys before distribution to school districts within the county under procedure outlined in Section 170.220, RSMo 1949.

CONCLUSION

It is the opinion of this department that where school districts are divided by county lines, the apportionment of "county foreign insurance tax fund" moneys referred to in Section 148.360, RSMo 1949, is to be based on the number of school children in each county, and split enumeration must be considered in line with the rule found in subparagraph 4 of Section 165.190, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

SCHOOLS: ELECTIONS: ABSENTEE BALLOTS:

FILED

Absentee ballots may be cast in school elections on question of issuing bonds or increasing tax rate. Application for absentee ballots made to official charged with furnishing regular ballots. Absentee ballots counted by canvassers appointed by body or officials charged with duty of canvassing election returns.

June 19, 1953

copy

Honorable Robert E. Crist Prosecuting Attorney Shelby County Shelbina, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this office and reading as follows:

"Will you please advise as to the procedure for counting absentee ballots at a school election, which is held under Chapter 165, R. S. Mo. 1949, if absentee ballots are permitted. I know of no provisions for absentee ballots at school elections."

In answer to a request for further information, you sent the following supplemental request:

"Pursuant to your letter of April 22, 1953, I would like for your opinion to relate specifically to Sections 165.040 and 165.080. I am particularly interested in knowing the procedure for voting such absentee ballots and for counting the same."

Section 165.040, RSMo 1949, provides in part as follows:

"1. For the purpose of purchasing schoolhouse sites, erecting school-houses, library buildings and furnishing the same, and building

1)

additions to or repairing old buildings, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes: it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets. 'For the loan;' those voting against the loan, the words 'Against the loan,' and if two-thirds of the votes cast on the proposition shall be for the loan, the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices aforesaid, subject to the restrictions of section 165.043.

"2. When bonds are voted under this section for the erection of one or more schoolhouses, to be erected on the same or different sites in common school districts, said bonds shall not be negotiated by said board until said bonds have been deposited with the county or township in which said district shall be situated, and upon the order of said board, and the payment to the county or township treasurer of the amount agreed to be received for the same by said board from the persons loaning said money upon said bonds. * * *"

Section 165.080, Laws of Missouri, 1951, page 469, provides as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the school board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election. or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by section 165.200; and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess

and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

We are enclosing copies of official opinions rendered under date of January 31, 1951, to William L. Hungate, March 21, 1951, to James T. Riley, and June 3, 1951, to Earl A. Baer, which opinions we believe will answer your question as to the right of an individual to cast absentee ballots at school elections. We are, of course, in this opinion ruling only as to casting absentee ballots on the two questions of public policy found in Sections 165.040 and 165.080, that is, voting for the issuance of bonds and voting for an increased tax levy. We believe that the enclosed opinions make it clear that absentee ballots may be cast at the elections provided for in Sections 165.040 and 165.080, supra.

You will note also that the opinion of January 31, 1951, to William L. Hungate, answers your question as to the proper person to supply the absentee ballots. Such opinion holds that the person or body charged with the duty of furnishing the ordinary ballots at such election is the proper person or body to whom application should be made for absentee ballots.

Section 112.070, RSMo 1949, provides in part as follows:

"In cases of elections wherein the county clerk and his assistants or board of election commissioners, as the case may be, are not charged with the duty of canvassing the returns of such elections, the body or officials, charged by law with such duty for such elections, shall appoint not less than four disinterested persons, not more than one-half of whom shall be of the same political faith, from a list furnished to said body or officials by the central committee of each of the two dominant political parties, double the number required for appointment, not later than six o'clock p.m. of the day next succeeding the day of such election; provided, that if any political party, through its committee, shall fail to

Hon. Robert E. Crist

present a list of names as aforesaid, within the time aforesaid, then said body or officials may select and appoint the requisite number provided by law for said party, to open, canvass, count and certify the votes cast by absent voters at such election, and the provisions of chapter 111, RSMo 1949, insofar as applicable thereto, shall apply and govern in such elections. * * * *

We believe that the provisions of such section are applicable in the counting of the absentee ballots cast at such school elections, but we do not believe that the provisions of such section providing that not more than one-half of the canvassers shall be of the same political faith are applicable, since school elections are not partisan political elections but are conducted without reference to political parties.

CONCLUSION

It is the opinion of this office that absentee ballots may be cast at school elections on the questions of issuance of bonds and increase of tax levy; that the application for absentee ballots to be cast at such elections should be made to the person or body which furnishes the ordinary ballots to be cast at such elections; and that the canvassers of the absentee ballots should be appointed by the body or officials charged by law with the duty of canvassing the returns of such elections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

Enclosures (3)
CBB:lrt

SCHOOL DESTRICTS: Revised estimate and changed levy may be filed TAXATION: if such action is taken proof to any action having been taken upon the original estimate and levy.

July 16, 1953



Honorable Robert E. Crist Prosecuting Attorney Shelby County Shelbina, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Please send your opinion regarding the following:

"A school election under Section 165.080, M.R.S., 1949, was held on June 26, 1953, and an additional levy of \$1.25 was voted for building purposes for one year.

"The school district had submitted an 'Annual Estimate of Needs and Tax Rate' to the County Superintendent of Schools, as provided in Section 165.077, R. S. Mo. 1949. The County Superintendent furnished the County Clerk with such estimate as provided in Section 167.040, M.R.S., 1949, prior to said 26th day of June, 1953.

"What procedure should be followed by such school district, County Superintendent and County Clerk to amend the prior estimate and all assessments, tax books and records to conform with such election? Would Section 50.110, M. R. S., 1949, have any bearing on this question? We are pressed for time, and would be most appreciative if we could get this opinion at your earliest convenience."

Under the provisions of Section 165.077 boards of directors of each school district are required annually on or before the 15th day of May of each year to make an estimate of the anticipated needs and rate of levy required to produce sufficient income to operate the respective schools for the ensuing term. However, in construing this particular section, it has been held by the Supreme Court of Missouri that such an estimate, after having been filed, may be withdrawn and a new estimate and a new proposed tax levy substituted in lieu thereof if such action be taken prior to the original estimate having been acted upon. I direct your attention to the case of Lyons v. School District, 311 Mo. 349, 278 SW 74, 1.c. 78, from which we quote:

"* * The estimate filed under the provisions of section 11142 may be withdrawn, and revised estimates may be submitted, if done before the first estimates were acted upon, and a valid levy may be made upon such revised estimates. State ex rel. v. Phipps, 148 Mo. 31, 49 S. W. 865."

With this authority in mind, it next becomes pertinent to examine the statutes relating to the extension of tax levies based upon such estimates in order to determine whether or not sufficient time yet remains in which a revised estimate may be filed in the light of the circumstances you have outlined in your letter.

We note that under the provisions of Section 165.083, RSMo 1949, the tax levy is to be extended by the county clerk upon the real and personal property as shown in the "last annual assessment" for state and county purposes. We find that under the provisions of Section 137.290, RSMo 1949, the assessor's books are to be finally corrected not later than the 1st day of September in each calendar year. This will be after action has been taken by the county board of equalization and by the county board of appeals. Under the same statute the county clerk is given until the 31st day of October of each year to extend the taxes upon the valuations so finally fixed and determined by action of the assessor and the county board of equalization. From the foregoing, it seems that ample time yet remains in which procedural steps may be taken to certify a revised estimate to the county superintendent Honorable Robert E. Crist

of schools as provided by Section 165.077, RSMo 1949, mentioned supra, and by such county superintendent of schools approved and forwarded to the county clerk of such county in accord with the provisions of Section 167.040, RSMo 1949.

In addition, the clerk or secretary of the school board or district should also certify to the clerk of the county court the increased levy in accordance with the provisions of Section 165.080, Mo. RS 1951 Supp, which provides as follows:

" * * and if the necessary majority of the qualified voters voting thereon, as required by article X, section 11 of the constitution, shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

CONCLUSION.

In the premises, we are of the opinion that at this time the board of directors of the school district mentioned in your letter of inquiry may prepare and certify to the superintendent of schools of Shelby County a revised estimate and new levy. On approval of that officer such revised estimate may thereupon be certified to the County Clerk for his use in extending the new tax rates.

It is our further opinion that the clerk or secretary of such school district or board should make the certifica-

Honorable Robert E. Crist

tion of the increased rate direct to the county clerk as provided by Section 165.080, Mo. RS 1951 Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB:sw

WORKMEN'S COMPENSATION INSURANCE:

Employers under the Workmen's Compensation Act must pay the total cost of insurance covering their liability to their employees. The employee is prohibited, by the Compensation Act of this State, from paying any part of such cost of insurance.



September 3, 1953

Honorable Robert L. Crist Prosecuting Attorney Shelby County Shelbina, Missouri

Dear Mr. Crist:

This will be in reply to your letter requesting the opinion of this office whether the County Court of Shelby County may lawfully pay half of the insurance premiums and the employees of the county pay the other half of the cost of such premiums if the county elects to accept the provisions of the Workmen's Compensation Act as an employer and the county procures insurance covering its liability to its employees under the Act.

Your letter, requesting the opinion, reads as follows:

"Our County Court desires to take out workmen's compensation on its laboring personnel.
Our Court further proposes to pay one-half
of the insurance premiums and the employees
are to pay the other one-half. Is such action
permissible?

"If it is not permissible for the County Court to pay one-half of the insurance premiums and the employees to pay the other one-half, would it be all right for the County Court to pay all of the premium? Would it make any difference if the employees agreed in writing to pay one-half of the insurance premiums?"

Section 287.030, V.A.M.S., 1949, provides that with other political subdivisions of this State counties may elect to accept the chapter on workmen's compensation as an employer, and if and when such election is made any county in this State is an employer like any other employer as defined in said section. We are enclosing a copy of the opinion of this office dated February 7, 1950, holding that under the terms

Honorable Robert E. Crist:

of Section 3693, R.S. Mo. 1939, counties could elect to accept the terms of the Compensation Act respecting their employees.

The Workmen's Compensation Act of this State provides that the procuring of insurance by the employer to cover liability of the employer to his employees, if both have accepted the Act, is compulsory. This requirement is contained in Section 287.280, Vernon's Annotated Missouri Statutes, 1949, which reads as follows:

"Employer must carry insurance -- failure -- compensation commuted -- exception. Every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do. If the employer fail to comply with this section, an injured employee or his dependents may elect after the injury to recover from the employer as though he had rejected this chapter, or to recover under this chapter with the compensation payments commuted and immediately payable. If the employer be carrying his own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the commission shall require the employer to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and become immediately payable; provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but such employer may carry his own risk for any excess liability."

The Act further provides, in plain and brief terms, that the employee shall not pay any part of such insurance cost. That prohibitory provision constitutes Section 287.290 of said Act, which states:

Honorable Robert E. Crist:

"Employee not to pay cost of insurance. No part of the cost of such insurance shall be assessed against, collected from or paid by any employee."

Said Section 287.290 uses the phrase "such insurance", and manifestly its terms are intended to be and are of the essence of the requirement of insurance under the said Section, 287.280. This, it is plain, we believe, was the intention of the Legislature in the enactment of both of said sections. The rules of construction of the meaning of statutes, adopted and followed by the text writers and the Appellate Courts of this State, provide that if a section of the statutes providing the method of doing an act, or prohibiting the doing of an act, is of the essence and substance of the matter involved, then the statute is mandatory.

59 Corpus Juris, pp. 1074, 1075, states the following text on this question, to-wit:

"* * * But a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. So it has been held that, where a statute is founded on public policy, those to whom it applies should not be permitted to waive its provisions."

The Appellate Courts of this State have consistently followed that rule in their decisions. That question was before the Supreme Court of this State in the case of State ex rel. Ellis vs. Brown, 33 S.W. (2d) 104. The Court, following the rule, quoted 25 R.C.L., Section 14, pp. 766, 767, and in approval, 1.c. 107, said:

"'A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences

of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance. are mandatory. "

There are many decisions by our Supreme Court and our Courts of Appeals adhering in like terms to the application of this rule of construction. We deem it sufficient here to quote only the case and text cited above.

It appears clear, we believe, from the terms of the statutes cited and quoted, and from the decisions construing such provisions as being of the essence and the substance of a matter such as providing insurance by employers under the Workmen's Compensation Act, that employers under the Act must pay the entire cost of procuring such insurance, and that the provisions of both of such sections hereinabove quoted are mandatory.

CONCLUSION

It is, therefore, the opinion of this office that it is not permissible for the County Court of your county, if it elects to accept the provisions of the Workmen's Compensation Act of this State, to pay one-half of the cost of insurance required by the Act and its employees pay the other half of the cost of such insurance. By the terms of the two sections of the Compensation Act noted the county is required to pay all of

Honorable Robert E. Crist:

the cost of such insurance and the employees of the county are not permitted to pay any part of the cost of such insurance. Every person involved is prohibited, by the terms of said Section 287.290, from requiring the payment or receiving any part of the payment of such cost from the employees, and employees are prohibited, by the terms of said section, from paying any part of the cost thereof, even if they consented to do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

COUNTY COURTS: HEALTH: NURSES: PUBLIC HEALTH: A County Court is not authorized to employ a public health nurse unless the Division of Health has made a formal written report that it considers the services of a public health nurse necessary, under Section 192.140, RSMo 1949, or unless a petition signed by two hundred and fifty taxpayers has been presented to the County Court asking for appointment of a public health nurse or nurses, under Section 192.160, RSMo 1949.



December 23, 1953

Honorable Robert E. Crist Prosecuting Attorney Shelby County Shelbina, Missouri

Dear Sir:

By letter of December 4, 1953, you requested an official opinion, as follows:

"The Department of Health of the State of Missouri sponsors a county health program whereby the State pays almost half of the cost of a county nurse.

"The Shelby County Health Council has submitted a budget of \$1980.00 to support our county health nurse for the first six months of 1954. The State will pay \$855.00 of such sum, the County Tuberculosis Association will pay \$625.00 of such sum and the balance of \$500.00 is to be paid by the County Court.

"Question: May the County Court of Shelby County, Missouri pay such sum of \$500.00 for the support of a county nurse by virtue of its authority to protect the general welfare of the county in the absence of election or petition by the voters of Shelby County, Missouri?"

Honorable Robert E. Crist

Provision for the employment of a public health nurse by the county court is authorized by Section 192.140, RSMo 1949, as follows:

"Public health nurse provided -- public and private places disinfected .-- Whenever the division of health considers it necessary to secure the aid and services of a visiting public health nurse, or to disinfect any building, residence or room in any hotel or dormitory, or other place in such city or county infected with infectious or contagious diseases, such division shall make formal written report of such fact to the county court or mayor of any city of the second, third, or fourth class, or both such court and mayor, and therein recommend the course of action necessary and advisable to be taken in relation thereto to prevent the spread of such infectious or contagious diseases; and in case said report is made to the mayor of any city he shall lay the same before the city council at its next meeting, and the said city council and the said county court at its next meeting after said report has been made as aforesaid, shall consider said report and recommendation and act upon it, and such city council and county court shall each be authorized to employ, at a fixed monthly compensation, a public health nurse, qualified for such service by registration as such according to the laws of this state, to visit any family, home, boarding house, dormitory or club in which is a member or members, a person or persons afflicted with a contagious or infectious disease, and upon the consent of such person or family or parent or guardian, if a minor, to assist in nursing said person and to advise such person and the persons or members of the family, boarding house, dormitory or club, as to the proper methods to be pursued to prevent the spread of such infectious or contagious disease, and also to authorize some other proper person or persons to visit and disinfect any building, residence, room in any hotel or dormitory or other place therein infected with such infectious or contagious disease upon the consent of the owner thereof."

Honorable Robert E. Crist

Other provision for employment of a public health nurse(s) is made by Section 192.160 as follows:

"Taxpayers may petition for the appointment of a nurse. In case a petition is signed by two hundred and fifty taxpayers and presented to any city council of the second, third or fourth class or any county court, asking for the appointment of a public health nurse or nurses or that any place infected with infectious or contagious disease be disinfected, as designated in section 192.140, it shall be the duty of said city council or county court, as the case may be, to provide for the appointment of said nurse or nurses and for the disinfecting of any infected place and to pay for the same as provided for in section 192.170."

Provision for payment of such nurse(s) is made by Section 192.170.

"Money appropriated from current revenue.
--The county court or city council in any such city shall have power to appropriate money out of the current revenues of the county or city, as the case may be, for the purpose of carrying out the provisions of sections 192.140 to 192.170."

Since the Legislature has by Section 192.140 authorized County Courts to employ a public health nurse after formal written report by the Division of Health that said Division considers it necessary to secure the aid and services of a public health nurse; and further authorized, by Section 192.160, the County Court to employ a public health nurse(s) upon petition signed by two hundred and fifty taxpayers, by Section 192.170 authorizes payment of such nurses when employed by virtue of the two above sections, the question arises: Are these statutory provisions exclusive, or may the County Court employ a public health nurse(s) without the written report by the Division of Health, or petition by taxpayers?

A general principle is expressed by the Missouri Supreme Court in Kroger Grocery & Baking Co. v. City of St. Louis, 106 S.W. (2d) 435, 1.c. 439, as follows:

"* * * Keane v. Strodtman (Banc) 323 Mo. 161, 167 (11); 18 S.W. (2d) 896, 898 (11) (quoting Dougherty v. Excelsior Springs,

110 Mo. App. 623, 626, 85 S.W. 112, 113, to the effect that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S.W. 755, 758, 21 Ann. Cas. 1218)."

The Missouri Supreme Court was called upon in Cook v. St. Francois County, 349 Mo. 484, 162 S.W. (2d) 252, to decide whether plaintiff was entitled to recover for her services as county health nurse. The Court held that she was not entitled to recovery, stating as follows, 1.c. 254:

"* * There was no proof that the State Board of Health made the finding and gave the authority to the county court provided in Section 9756, (now Section 192.140), supra, nor was there any proof that a petition was filed as provided in Section 9759, (now Section 192.160), supra. The proof shows that appellant was not 'qualified for such service by registration * * according to the laws of this state as required by Section 9756. Therefore, the appellant was not eligible, the county court was not authorized to appoint or employ her, and the order of revocation is valid." (Emphasis, and matter in parentheses ours).

Thus it is clear that the County Court is not authorized to employ or pay a public health nurse unless there has been the written report by the Division of Health contemplated by Section 192.140, or unless there has the taxpayers! petition contemplated in Section 192.160.

CONCLUSION

It is therefore the opinion of this office that a County Court is not authorized to employ or pay a public health nurse unless

Honorable Robert E. Crist

the Division of Health has made a formal written report that it considers the services of a public health nurse necessary, under Section 192.140, RSMo 1949; or unless a petition signed by two hundred and fifty taxpayers has been presented to the County Court asking for appointment of a public health nurse or nurses, under Section 192.160, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

PMcG:vlw

CONSTITUTIONAL LAW

Missouri State Highway Commission determination of limited access to state highway prevails over inconsistent city ordinance.

February 10, 1953



Honorable E. Gary Davidson State Senator, 15th District Senate Post Office Capitol Building Jefferson City, Missouri

Dear Senator Davidson:

Reference is made to your request for an official opinion of this department reading as follows:

"Request is hereby made for your opinion on the following matter:

"Reference is made to Article IV, Section 30, Paragraph (e) and Article IV, Section 29 of the Constitution of the State of Missouri 1945.

"May the State Highway Commission when authorized by law to legally establish and construct a state highway within and through a municipality by condemnation or purchase, acquire and limit the right of access to from or across such state highway within such municipality; and pursuant to such acquisition erect wire barriers along such highway, thoroughfare or right-of-way contrary to an ordinance of said municipality prohibiting the erection of obstructions or barriers along any highway, street or thoroughfare within such municipality and thereby limit and interfere with the free movement of police, fire equipment, emergency services and personnel in the interest of public safety?"

Section 29, Article IV, Constitution of Missouri, 1945, which you have referred to in your letter of inquiry, reads as follows:

"Highway Commission -- Qualifications of Members and Employees -- Authority over State Highways .-- The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law. and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

(Emphasis ours.)

Section 30, Article IV, which you have also referred to in your letter of inquiry, relates to the source of money to be expended under the supervision of the state highway commission and to the purposes for which such money may be expended. The portion of the constitutional provision quoted at length above first became a part of the organic law of this state by virtue of its incorporation in the present constitution. It has already been the subject matter of a case decided by the Supreme Court of Missouri. We direct your attention to State ex rel. State Highway Commission v. James, Circuit Judge, 205 S.W. (2d) 534, 1.c. 537, wherein the court said:

"* * * Section 29 of Article IV provides that limitation of access is a proper

consideration in the construction of state highways where the public interest and safety may require and, therefore, announces a purpose for which condemnation may be had under the statute. power to limit access is 'subject to /such/ limitations and conditions /as may be imposed by law. Existing law, both statutory and constitutional, already limit and condition the taking of any interest in land by providing that just compensation must be ascertained and paid in the manner provided by statute. The general assembly is authorized to impose additional limitations and conditions."

It is apparent from the conclusion reached in the case cited that the constitutional provision is self-enforcing, and that it does confer upon the state highway commission broad powers in determining whether or not access to high-ways shall be limited.

It might at this point be well to inquire whether the delegation by the state to municipalities of the power to regulate traffic upon their streets amounts to a "limitation and condition imposed by law." We think this pertinent in view of the fact that in many instances city ordinances do have the effect of "laws." However, we believe the proper construction to be placed upon the last provision found in Section 29, Article IV, Constitution of Missouri, 1945, quoted supra, is one that will interpret such proviso to authorize the General Assembly only to prescribe the mode and manner of the constitutional authority to limit access to highways granted the State Highway Commission in the same constitutional provision. Reference to the debates of the Constitutional Convention, which wrote the present organic law, indicates such a purpose was in the minds of the framers of the constitution. Further, in United States v. Ensign, 2 Mont. 396, the Supreme Court of the Montana territory had for consideration a somewhat similar constitutional provision. The provision substantially provided that the jurisdiction of certain courts should be as limited by law. The court held that this could not serve to authorize the General Assembly to diminish such jurisdiction but could only serve

to authorize that body to prescribe the mode and manner in which such jurisdiction might be exercised. From the foregoing we believe that the constitutional provision forming a part of our present organic law should be construed in the same manner.

That such is the proper construction to be placed upon the constitutional provision further appears in Public Water Supply Dist. No. 2 v. State Highway Commission, 244 S.W. (2d) 4, 1.c. 6, wherein we find the Supreme Court of Missouri saying:

"The State Highway Commission is likewise a political subdivision of the state with jurisdiction over the 'state-wide connected system' of highways. Mo. R.S. 1949, Sec. 227.020. It is plain beyond question, by the terms of the Constitution, that the State Highway Commission has the dominant, primary and superior dominion over highways: * * *"

The purpose of such grant of power is to promote the free flow of vehicular traffic and to safeguard persons using such highways to the greatest possible extent. Your letter of inquiry does not indicate the particular area through which the right of way has been fenced. However, it seems to us that such fencing might very well be a reasonable exercise of the power granted the state highway commission to limit access to a highway, particularly in a greatly congested area. Such a method of exercising the power might very well be necessitated by factors involving schools, churches or other congregating places from whence pedestrian traffic might encroach upon the highway. In any event it seems that the constitutional grant of power is broad enough to embrace a reasonable method for effectuating the purpose of the grant.

It is, of course, elementary that municipalities are but mere adjuncts of the state to which have been delegated certain governmental functions. Within the sphere of the delegated authority such municipalities may freely exercise that portion of sovereignty as may be necessary to discharge their duties. You have not mentioned the class of the municipality through which the highway referred to in your letter of inquiry runs, but regardless of the class of

municipality it is generally true that the regulation of traffic is a proper function of municipal concern. We presume that it has been under such delegated police power that the ordinance mentioned in your letter of inquiry has been enacted.

However, in the discharge of municipal functions the same constitutional restrictions and inhibitions are applicable as apply to acts of the General Assembly itself. In the event of a conflict between ordinances enacted by municipalities with the organic law of the state, then such ordinances must fall.

We, therefore, have in the situation presented in your letter of inquiry a conflict between a regulation or determination made by a constitutionally created agency of state government and an ordinance enacted under the duly delegated authority of a municipality. We have been unable to find a case precisely of this nature in the reports of appellate court decisions, viz., the effect of a conflict between such a determination made by a constitutionally created body and an ordinance of a municipality. However, it seems to us that in the circumstances the same weight should be ascribed to such regulation or determination as would be given to a positive constitutional rule of law insofar as resolving the conflict between such regulation or determination and a municipal ordinance. We, therefore, are constrained to reach the conclusion that the regulation or determination made by the Missouri State Highway Commission must prevail, and that the municipal ordinance insofar as it purports to establish a different regulatory provision is void.

CONCLUSION

In the premises we are of the opinion that under the provisions of Section 29, Article IV, Constitution of Missouri, 1945, the Missouri State Highway Commission is empowered, subject to such limitations and conditions as may be imposed by law, to determine that access should be limited in or upon a particular highway; that upon such determination having been made the state highway commission

may use such reasonable methods as may be necessary to effectuate such limitations of access; and that a municipal ordinance prescribing conflicting regulatory provisions is of no force and effect with respect to such highways.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB/fh

SCHOOLS:

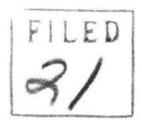
BUILDINGS:

Board of directors of local reorganized school district may rescind order for election to authorize issuance of bonds for borrowing money for purpose of erection

of school building.

XXXXXXXXXXX

JOHN M. DALTON



April 16, 1953

J.C. Johnsen

Honorable Bill Davenport Prosecuting Attorney Christian County Ozark, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The Board of Directors of a local reorganized school district has ordered an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for a building for the school. Notices of the election have been lawfully posted and have been up for several days.

"They are wondering whether or not they can rescind their action and cancel the election or whether the public now has such an interest in the election and its results that they cannot revoke their acts.

"I presume that the election is based on proper minute entries finding the necessity for the building program and its benefit to the school district.

"May we ask your opinion on this matter at your earliest convenience. The election is set for about the 23rd of April, 1953."

The sole question here is whether the board of directors of a local reorganized school district can rescind its order calling for an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for the erection of school buildings.

Hon. Bill Davenport

Authority for the board of directors to order such an election is found in paragraph 1 of Section 165.040, RSMo 1949 which reads:

"1. For the purpose of purchasing schoolhouse sites, erecting schoolhouses, library buildings and furnishing the same, and building additions to or repairing old buildings the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at an annual school meeting or at a special election to be held for that purpose. Notice of said election shall be given at least fifteen days before the same shall be held, by at least five written or printed notices, posted in five public places in the school district where said election shall be held, and the amount of the loan required, and for what purposes; it shall be the duty of the clerk to sign and post said notices. The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets, 'For the loan;' those voting against the loan, the words 'Against the loan,' and if two-thirds of the votes cast on the proposition shall be for the loan, the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices aforesaid, subject to the restrictions of section 165.043.

We would now direct attention to the 1930 case of State v. Wenom, 32 SW (2) 59. We here note that this case was based upon Section 11127, RSMo 1919, which section now is Section 165.040, supra.

The background of the Wenom case is stated by the court in its opinion at 1.c. 59, as follows:

"Mandamus begun and tried in the circuit court of Jefferson County. The trial court,

upon the filing of the petition, issued an alternative writ which was made permanent upon final hearing, and five of the respondents below appealed. Relators are residents and taxpayers of consolidated school district No. 1 of Jefferson county and at the time of the institution and trial of this action the six men who were respondents below constituted the board of directors of said district. One of the directors made no return to the alternative writ and did not join in the appeal.

"On March 18, 1922, soon after the organization of the consolidated district, a special election was held therein pursuant to call of the then board of directors, at which it was voted to authorize the board to issue bonds in the sum of \$40,000 to build a 'central school building' and to purchase a school site, and by vote of the electors at the same election a specified site was selected embracing about 5 1/3 acres. The bonds have not been issued. Shortly following the special election, there was some litigation involving the organization of the district and an attempt to disorganize, which may account for the fact that the bonds were not issued immediately after the election. This suit was filed in December, 1926. Meantime, as we infer from the evidence, the personnel of the board-had changed, and the present board refused to issue the bonds. The suit is to compel the board to issue the \$40,000 in bonds and to acquire the site selected at the special election and to erect thereon a central high school building. The organization of the district and the regularity of the proceedings in calling and holding the special election are not here questioned."

In regard to this matter the opinion, at 1.c. 61, states:

"* * * But we are of the opinion that there was no case made by pleading or proof that

entitles relators to any part of the relief sought.

"As said above, relators proceed upon the theory that, when the voters of the district voted to authorize the loan, it thereupon became the imperative duty of the directors to issue the bonds, acquire the site selected, and erect the building, a positive mandate that left nothing to their discretion except details of carrying it out, and that, if they did have a discretion, it was not honestly exercised.

"(2) The statute pursuant to which the special election was held, section 11127, Rev. St. 1919, provides that, for the purpose of purchasing schoolhouse sites and erecting and furnishing buildings, the board of directors shall be authorized to borrow money and issue bonds for the payment thereof in the manner therein provided. It then directs how the election shall be called and conducted, and provides that, if two-thirds of the votes cast on the proposition are for the loan, 'the district board shall be vested with the power to borrow money, in the name of the district, to the amount and for the purpose specified in the notices. * * * The further provisions of that section are not pertinent to the question under discussion. The statutory provisions specifically applying to consolidated school districts do not in terms provide for borrowing money and issuing bonds, but it has been held that they may do so under said section 11127, which applies to schools generally. State ex rel. v. Gordon, 261 Mo. 631, 170 S.W. 892. It will be observed that section 11127 is not mandatory in terms. It does not say that the board of directors shall borrow the money or that it shall be their duty to do so. We find no statutory provision using mandatory language on this subject."

At 1.c. 62 the opinion states:

"The vote, which relators say was a direction to the board, purported to do no more than the statute requiring it provides, viz. confer authority upon the board to borrow the money and issue the bonds. If a mandatory duty to borrow and use the money for the purpose for which the vote authorized it was thereby created, that mandate must be found in the statute. The terms of the latter, as we have seen, are permissive rather than mandatory. If the Legislature intended to make the duty imperative upon grant of the power, it would have been an easy matter to have inserted in the statute words indicating such intent, as in the statutes under consideration in State ex rel. v. School Directors of Springfield, supra, State ex rel. v. Cartwright, supra, and kindred cases."

The holding of the Missouri Supreme Court in this case was that even though this election had been held, and that as a result of the election the board of directors was authorized to issue bonds and borrow up to \$40,000.00 for the erection of a school building, it remains in the discretion of the board whether they would do soor not. It would seem that rescinding the order for such an election before the time set for holding the election would entail a much less degree of discretion than was exercised in the Wenom case, and we believe that it is within the authority of the board of directors to set aside its order for such an election at any time before the election date.

Furthermore, there would appear to be many practical reasons why the board of directors should have this authority. Between the time when the order calling for the election was made and the time of the election, there could be many unforseen developments which would make the holding of such an election unnecessary. One of these developments could be the availability of another building which could be used for school purposes. Another such development could be a finding that the erection of such a building was unnecessary either because of decrease in the number of pupils or by reason of

a finding that buildings which were in use and which it had been believed would not be satisfactory for school purposes could be made satisfactory. It would seem clear that if, in the opinion of the board, it became unnecessary to raise additional money, that it would be folly to compel the board to go ahead and raise it anyhow, money which, even if raised, would not be used by the board. To do this would cause the unnecessary expenditure of the cost of holding such election.

CONCLUSION

It is the opinion of this department that the board of directors of a local reorganized school district may, at any time after the board has ordered an election for the purpose of authorizing the issuance of school bonds for the borrowing of money for the purpose of erecting a school building, and the time of the election, may rescind its order calling for such election.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. PALTON Attorney General

HPW:mm

CRIMINAL LAW:

CIRCUIT CLERKS:

(1) No criminal prosecution would lie for dumping rubbish along banks of stream on own property which washes down stream in high water; (2) Sec. 583.280, Mo. R.S., 1951 Supp., relating to compensation of clerks of courts of criminal jurisdiction, applies only in counties having population in excess of 500,000 or in cities of such population.

JOHN WAXXXXX



May 22, 1953

John C. Johnsen

Honorable Bill Davenport Prosecuting Attorney Christian County Ozark, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I have had an inquiry bringing up the following question: Is there any criminal or punitive action provided for in the State of Missouri against one who dumps trash such as bottles, cans, etc., in or near the bed of a small natural stream bed wherein flows a stream of water periodically but mostly at high water but which is fed above this point by a small wet-weather spring where such trash washes down the stream bed onto the lands of another. This dumping is presumably of trash other than and in addition to the ordinary household trash of the landowner but all actual dumping is strictly on the lands of the person dumping the trash. It is in times of high water that it washes down onto the complainant's lands.

"Also, the Circuit Clerk was just in my office and asked that I request a clarification of Section 483.280, R.S. 1949 and Laws 1951. The first few lines of this section are confusing to him in that it might indicate that the salary schedule of this section might refer to all counties of the State or might refer to counties and certain cities over 500000 population."

As to your first inquiry, examination of the statutes reveals no offense described therein such as might be expressly included under the circumstances set forth in your letter.

Such disposal of trash might be held to constitute stream pollution. "It is an unreasonable use, resulting in liability for the pollution caused thereby, * * * to leave logs, fallen timber, waste matter, and debris alongside a stream so that flood waters will wash them down stream; * * *" 67 C. J., Waters, Section 125, page 775. However, Missouri statutes making stream pollution criminally punishable do not cover a situation such as this.

Section 252.210, RSMo 1949, makes punishable as a misdemeanor contanimation of a stream sufficient to "injure, stupefy or kill fish," but that situation is apparently not present here, and therefore that section would not be appliedable.

Section 564.000, RSMO 1949, provides:

"1. If any person or persons shall put any dead animal, carcass or part thereof, the offal or any other filth into any well, spring, brook, branch, creek, pond, or lake, every person so offending shall, on wonviction thereof, be fined in any sum not less than ten mor more than one hundred dollars."

That section would not be applicable on the basis of the facts submitted by you.

We find no provision in Chapter 560, RSMo 1949, relating to offenses against property generally, which would cover this situation.

Stream pollution has been held punishable as a public nuisance. 67 C. J., Waters, Section 161, page 799. Section 564.080, RSMo 1949, prohibits the maintenance of a public nuisance. However, the pollution here involved would probably not come under this section. In the case of Smith v. Sedalia, 152 Mo. 283, the court, in discussing pollution as a public nuisance, stated at 1.c. 301:

"But it is a misconception to treat the case made in the petition as one of a public nuisance. Though there be several landowners through whose possessions the polluted stream may flow, and all suffer damage of the same character but each of different degree, that does not convert the injurious act into a public nuisance, for it is only those individuals and not the public in general who suffer; and therefore each may recover the damage he suffers though it differs only in degree from that that others in the same class suffer."

The circumstances outlined in your letter would not indicate any injury to the public generally.

We do not consider the question of liability in an action for damages, inasmuch as you would not be officially concerned with such question.

As for your second inquiry, Section 483.280, Mo. R.S., 1951 Supp., provides:

- "1. In all counties and cities not within the limits of a county having a population of five hundred thousand inhabitants or more, or such as may hereafter have five hundred thousand inhabitants or more; the clerks of courts having criminal jurisdiction in such counties or cities shall receive an amount not exceeding six thousand dollars per annum for his salary and services as such clerk, said amount to be paid out of the treasury of such counties or cities in equal monthly installments on the first day of each month.
- "2. In addition to other duties now provided by law for such clerk, he shall prepare and deliver to the judges of the court an annual report setting up the number of cases handled by the court, their disposition, their classification, the number of

cases pending at the end of the year and such other information as the judges may require from time to time, and for such duties the clerk shall receive additional compensation in the amount of one thousand five hundred dollars per annum to be paid in the same manner as the compensation provided for in subsection 1.

- "3. In all such counties or cities the clerk of such court shall have the right to select and appoint as many deputies. subject to the approval of the court, as may be necessary to perform the duties of his office, and shall fix the compensation of such deputies, not exceeding the sum of sixty thousand dollars in the aggregate which deputy hire shall be paid to such clerk, out of the treasury of such counties or cities in equal monthly installments on the first day of each month.
- "4. On the last days of March, June, September and December of each year such clerk shall make out and file with the clerk of county court of such counties or with the auditor or comptroller of such cities a full and correct statement of all fees collected by him since his last report, and such clerk shall within fifteen days after filing said statement pay over to the treasurer of such counties or cities the amount of fees specified in such statement and take therefor duplicate receipts from the treasurer of such counties or cities and file ane of such receipts with the clerk of the county court of such counties or with the auditor or comptroller of such cities and retain the other of such receipts in the office of such clerk." (Emphasis ours.)

We are of the opinion that this section is applicable only to counties having a population of 500,000 inhabitants or more or in cities not within a county having such population. You

will note the reference in the section, as above quoted, to "such counties." This clearly indicates, we feel, that the Legislature did not intend it to apply to all counties, but only such counties as have a population of 500,000 inhabitants or more. Paragraph 2 of this section was added at the last session of the General Assembly (Laws of Missouri, 1951, page 434). The title of the amendatory act read as follows:

"AN ACT to repeal section 483.280, RSMo 1949, relating to the duties and compensation of clerks and deputy clerks of courts having criminal jurisdiction in counties and cities not within the limits of a county having a population of over five hundred thousand inhabitants, and to enact in lieu thereof one new section, relating to the same subject, to be known as section 483.280."

This clearly shows that the provision added by the act was intended to apply only to the counties originally included therein, that is, counties having a population in excess of 500,000 inhabitants.

CONCLUSION

Therefore, it is the opinion of this office that there is no provision for criminal punishment of a person who dumps trash on his own land near the bed of a small stream which washes down stream in times of high water and comes to rest on other persons land. This department is further of the opinion that Section 483.280, Mo. R.S., 1951 Supp., applies only to counties having a population in excess of 500,000 persons or cities not within a county having a population in excess of that figure.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

COMPENSATION: COUNTY RECORDER: That the county recorder in fourth class counties wherein the offices of circuit clerk and recorder have been combined, shall receive only that portion of the additional compensation provided in Section 2 of Senate Bill 166, passed by the 67th General Assembly, prorated from the effective date of said bill; furthermore, that such payment shall be made in monthly installments as provided under Section 50.330, RSMo 1949.

XXXXXXX

John M. Dalton



August 17, 1953

XXXXXX

John C. Johnsen

Honorable Bill Davenport Prosecuting Attorney Christian County Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

"The Circuit Clerk and Recorder of my County has requested the opinion of your office regarding the interpretation of Senate Bill 166 of the last session concerning a yearly increase in pay for such officers of fourth class counties for preparing an alphabetical list of persons discharged from military service.

"The specific information requested is whether this \$300.00 is payable in full for the year 1953 and whether it is contemplated to be paid in a lump sum or monthly. Of course, as you know, much of the work to be done thereunder will be retroactive to the old files."

Section 1 of said Senate Bill 166, passed by the Sixtyseventh General Assembly, fixing additional duties upon the
Circuit Clerk and Recorder in counties of the fourth class,
wherein said offices have been combined as the recorder of
county. These additional duties are the preparing of alphabetical lists of all residents of his county who have been
discharged from the Armed Forces of the United States, showing other things mentioned in said section, also the book
and page number wherein the discharge is recorded. It

furthermore requires that such lists be up-to-date at all times and, in addition to the above, includes other related duties.

Section 2 of said Senate Bill provides for additional compensation for the performance of such additional duties and reads:

"2. For the performance of the duties required by sub-section 1 of this section the circuit clerk and recorder in counties of class four shall receive the sum of three hundred dollars annually."

Said Senate Bill 166 carried no emergency clause. It was approved by the Governor on the 19th day of June, 1953, and, therefore, it becomes effective under the provisions of Section 29, Article III, Constitution of Missouri, within ninety days after the adjournment of the General Assembly which occurred on May 31, 1953, making said bill become effective on August 29, 1953.

At first blush, it might appear that to give said county officers such additional compensation would be in violation of Section 13, Article VII, Constitution of Missouri, which provides that no county of ficer should receive increased compensation during his term of office. However, the Supreme Court of this state has frequently held that said provision is not applicable in cases wherein the General Assembly has burdened such county officers with additional duties and further provided for additional compensation for the performance of such additional duties. See State ex rel. v. Sheehan, 269 Mo. 421, l. c. 429, 190 S.W. 864.

You specifically inquire if the \$300.00 as additional compensation under said bill to said county officers for performing additional duties as provided therein should be paid in full for the year 1953 and if it shall be paid in a lump sum or monthly.

We are mindful of the fact that said bill does not become effective until the 29th day of August, 1953. Furthermore, it requires additional work of said county recorder in preparing a list of residents of his county that may have heretofore been discharged from the Armed Forces and also in keeping such list up-to-date and recording same. This not only entails the making a list and recording the names of those discharged in the state subsequent to the effective date of said bill but of those discharged prior to the effective date

of said bill.

The General Assembly, under Section 2 of said bill provided that for the performance of such additional duties, said officers shall receive the sum of \$300.00 annually.

"Annually" has been defined as meaning yearly or once in each year. See Continental National Bank v. Buford, 107 Federal 188, 1. c. 189; Metropolitan National Bank v. Sirret, 97 N. Y. 320,331; Hoffman Speciality Company v. Pelouze, 164 S. E. 397, 399. It was also held in Kearney v. Cruikshank, 22 N. E. 580, 582, 117 N. Y. 95, that the direction to pay to the councy a specified sum annually is that sum to be paid in an annual yearly payment. See also Henry v. Henderson, 33 So. 960-964, 81 Miss. 743, 63 R.L.A. 616.

It is well settled that every statute be given a prospective operation unless a definite effect is clearly to be gathered from its terms, even though general language is used which might include past transactions. See State ex rel. Parker v. Thompson, 41 Mo. 25; Lucas v. Murphy, 156 S. W. (2d) 686, 348 Mo. 1078. While the bill in question may require listing and recording those discharged prior to this bill becoming a law and further that said bill provides that said officers shall receive additional compensation of \$300.00 annually, we cannot see wherein such language alone is sufficient to clearly indicate that the legislative intent was that it should operate retroactively.

Section 50.330, RSMo 1949, provides that any salary for a county officer shall be paid in monthly installments on the first day of each month by warrant drawn on the County Treasury.

A well established rule of statutory construction is that all statutes applicable to the subject involved must be read and construed together and, if possible, harmonized. See State v. Naylor, 40 S. W.(2d) 1079, 328 Mo. 395.

Considering Section 50.330, supra, and Section 2 of Senate Bill 166, supra, it was apparently the legislative intent that said officers shall receive \$300.00 additional compensation annually, however, it shall be paid in monthly installments, furthermore, that for the year, 1953, said officers shall only receive that portion of additional compensation provided in said bill provated from the effective date of said bill.

CONCLUSION

It is the opinion of this department, in view of the foregoing, that the county recorder in fourth class counties wherein the offices of circuit clerk and recorder have been combined, shall receive only that portion of the additional compensation provided in Section 2 of Senate Bill 166, passed by the Sixty-seventh General Assembly, prorated from the effective date of said bill; furthermore, that such payment shall be made in monthly installments as provided under Section 50.330, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH/mv

SPECIAL ROAD DISTRICTS: FOURTH CLASS, NON-TOWN-SHIP COUNTIES: TREASURER'S DUTY:



Treasurer of fourth class, non-township county also treasurer of special benefit assessment road district organized under Sections 233.170 to 233.315, RSMo 1949. When district commissioners draw warrant on treasurer issued in payment of construction or improvements on district's made to member of court of said county, and warrant is regular on face, it is duty of treasurer to cash same out of available district funds. He and sureties will not incur liability on official bond.

October 2, 1953

Honorable Bill Davenport
Prosecuting Attorney of
Christian County
Ozark, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"We request an opinion upon the following question: Will the County Treasurer of a fourth class county incur any personal liability because of the payment of warrants, regular on their face, issued by a special road district in payment for road work done by a member of the County Court of said County."

From the facts upon which the opinion request is based, it appears that the County of Christian is one of the fourth class and not operating under township organization. For several years a party has done construction and improvement work on the special road districts of the county and the commissioners of said districts have issued warrants upon the county treasurer in payment of such road work.

The statement has been made that the quantity or quality of the work performed has not been questioned and that the commissioners are well pleased with such work. However, it appears that at the time the said person was doing the road work he was a member of the county court of said county and the question has arisen

as to the legality of the road construction contract between the board of commissioners of the special road districts involved and the county judge and also as to whether or not in the event the county treasurer cashes warrants drawn upon him by the commissioners, and given in payment to the county judge, said treasurer will incur any personal liability himself or in behalf of the sureties on his official bond. The general rule regarding a public officer's liability in paying out public funds has been stated in Sec. 306, page 111, 43 Am. Jur., as follows:

"Public officers who have charge of public funds and public money are charged with the duty, as trustees, to disburse and expend the money for the purposes and in the manner prescribed by law. are liable if they divert the trust funds from the governmental purposes for which they were collected. Mere good faith in making an improper payment of public funds is not recognized as any excuse whatever. Nor is it material that in other respects the duties of the officer may be discretionary or legislative if in respect of disbursement they are merely ministerial. Where, however, an officer disburses public money on warrants or orders, fair on their face in good faith, and without knowledge of the facts, showing the illegality of the claims on which the order or warrant purports to have been issued, he is not necessarily liable for a return of the money on a showing that the claim was not in fact a legal charge against the municipality he represents, although it is otherwise if he knows that the warrants are drawn for illegal claims.

"Where the fiscal court of a county and the taxpayers have for many years allowed public money to be expended in an irregular manner, the county may be estopped from recovering the money from the officer making the expenditure, if he has made it in good faith for an authorized purpose

and the county has received the benefit. But the mere fact that malfeasance in the disbursement of public funds has covered a period of years does not in any way excuse the officers participating in the misconduct. And it is in general held that custom or usage does not justify a departure from plain statutory mandates or prohibitions in respect of the manner in which public money shall be paid or the public credit pledged.

"It is in general held that officers are not liable for paying out public money in reliance on an unconstitutional statute were the payment was made in good faith before the law was held unconstitutional.

"Obviously, in respect of many expenditures of public funds, the legislature must leave much to the discretion and judgment of public agencies in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority."

The warrants issued by the road commissioners are described as being "regular on their face," and from the meaning of the term "regular on their face" as generally applied to written instruments, we assume that the warrants in question were issued by the legally constituted board of commissioners of the special benefit assessment districts of the county, which boards, as we have already noticed, are the bodies authorized under the provisions of the applicable statutes to issue warrants in payment of the obligations of such districts. We further assume that the warrants were legal in form and contained nothing which would notify or fairly apprise the county treasurer that they were issued without authority.

Section 233.170, RSMo 1949, provides for the formation of special benefit assessment districts located in non-township organization counties and reads as follows:

"l. County courts of counties not under township organization may divide the territory of their respective

counties into road districts, and every such district organized according to the provisions of sections 233.170 to 233.315 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known road district of county, and in that name and styled ' shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of sections 233.170 to 233.315, or of which it may be rightfully possessed at the time of the passage of sections 233.170 to 233.315, and of contracting and being contracted with as herein provided.

"2. Districts so organized may be of any dimensions that may be deemed neccessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory; provided, that the county courts shall not have power to divide the territory within the corporate limits of a city having a population of one hundred fifty thousand into such road district.

Subsection 2 of Section 233.185 provides that the county treasurer shall be the treasurer of the road district. Such subsection reads as follows:

"2. Meetings of said commissioners shall be held thereafter at such time and place as they may agree upon in writing, or the president or vice-president may order. The treasurer of said board shall be the county treasurer, and he shall be responsible on his bond for the faithful keeping of all moneys deposited with him by reason of this law. The president of the board shall preside at all meetings thereof, he shall sign the minutes

and records of the board, and all
warrants that may be drawn upon
the treasury for the payment of any
money out of the treasury on account
of the funds belonging to said district,
and exercise a general supervising control over the work of such commissioners,
and in a general way may do all the acts
and things that the said board may empower him to do, and such other as may
be authorized by law. During absence
of the president from the county, or
from any meeting of the board, the vicepresident shall perform the duties herein conferred upon the president."

In view of the fact that the statement is made that the warrants of the districts were issued on the treasurer of the county to meet the district's obligations, then the districts referred to in the opinion request are the special benefit assessment districts organized under Section 233.170, supra, since section 233.185, supra, provides that the treasurer of such boards shall be the county treasurer. The treasurer of an eight mile district is not the county treasurer as will be seen from the provisions of Section 233.055, RSMo 1949. might be contended that the warrants were not regular on their face, and that the transaction between the county judge and the county road districts were void because the judge is a public officer, and as such cannot contract the board or body of which he is a member, as has been declared in the case of Nodaway County v. Kidder, 344 Mo. 795. Section 49.190, RSMo 1949, prohibits a county judge from entering into any county contract when he is a member of the court of which the contracting county is a party. However, none of the rules or court decisions mentioned above have any application to the facts before us for reasons to be given hereafter.

Section 233.170, supra, specifically provides that road districts organized under this section are bodies politic and corporate with powers to perform the actual and necessary corporate functions and also it was held to be true in the case of State ex rel. v. Thompson, 315 Mo. 57, that a road district is a municipal corporation.

The road district as a corporation would be an artificial being with only those powers which are conferred upon it by law, and as such it would have an existence separate and apart from the county in which it was located, for the purpose for which it was organized.

Subsection 2 of Section 233.190, supra, in referring to the road districts organized under Section 233.170, supra, states that the board of commissioners shall have the sole, exclusive and entire control over the public highways, bridges and culverts within the district, and among other matters, the commissioners have power to contract for material, machinery or labor to be used upon the roads of the districts.

While no statutory restrictions are placed upon the commissioners as to what persons they may employ on the roads or bridges of said districts, the commissioners could not legally employ any one who was a member of the board of commissioners. The facts given above do not so indicate, and we assume that the county judge doing the work is not a member of the said board, therefore, the said judge is not entering into any contract of employment with any body or board of which he is a member. The board of commissioners is legally authorized to enter into the particular contract in question and the transaction is assumed to be free of fraud, and such board had a right to issue warrants on the county treasurer as treasurer of the board with which to pay the judge for work done on the district roads. The warrants were therefore issued legally and regularly on their face within the commonly accepted meaning of the term and it was the duty of the treasurer to cash such warrants out of any available funds belonging to said district. The treasurer, or the sureties upon his official bond could not incur any personal liability when cashing the district's warrants given to the county judge for above mentioned purposes, and when all such warrants were regular on their face.

CONCLUSION

It is therefore the opinion of this department that the treasurer of a fourth class, non-township county is also treasurer of a special benefit assessment road district of said county, organized under the provisions of Section 233.170 to Section 233.315, inclusive, RSMo 1949. That when the board of commissioners of such district draw a warrant upon said treasurer issued in payment of construction and improvement work done by a member of the court of said county, the warrant is regular on its face, it is the duty of the treasurer to cash same when presented for payment, out of any available funds of the district, and in so doing the treasurer and the sureties upon his official bond will not incur any personal liability.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General CRIMINAL PROCEDURE: SECTION 544.530, RSMo. 1949: SUPREME COURT RULE 32.01: Under provisions of Section 544.530 RSMo. 1949, and Supreme Court Rule 32.01, when defendant is charged by indictment or information with crim-

inal offense in circuit court, bail not fixed, and court not in session, it is mandatory duty of circuit clerk to ascertain if offense is bailable within meaning of Article 1, Section 20, Constitution of Missouri, 1945. If bailable, to fix reasonable bail, and to release defendant when sufficient bond in that sum given. If offense not bailable, bail must be refused. Reasonableness of bail question of fact for clerk. Bail fixed in greater sum than will secure attendance of defendant at trial or from time to time, term to term continued to, and restrains defendant from departing without leave, is excessive within meaning of Article 1, Section 21, Constitution of Missouri, 1945, and denies defendant's constitutional right to bail for bailable offense. Subject to these exceptions clerk has no discretionary powers of refusal to admit defendant to bail or to prescribe time, place or conditions of admittance to bail.

November 5, 1953

Honorable Bill Davenport Prosecuting Attorney Christian County Ozark, Missouri FILED 21

Dear Sir:

This department is in receipt of your recent request for a legal opinion which reads as follows:

"At the request of the Clerk of the Circuit Court of this County we wish to ask for the opinion of your office in interpreting the provisions of Supreme Court rules 32.01 and 32.03 and also Sections 544.530 and 544.560 R.S.Mo. 1949.

Such laws provide in substance that the Judge or Magistrate shall admit persons to bail where justified and that the Clerk of the Court may admit such persons to bail in the absence of the Judge or Magistrate and under certain conditions.

Our question is whether the Clerk's duty of admitting a person to bail, and setting such

bail where it has not been set by the Judge, is mandatory, assuming that the Judge or Magistrate's duty therein is mandatory and what discretion, if any, the Clerk has to refuse to admit a person to bail, or short of refusal, what discretionary power, if any, he has over the time, place, or conditions of admitting one to bail."

We understand the inquiry to be for a construction of Supreme Court Rules 32.01 and 32.03, also Section 544.530 and 544.560, RSMo. 1949, insofar as they relate to the duties of the circuit clerk in fixing the amount of bail of a person charged with crime in the circuit court, and, upon the bail bond being given and approved by the clerk, his order releasing him, and whether the duties of the clerk in this particular are mandatory, and what discretion, if any, he has to refuse to admit a person to bail.

Supreme Court Rule 32.01, referred to above, reads as follows:

"Bail--Admission by Judge or Clerk. When a defendant is entitled to bail, the court in which the complaint, indictment or information is pending, or the judge or magistrate thereof, shall admit him to bail, but if the court is not in session, the clerk of the court may admit the defendant to bail."

Supreme Court Rule 32.02, also referred to above, reads as follows:

"Bail--Admission by Sheriff or Peace Officer. When the sheriff or other peace officer shall have a person under arrest and in custody by virtue of a warrant issued upon an indictment for a felony, or upon a warrant of commitment for failure to furnish bail, and the amount of bail is specified on the warrant, the sheriff or other peace officer may admit the defendant to bail in the amount so specified. If the defendant is under arrest and in custody by virtue of a warrant issued upon a complaint, information or indictment charging the commission of a misdemeanor, the sheriff or other peace officer may admit the defendant to bail in the amount specified upon the warrant, or, if the amount of bail is not so specified and the judge or magistrate thereof is not in the county, the sheriff or other peace officer may admit the defendant to bail in an amount not less than \$100.00 nor more than \$1,000.00."

Section 544.530, RSMo. 1949, provides that when one is in custody or under arrest for a bailable offense, by whom bail may be taken. Said section reads as follows:

"When the defendant is in custody or under arrest for a bailable offense, the court in which
the indictment or information is pending may
let him to bail and take his bond or recognizance, or, if the court is not in session, the
clerk of the court may fix the amount of such
bail and take his bond or recognizance."

Section 544.560, RSMo, 1949, authorizes the sheriff to take bail of one arrested and in his custody under a warrant of commitment, and reads as follows:

"When any sheriff or other officer shall arrest a party by virtue of a warrant upon an indictment or shall have a person in custody under a warrant of commitment on account of failing to find bail, and the amount of bail required is specified on the warrant, or if the case is a misdemeanor, such officer may take bail, yich in no case shall be less than one hundred dollars, and discharge the person so held from actual custody."

Upon a comparison of Section 544.530 supra, and Supreme Court Rule 32.01, supra, it is apparent that the provisions of each are the same regarding the duty of a circuit clerk in admitting persons to bail, and that since the rules of criminal procedure for all Missouri courts, were adopted by the Supreme Court for the purpose of implementing and giving effect to the applicable sections of the revised statutes, we believe that a construction of Rule 32.01, supra, would be equally good as a construction of Section 544.530, supra, or that a construction of the section would be a good construction of the court rule as far as the duties of the circuit clerk are concerned.

In effect, both provide that when a defendant is in custody or has been arrested for a bailable offense, the court in which the indictment or information is pending may admit him to bail and take his bond or recognizance, or if the court is not in session the clerk may fix the amount of bail and take the bond or recognizance.

In this connection the question might arise as to what offenses are bailable within the purview of the statute and court rule. While neither specifically state what offenses are bailable, we must look to another source for an explanation of what offenses were meant to

be included within the meaning of the term "bailable offenses." We therefore direct your attention to Article 1, Section 20, Constitution of Missouri, 1945, which reads as follows:

"Bail Guaranteed--Exceptions.--That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."

In the case of Ex parte Spoor, 173 S.W. 2d. 943, in construing Article 2, Constitution of Missouri 1875, which is the same as Article 2, Section 20, Constitution of 1945, quoted above, and in applying same to the facts before the court, the court said at 1.c. 944:

"There is only one question presented by the record for our determination: Is the proof of petitioner's guilt of a capital offense evident or the presumption great, within the meaning of Section 24, Article 2, of the Constitution Mo. R.S.A.? 'What is meant by the presence of proof evident, or its alternative, presumption great, is simply that, if the evidence is clear and strong, leaving a well-guarded and dispassionate judgment to the conclusion that the offense has been committed as charged, and that the accused is the guilty agent, and that he would probably be punished, capitally if the law is administered, bail is not a matter of right, and should be refused.'

(Italics ours) Ex parte Burgess, 309 Mo. 397, 274 S.W. 423, 426."

Following the same line of thought as indicated by the preceding excerpt, the Supreme Court stated in the opinion of Ex parte Verden, 237 S.W. 734, at 1.c. 737:

"* * *We think the proper test is whether the evidence before the judge on the hearing for bail tends strongly to show guilt of a capital offence, which is only another way of saying the proof must be evident or such facts must be shown as to raise a strong presumption of guilt of the crime charged. If so, bail should be denied; if not, it should be granted.

"(5-6) Confinement in jail prior to trial is not authorized because defendant may eventually be convicted of the charge by a jury, or as any part of his punishment, if guilty, but to assure his presence when the case is called

for trial and during the progress thereof. The only theory on which bail can be denied in any capital case is that the proof is so strong as to indicate the probability that defendant will flee if he has the opportunity, rather than face the verdict of a jury. Where the proof is not evident or the presumption great, the accused should be admitted to bail in such sum as in the judgment of the court will insure his presence to submit himself in judgment before the trial court. The amount will be determined by the court in view of all the circumstances in the case and the extent of the ability of the accused to give it. * * *"

In commenting upon the purpose of a bail bond, and the constitutional right of the defendant to be released upon giving bail with sufficient sureties, in the case of State ex rel Corella v. Miles, 303 Mo. 648, the court said at 1.c. 651-652:

"1. Section 24, Article II, of the Constitution of Missouri, provides that any person charged with a felony, except in capital offense in certain cases has a right to be released upon giving bail with sufficient sureties. It is a right of which a defendant cannot be deprived. (6 C.J. p. 953.)

"Section 25, Article II, of the Constitution of Missouri, provides that excessive bail shall not be required. The purpose of giving bonds is to secure the appearance of the defendant at trial and when the Constitution forbids excessive bail it means that bail shall not be more than necessary to secure that attendance. (6 C.J. p. 989.) * * * * * Since the only purpose of bond is to secure the appearance of the defendant at the trial, any bail fixed at more than is necessary to secure that appearance is excessive within the meaning of Section 25, Article II, of the Constitution.

"II. The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates Section 24, Article II, of the Constitution. For that is saying the offense is not bailable when the Constitution says it is." (Underscoring of last paragraph ours.)

In view of the foregoing, and in answer to the inquiry of the opinion request, it is our thought that when a defendant is in custody, or has been arrested for a criminal offense, an indictment or information setting forth the charge for which he is held has been filed in the circuit court having jurisdiction to try defendant on said charge, and the court is not in session, it is the mandatory duty of the clerk to ascertain whether or not the offense thus charged is a bailable one within the meaning of Article 1, Section 20, Constitution of Missouri, 1945. If the offense is found to be bailable then it is the further mandatory duty of the clerk, and he has no legal cause for refusal to fix the amount of bail in a reasonable sum, and upon defendant's furnishing a bail bond in that amount with sufficient sureties to order the release of the defen-If after investigation the clerk finds the offense is not a bailable one within the meaning of above cited constitutional provision, then, and only then, is it his duty to deny the defendant bail.

When the offense is found to be bailable, the question might present itself to the clerk as to what might be a reasonable sum for bail, but such a question is clearly one of fact which can only be determined by the clerk in each individual case. However, it might be stated as a general rule applicable in every instance that the fixing of bail in a greater sum than is believed to be reasonably necessary to secure the attendance of the defendant at the time and place of the criminal proceeding against him in circuit court, or from time to time, or term to term to which the cause might be continued, and not to depart without leave of court, would be excessive and a violation of Article 1, Section 21, Constitution of Missouri of 1945, and a denial of defendant's constitutional rights. Such improper action would, in effect, declare a criminal offense not bailable, when the Constitution declared it to be bailable. Subject to exceptions in the particulars noticed above in admitting a defendant to bail, the clerk has no discretionary power in prescribing the time, place or conditions of the admittance to bail.

CONCLUSION

It is the opinion of this department that under the provisions of Section 544.530, RSMo. 1949, and Supreme Court Rule 32.01, when a defendant is charged by indictment or information with a criminal offense in the circuit court of proper jurisdiction and the amount of defendant's bail has not been fixed, and said court is not in session, it is the mandatory duty of the clerk of that court to ascertain if the offense charged is bailable within the meaning of Article 1, Section 20, Constitution of Missouri, 1945. If the offense is bailable the clerk must fix the amount of bail in a reasonable sum, and upon defendant furnishing a bail bond in that sum,

with sufficient sureties to order the defendant's release. If the offense is found not to be bailable then, and only, is it the clerk's duty to refuse to admit the defendant to bail. While the reasonableness of the amount of bail is a question of fact to be determined by the clerk in each individual case, yet, bail fixed in any greater sum than is believed necessary to secure the attendance of the defendant at the time and place of trial of the criminal charge against him, or from time to time, or term to term to which the cause may be continued, and which will restrain the defendant from departing therefrom without leave of court, is excessive bail within the meaning of Article 1, Section 21, Constitution of Missouri, 1945, and denies the defendant his constitutional right to secure bail for a bailable offense. Subject to these exceptions the circuit clerk has no discretionary powers of refusal in admitting a defendant to bail, or in prescribing the time, place or conditions of admittance to bail.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General CHARTER COUNTIES, CITIES,)
TOWNS AND VILLAGES:

The term "incorporated cities," found in Section 18(c), Article VI, Constitution of Missouri, includes all incorporated cities, towns and villages.



April 21, 1953

Honorable C. W. Detjen Assistant County Counselor St. Louis County Clayton, Missouri

We have given careful consideration to your request for an opinion, which request is as follows:

"Hon. John J. McAtee, County Counselor, has requested that I write to you for an opinion on the following subject.

"St. Louis County has adopted a Special Charter under the provisions of Article VI, Section 18 of the 1945 State Constitution. Section 18(c) of this Article of the Constitution provides:

"The charter may provide for the vesting and exercise of legislative power pertaining to public health, police and traffic, building construction, and planning and zoning, in the part of the county outside incorporated cities; and it may provide, or authorize its governing body to provide, the terms upon which the county shall perform any of the services and functions of any municipality, or political subdivision in the county, except school districts, when accepted by vote of a majority of the qualified electors voting thereon in the municipality or subdivision, which acceptance may be revoked by the vote.

"In St. Louis County there are nearly one hundred incorporated municipalities, most of which are 'cities', but a few

Honorable C. W. Detjen:

of them are classed as 'towns' or 'villages' under our Statutes. Incorporated towns and villages are permitted to enact police and traffic ordinances and zoning ordinances. St.
Louis County, under its Charter, has
also legislated on the subjects of
traffic and zoning.

"The question is now raised as to whether the words 'incorporated cities' as used in Article VI, Section 18 of the Constitution, includes towns and villages, in which event the County's ordinances would not apply in the latter municipalities; or, on the other hand, whether 'incorporated cities' are to be construed to mean cities in a more restricted sense, in which event the County's traffic and zoning ordinances would control so far as towns and villages are concerned."

Section 18(c), of Article VI, of the Constitution of Missouri has never been construed by the Appellate Courts of the State. We must, therefore, rely upon the well-known rules of statutory construction and undertake to determine the intent of the convention at the time this section was written into the Constitution of 1945.

Evidently the purpose herein is to give counties adopting the charter form of government "legislative power pertaining to public health, police and traffic, building construction, and planning and zoning," in the rural areas of the county where such authority does not exist. All cities, towns and villages are vested with such power, and the convention certainly did not intend to duplicate this authority or open the way for conflicts in local administration.

The term "incorporated cities" is a very broad term and it may be construed to include incorporated towns and villages, or it may apply to municipal corporations of all classes. The Supreme Court of the State of Washington Honorable C. W. Detjen:

defined this term in the case of Town of Elma vs. Carney, 4 Wash. 418. In the course of that opinion, on page 419, the Court said:

"* * * The appellant is a municipal corporation of the fourth class called a 'town' (Gen. Stat., Sec. 505), and the respondent maintains that the term 'incorporated city, used to designate a class of appellants who are not required to file appeal bonds, under Code Proc., Sec. 1407. does not include a 'town.' But we are strongly convinced that there was no such intention on the part of the legislature. The state and every one of its municipal servants are, by the terms of this section, relieved of giving bonds, as they ought to be, unless this invidious exception has been made. This is the evident policy adopted with deliberation, as was the act of March 27, 1890, which treated of municipal corporations alone, and brought the bodies of this class in the state into a harmonious system for the first time. The sections of that act, from 142 on, chartered municipal corporations of the fourth class to be entitled 'towns.' We think we shall do no violence to construction in this case if we interpret 'incorporated city' to mean municipal corporation, and hold that no bond is required. * * *."

CONCLUSION

It is the opinion of this office that the term "incorporated cities," as contained in Section 18(c) of Article VI of the Constitution of Missouri, includes towns and villages and applies to all incorporated cities, towns and villages, as defined by the laws of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Yours very truly,

JOHN M. DALTON Attorney General

BAT:MA:irk

BUTTERS

AGRICULTURE:

FOODS AND DRUGS:) The mixing within the State of Missouri of b vegetable fats, vitamins and preservatives to ake a product intended for human food without the labels specifying in what percentage the vegetable fats enter into the composition is a violation of Section 196.770, RSMo 1949, and that the offering of such product for sale, without informing the purchaser of the percentage or quantity of the various ingredients, is also a violation thereof.



May 15, 1953

Honorable Ray DeWitt Acting Director, Dairy Division Department of Agriculture State of Missouri Jefferson City, Missouri

Dear Mr. DeWitt:

We render herewith our opinion based on your request of April 30, 1953, which request is as follows:

> "Section 196.770 RSMo 1949 states that oleomargarine shall not be mixed with butter without distinctly marking the percentage of butter in which such oleomargarine enters into its composition.

"We have in our possession a one-pound package of Reddi-Spred which is distributed by Reddi-Spred Corporation of Philadelphia, Pennsylvania. This Reddi-Spred has butter added to vegetable fats. On one side of the package is the word 'Margarine'; on another side is the word 'Oleomargarine'; but the percentage of butter added is not given.

"We are respectfully requesting an opinion as to whether or not this product is in violation of Section 196.770 RSMo 1949."

By a subsequent telephone conversation with you we have learned that the label on the package referred to in your letter contains the percentage of preservatives and vitamins and a list, but not the percentage or quantity, of the other ingredients, including butter.

Honorable Ray DeWitt

The statute to which you refer, Section 196.770, RSMo 1949, reads as follows:

"Labeling of butter and olegmargarine, mixed .-- No person shall mix oleomargarine, suine, butterine, beef fat, lard or other foreign substance with any butter or cheese intended for human food without distinctly marking or stamping or labeling the article or package containing the same with the true and appropriate name of such article, and the percentage in which such oleomargarine or other such substance enters into its composition. Every person offering for sale must inform the purchaser of contents and makeup of article. Whoever shall violate the provisions of this section shall be punished as provided for by section 196.790."

It appears that in the product to which you refer oleomargarine "or other foreign substance" has been mixed with butter; that it is intended for human food; and that there is no marking, stamping or labeling on the article or package containing the percentage in which oleomargarine "or other such substance" enters into the composition of the product.

This being so, there is no doubt that the mixing of the product you have described labeled in the manner you have described is in violation of the above-quoted section.

We point out, however, that this statute has no extraterritorial force and that it would be violated only by mixing within the State of Missouri. It is not concerned with mixing outside the state.

While you do not specifically request it, your original telephone request indicated that you would be interested in the liability of the retailer selling this product within the State of Missouri.

"Every person offering for sale," the statute provides, "must inform the purchaser of contents and makeup of article." We believe that this portion of the statute requires the seller to furnish the purchaser the information, not only as to the ingredients but also as to the percentage or quantity of each ingredient.

The word "make-up" is defined by Webster as follows:

"MAKE-UP, n. 1. The way in which the parts of anything are put together; manner or method of construction; also, the constitution or composition of anything; the elements of anything; as, the make-up of a ball team; physical, mental, and moral constitution; as, the human make-up."

If the statute only requires the seller to inform the purchaser of the ingredients, then that requirement is made by use of the word "contents." It is apparent by use of the word, "make-up," that the legislature intended to require something more, to-wit: the quantity or percentage of each ingredient. This conclusion is supported by the preceding portion of the statute referring to the mixing of the article, and requiring the label to specify the percentage in which any substance other than butter enters into the composition; and by the object apparently sought to be accomplished, to prevent the misleading of the consuming public by the inclusion in an article of an infinitesimal amount of butter and then representing the product merely as "containing butter," without specifying how much, and without specifying the quantity or percentage of the other substance.

This is not to be taken to mean that the sale of the product you have described is <u>ipso</u> <u>facto</u> a violation of law; but that the seller is required in some manner to give the buyer more information than is contained in the label, in particular the percentage or quantity of the ingredients. This information could be given the purchaser in any way -- by label, sign, orally, or in any way in which the information might be conveyed to the purchaser.

Honorable Ray DeWitt

CONCLUSION

It is the opinion of this office that the mixing, within the State of Missouri, of butter, vegetable fats, vitamins and preservatives to make a product intended for human food, without the label's specifying in what percentage the vegetable fats, vitamins and preservatives enter into the composition is a violation of Section 196.770, RSMo 1949; and that the offering of such product for sale, without informing the purchaser of the percentage or quantity of the various ingredients, is also a violation thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

COUNTY COURTS: County courts may organize

DRAINAGE DISTRICTS: drainage districts.

JOHN M. DALTON



June 12, 1953

John C. Johnson

Honorable Bernard DeLisle Clerk of the County Court New Madrid County New Madrid, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"The County Clerk has had filed with him a petition for the organization of a drainage district by the County Court. (Under Section 243.030)

"We are in a quandary about the validity of any such drainage district being organized through the County Court, or of the jurisdiction of the County Court in such matters, since the 1945 Constitution.

"In order to be in the clear, because of the importance of this particular district, we think it would be best to have an opinion from your office.

"At your convenience kindly advise us, with an opinion, as to whether the organization of a drainage district by the County Courts is yet valid, or whether the 1945 Constitution nullified the provisions of the statutes pertaining to the right of the County Court to organize a drainage district."

Organization of county court drainage districts is provided by Chapter 243, RSMo 1949 (unless otherwise noted all statutory references are to RSMo 1949).

Section 243.020 provides, in part:

"1. When it shall be conducive to the public health, convenience or public welfare, or when it will be of public utility or benefit, the county court of any county in this state shall have the authority to organize, incorporate and establish drainage districts and to cause to be constructed, straightened, widened, altered or deepened, any ditch, drain, natural stream (not navigable), bank protection, current control, or watercourse, when the same is necessary to drain or protect any land or other property."

Section 243.030 requires a petition to be filed by the county court, to be signed by one or more landowners whose land will be affected by the proposed improvement. The petition is required to set forth: "(1) The necessity for the proposed improvement, as well as the starting point, route and terminus thereof; (2) The boundary of the proposed district; (3) The names of the owners of lands or other property within the boundary of said proposed district, * * *."

Section 243.040 provides for the appointment of counsel after filing of the petition, to assist in the establishment of the district.

Section 243.050 provides for the appointment of an engineer and three viewers. The engineer and viewers are required to view the location of the proposed improvement. "If they find that the proposed improvement is necessary, practicable and would be of public utility or conducive to the public health, convenience or welfare, they shall so report and in said report they shall indicate approximately the proper character, dimension, location and probable cost of the improvement necessary to accomplish the object of said petition " " "."

Section 243.060 requires the county clerk to publish notice of the filing of the report of the viewers and engineer.

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Section 243.070 provides for the filing of remonstrances against the establishment of the district and for their hearing by the court in a summary manner. The section further provides:

- If, after hearing and determining all such objections, the court finds that the owners of a majority in acreage of the proposed district are petitioners or have joined in the prayer of said petition, by motion, or otherwise, then the court shall, or if less than a majority, the court, in its discretion, may find in favor of making the improvement. The petitioners shall be released from their liability and bond when the county court shall find in favor of making the improvement. If the court finds in favor of making the improvement, it shall, by order of record, incorporate the land and other property described in the report of the viewers and engineer or any part thereof into a drainage district for the purpose of this chapter, and shall designate the same by number.
- "3. Such district shall be a body corporate and a political subdivision of the state, shall possess the usual powers of a corporation for public purposes, shall be capable of suing and being sued in its corporate name and shall be capable of holding such real and personal property as may be at any time either donated to or acquired by it in accordance with the provisions of this chapter or of which it may be rightfully possessed at the time of the passage of this chapter.
- "4. If the court shall find against the improvement, it shall dismiss the petition and proceedings at the cost of the petitioners, and shall issue an itemized bill of all costs and expenses, in like manner and with like effect as fee bills are issued by the clerk of the circuit court."

Section 243.080 provides for the engineer and viewers to determine the exact location of the proposed improvement.

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They are required to make a report showing the land in the district which will be benefited or damaged by the improvements and to assess the amount of benefits and damages to each tract of land. They are also required to include in their report a list of land which will be needed for right of ways for ditches and the value of such land. The report must further show the total cost of the improvement.

Section 243.100 lists matters which are required to be taken into consideration in the assessment of benefits.

Section 243.090 provides for the filing of the report required by Section 243.080 with the clerk of the court, and Section 243.110 requires the clerk to publish notice of the filing of the report.

Section 243.120 provides for the filing of exceptions to the report with the county court, and the court is required to hear such exceptions in a summary manner and to approve the report as modified if the cost of constructing the proposed improvement is less than the benefits assessed. The section further provides for the dondemnation by the county court of land within or without the district needed for right of ways, holding basins and other works. Said section also provides for an appeal to the circuit court limited to the following questions: "(1) Whether just compensation has been allowed for property appropriated; and (2) Whether proper damages have been allowed for property prejudicially affected by the improvements."

Section 243.130 provides for the condemnation by the county court of additional land not acquired or condemned on the report of the viewers.

Section 243.160 gives the county court authority to construct the improvements prescribed and set forth in the report of the viewers and engineer.

Section 243.240 vests continuous management and control of county court drainage districts in the county court.

Sections 243.290 to 243.370 provide for the levy and collection of drainage taxes. Under Section 243.290 the court is authorized to levy a tax of not more than fifty cents per acre upon each acre of land in the district, for the purpose of paying expenses incidental in organizing the district, as soon as the district has been incorporated. The taxes, based on the benefits, are levied by the county court under Section 243.200.

The foregoing scheme for the organization of drainage districts was adopted under the 1875 Missouri Constitution

which conferred judicial power upon the county courts (Sec. 1, Art. VI) and gave them "jurisdiction to transact all county and such other business as may be prescribed by law." Section 36. Article VI. The 1945 Constitution removed the county courts judicial authority and provided that they "shall manage all county business as prescribed by law, * * * Section 7. Article VI. In view of the change made in the authority of the county court under the 1945 Constitution, the primary question involved in answering your inquiry is whether or not county courts in organizing drainage districts are exercising judicial power. "Judicial power" does not admit of simple definition. A discussion of the meaning of the term is found in 50 G.J.S.. page 568. The Supreme Court has considered the status of the county courts under the 1945 Constitution in several cases. In the case of Rippeto v. Thompson, 216 S.W. 505, the Supreme Court held that county courts, by virtue of the change in their status made by the 1945 Constitution, lost jurisdiction to establish private roads. In this case the court stated, 216 S.W. (2d) 1.c. 507:

> "The authority to establish a private road comprehends judicial, not ministerial, action by a county court. Under the old Constitution (1875) a county court was a court of record. In acting on matters within its discretion, a county court is held to exercise judicial functions. Dumm v. Cole County, 315 Mo. 568, 287 S.W. 445. An appeal from a county court was not allowed where the order appealed from was entered by the court in its administrative Mo. 26, 46 S.W. 963; Colville v. Judy, 73 Mo. 651. An appeal from a county court is held to be authorized only when the judgment appealed from was entered by the court acting in its judicial function. Bradford v. Phelps County, Mo. Sup., 210 S.W. 2d 996; St. Louis, I. M. & S. R. Co. v. St. Louis, 92 Mo. 160, 4 S.W. 664; State ex rel. Dietrich v. Daues, 315 Mo. 701, 287 S.W. 430. And we have pointed out above a judgment of a county court establishing private roads is appealable.

"Accordingly, there can be no question but that a county court is acting in its judicial capacity when it enters a judgment establishing a private road. Article VI, Section

Honorable Bernard DeLisle

l of the old Constitution (1875) vested judicial power in the county courts. Also Section 36 of that Article provided in part: 'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *

"But this has now been changed. Under the new Constitution (1945) judicial power is no longer vested in county courts. Article V, Section 1, omits county courts in enumerating the courts in which the judicial power of the state is now vested. Article VI of the new Constitution (1945) which concerns local governments, not courts, provides in part in Section 7 that the county court 'shall manage all county business as prescribed by law.' Although that section provides that a county court shall 'keep an accurate record of its proceedings', it did not carry over the old provision that a county court shall be 'a court of record.'

"Thus, it is clear under the new Constitution (1945) county courts are no longer vested with judicial power, are not now 'courts of record' and are not what we generally know as courts of law. 'County courts are no longer courts in a juridical sense, but are ministerial bodies managing the county's business.' State ex rel. Kowats v. Arnold, 356 Mo. 661, 204 S.W. 2d 254, 258; Bradford v. Phelps County, Mo. Sup., 210 S.W. 2d 996, supra."

In the case of State ex rel. Lane v. Pankey, 221 S.W. (2d) 195, the court, in discussing the jurisdiction of county courts to establish public roads, stated, 221 S.W. (2d) 1.c. 196:

" * * * The new Constitution, as construed in the Rippeto case and as we now construe it, invalidates no provision of existing statutes relating to the authority of county courts over public roads except such as purport to authorize the county court to exercise judicial power. A county court can no longer adjudge the compensation to be paid for lands to be taken for read purposes nor render judgment divesting title from the owners thereof. But such court may take all statutory steps to determine the necessity, location, width and type of construction of public county roads, to determine whether same shall be constructed in whole or in part at county expense, and, when title has been legally acquired, to perform the administrative functions of supervising the construction and maintenance of such roads."

In the case of In re City of Kinloch, 242 S.W. (2d) 59, the court considered the power of the county court to disincorporate a fourth class city. In this case the court stated, 242 S.W. (2d) 1.c. 63:

"A statute by which an official (or a board. commission or other agency) is required to ascertain the existence of facts and apply the law to the facts in order to determine his official action does not necessarily confer 'judicial power' in a constitutional sense. The constitutional meaning of 'judicial power of the state' does not contemplate every exercise of duties judicial in nature, but refers to such powers and authority as courts and judges exercise; such as legitimately pertain to an officer in the department designated by the Constitution as 'judicial'; such as are exercised in the ordinary forms of a court of justice, in a suit between parties, with process. State ex rel. School District No. 1 v. Andrae, 216 Mo. 617, 116 S.W. 561. Many administrative and quasi judicial bodies. as a part of their delegated duties, must hear and determine facts in order to ascertain what action the law imposes upon them. In this respect such bodies are performing duties judicial in nature. But an administrative body or even a quasi judicial body is not and cannot be a court in a constitutional sense. State ex rel. Keitel v. Harris, 353 Mo. 1043, 186 S.W. 2d 31.

"Returning to the consideration of Section 79.490, supra - the sole duties of the County Court of St. Louis County were to determine if notice of the intended application had been given as required by the statute, and to determine if the petition was by two thirds of the legal voters of the City. The County Court could only hear and determine the facts which the legislature has said will effectuate the legislative power to disincorporate City. If the determined facts as to signatories to the petition and publication of notice met with the requirements of the statute, the statute was mandatory in effectuating the legislative will. The statute does not vest a county court with either legislative or judicial discretion. In such 'hearing and determination' the County Court was 'exercising a judicial function, or performing 'duties judicial in nature. In this respect an incorporating proceeding or a disincorporating proceeding has somewhat the characteristics of a true action at law or in equity. But in the performance of its whole duties, it seems to us, the County Court was not exercising 'judicial power' such as is vested in certain courts, other than county courts, by Section 1, Art. V, Constitution of 1945; it was merely acting as the legislative agent to hear and determine the facts. It was a part of the instrumentality through which, by Section 79.490, supra, the legislative power is exercised in disincorporating fourthclass cities. In re City of Uniondale, supra; Kayser v. Trustees of Bremen, supra; In re City of Berkeley, supra."

Taking the term "judicial power" in its broad sense, there would appear to be little doubt that the county court in organizing a drainage district does, in such broad sense, exercise judicial power. This conclusion is supported by the case of Turner et al. v. Penman et al., 220 Mo. App. 193, 282 S.W. 498, in which the court considered the question of whether or not the order of a county court organizing a drainage district was subject to review on certiorari. In its opinion the court stated (220 Mo. App. l.c. 200):

Honorable Bernard DeLisle

"As a general rule certiorari will lie to review proceedings to establish a drainage district where the court or other inferior tribunal before which the proceedings were had, fails to comply with the essential requirements of the statute, or otherwise acts without jurisdiction or in excess of its jurisdiction, and no appeal or other adequate remedy is provided. (11 C.J., p. 674, sec. 144; Dewell v. Commissioners of Sny Island Drainage District, 232 Ill. 215, 83 N.W. 811; Sanner v. Union Drainage District, 175 Ill. 575, 51 N.E. 857; State ex rel. v. Posz, 106 Minn. 197, 118 N.W. 1014; State ex rel. v. Grindeland, 195 N.W. (Minn.) 781; In re Jenson, 198 N.W. (Minn.) 455.)

"State ex rel. v. Weithaupt, on which relators rely to support their contention that certiorari will lie was decided in division in 1914, and State ex rel. v. Dawson, on which respondents rely to support their contention that certiorari will not lie was decided In Banc in 1920. The judge who wrote the opinion in State ex rel. v. Weithaupt, concurred in the opinion in State ex rel. v. Dawson. No mention is made of the Weithaupt Case in the Dawson Case. There is this distinction between the Weithaupt Case and the Dawson Case. In the former the act establishing the district was challenged, and in the latter the act extending the boundary lines was challenged. In extending the boundary no new entity was brought into existence, the arm of the old corporation was merely extended.

"5 Ruling Case Law, p. 259, says that it is fairly well settled that judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process and upon whose claims some decision or judgment is

rendered. The order establishing Drainage District No. 38 certainly has all of the ear marks of judicial action as defined by Ruling Case Law. And in addition to creating a corporate body this order went further and levied an assessment of 35 cents per acre upon all the lands in the district for the purpose of paying the expenses of organization. In State ex rel. v. Dawson, the court uses the following language: 'The mere fact that the lands of the relators in this case have been incorporated into the Albany Drainage District does not ipso facto in any manner affect relators' rights in the premises, so long as their property had neither been benefited nor damaged. Then follows a quotation from Buschling v. Ackley, 270 Mo. 157, 1.c. 165, 192 S.W. 727, as follows: 'From this it is evident that it is the taking or damaging of the property, and not the incorporation of the district that affects the owners! rights. But by the order at bar which we are asked to declare legislative in character the court not only incorporated the district and included relators lands therein, but also placed an assessment upon their lands which would result in literally taking the lands should they refuse to pay.

"It is our conclusion that the Weithaupt Case was not overruled by the Dawson Case, and that certiorari is the proper remedy to reach the merits of relators: cause."

However, the Supreme Court, in the Pankey case and the Kinloch case, did not hold that the county courts were excluded from the exercise of any judicial power. They held, rather, that the county courts could no longer exercise judicial power in the strict sense. In the earlier Rippeto case the court had leaned toward the idea of applying the more strict concept of judicial function, stating: "In acting on matters within its discretion, a county court is held to exercise judicial functions." 216 S.W. (2d) l.c. 507. However, in the Pankey and Kinloch cases the court did not adhere to this strict test, and the decision in the Kinloch case upholds the power of the county court to exercise "duties judicial in nature" but not judicial power in the strict sense.

Honorable Bernard DeLisle

The incorporation of drainage districts is a legislative matter and a drainage district organized by the county court is a municipal corporation. In re Mississippi and Fox River, 270 Mo. 157, 192 S.W. 727; Thompson v. City of Malden, 118 S.W. (2d) 1059. In view of the holding of the Supreme Court in the Kinloch case, we are of the opinion that the incorporation of a drainage district is not such exercise of judicial power as has been denied the county courts under the 1945 Constitution.

There are two provisions of the County Court Drainage law which might give rise to the question of whether or not the court exercises judicial power. One is Section 243.070, providing for the court's hearing remonstrances against the establishment of the district. This, however, is quite similar to the court's duties to hear remonstrances against the establishment of a public road (Sec. 228.050), and in the Rippeto case the court did not strike down the county court's exercise of such function. Therefore, we believe that the county court would not be precluded from exercising a similar function regarding county court drainage districts.

Section 243.120 provides for the county court's hearing exceptions to the report of the viewers assessing benefits and fixing damages. This section further provides for the county court's condemning land required for right of ways, holding basins and other work. This provision for condemnation in the county court is clearly unconstitutional under the Supreme Court's decision in the Pankey case. However, the Legislature has provided for the county court's condemnation in the circuit court of lands for drainage systems in Section 49.300. Adequate provision having been made for the condemnation of land for such purpose, we are of the opinion that the invalidity of the provision therefor in Section 243.120 would not invalidate the County Court Drainage District law.

Section 243.120 also provides for the county court's review of the assessment of benefits and the fixing of damages. In the case of Beck v. Missouri Valley Drainage Dist., 46 F. (2d) 632, 84 A.L.R. 1089, the United States Court of Appeals discussed the nature of proceedings for the assessment of benefits and damages under the Circuit Court Drainage District law (Chap. 242). In this case the court stated, 84 A.L.R. 1.c. 1096:

" * * * We have already seen that the mere inclusion of appellant's land within the district does not deprive him of due process,

if, at some stage of the proceeding, he is given an adequate hearing upon the question of benefits and damages. Such a hearing is provided by section 4392. Any landowner who feels aggrieved thereby may file exceptions to the report of the commissioners, or to any assessment of either benefits or damages, and such exceptions shall be heard by the court in a summary manner. If this action of the state circuit court be deemed judicial, it must be conceded that the hearing granted satisfies the demands of due process. But, if we assume, as we think we must, that, under the cited statutes, the report of the commissioners making the assessments, the filing of exceptions, and the action of the court upon these exceptions, taken together, form a part of the legislative or administrative procedure of the state in perfecting and carrying out the purposes of these drainage districts, then it is incumbent upon the landowner concerned to avail himself of the administrative remedy afforded by the state law.

That case did involve a circuit court drainage district, but we are of the opinion that the nature of the function of the court in reviewing assessments is the same under the County Court Drainage District law and that the exercise of such function by the county court does not constitute an exercise of judicial power.

Some question might also arise as to whether or not the county court is precluded from exercising jurisdiction respecting drainage districts by reason of the provision of Section 7 of Article VI of the 1945 Constitution, which authorizes the county court to manage only county business. As previously pointed out, the corresponding provision of the 1875 Constitution authorizes the county court to manage county "and such other business as may be prescribed by law." When the section here under consideration was first presented to the 1945 Constitutional Convention it read: "The court shall manage all county and such other business, except judicial as prescribed by law, and keep an accurate record of its proceedings." (Transcript of Debates, Constitutional Convention, page 1623.) An amendment was offered

Honorable Bernard DeLisle

to strike the words "except judicial" because of the ambiguous meaning of the term "judicial." After considerable discussion the further amendment was offered to strike the words "and such other." When this amendment was offered the following discussion took place:

"MR. PHILLIPS (of JACKSON): There are a good many functions which are delegated to the county court and which are really of a state nature, and it would be rather dangerous to strike out the words 'and such other business as prescribed by law! * * The county is a subdivision of the state in a sense that all of the powers of the county court carrying out county business are essentially state activities delegated by the states to the local units of government. but I think do not agree that it is true that if you go through our statutes you will find that the General Assembly has placed upon the county court a number of responsibilities.

"MR. BRADSHAW: Yes, that is true, and the organization of drainage and levee districts, etc., is in the county. I think that could be considered as county functions. Since they are within the territorial limits of the county, I think so."

In In re City of Kinloch, above cited, the court took a similar view of the nature of the powers which might be conferred upon the county court, stating, 242 S.W. (2d) 1.c. 64:

"We do not construe Section 7, Article VI, Constitution of 1945, as meaning the county court may not be given authority by law to act as the legislative agent in proceedings to effectuate the legislative power in creating or abolishing cities. Section 7 does not say county courts may not be given such statutory authority. Nor do we consider the cases of State ex rel. Lane v. Pankey, 359 Mo. 118, 221 S.W. 2d 195; Rippeto v. Thompson, 358 Mo. 721, 216 S.W. 2d 505; and State ex rel. Kowats v. Arnold, supra, as authorities for strictly construing

Section 7 to mean county courts may have statutory authority to act only in the management of the county's fiscal affairs. But the Lane, Rippeto and Kowats cases do clearly hold county courts now can have no authority to determine matters comprehending judicial action in the exercise of 'the judicial power of the state.'"

In view of the foregoing, we are of the opinion that Section 7 of Article VI of the 1945 Constitution does not preclude the Legislature's continuing to impose the organization and management of drainage districts upon the county courts.

CONCLUSION

Therefore, it is the opinion of this office that county courts may continue to organize drainage districts under Chapter 243, RSMo 1949, but county courts may no longer exercise the power of condemnation conferred upon them by Section 243.120, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

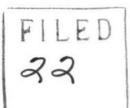
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CHURCH: PREMISE:

INTOXICATING LIQUOR: (1) Where an annex, which is built onto a church and which becomes a part of the church, is, at its nearest point, within the prescribed distance from a premise where intoxicating liquor is sold, that the sale of intoxicating liquor on such

premise is illegal without consent; (2) That a building where intoxicating liquor is sold, which at its nearest point is within the prescribed distance from a church, may be partitioned and that if after being partitioned, a premise is created which at its nearest point is without the prescribed distance from a church, the sale of intoxicating liquor on such premise is legal.

September 22, 1953



Honorable Robert A. Dempster Prosecuting Attorney Scott County Sikeston, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "You recently forwarded me an opinion construing section 311.080 of the liquor law whereby the measurement was made from the building in which intoxicants were sold to the nearest point to a church or school. Another question has arisen which I would like for you to advise me upon.

"A tavern which has been operated as such for some 15 years was more than the prescribed distance from a church. The church recently built an annex of substantial size which put the tavern closer than the prescribed distance by measuring on a straight line from the back door of the tavern to the nearest point on the new church building as extended. The owner of the building also owns all of the fixtures in the tavern and leases the building and fixtures to a licensee. The present licensee is giving up

the tavern and the owner of the building desires to rent the premises to a new licensee. Can a new licenses obtain a license under these facts? I desire to emphasize that this particular property has been used as a tavern for more than 15 years and that the owner of the building owns all of the fixtures. It will be a substantial loss to the owner of the building if he cannot rent this for a tavern. The church building is on property to the rear of the building which houses the tavern. The original church is without the prescribed distance but the annex as extended comes a few feet too close under the law.

"The second question is, assuming that the church is within the prescribed distance to the building occupied by the tavern, would it not be possible to partition off a portion of the building that houses the tavern thereby making the part of the building so used as a tavern without the prescribed limitation. The building I have in mind is quite large and houses a number of other businesses. The front part of the building could be used as a tavern and partitioned off from the rear and the rear of the building used for another purpose. Would you not measure from the part of the larger building that houses the tavern to the point nearest the chruch?"

In answer to your first question we enclose a copy of an opinion rendered by this department June 22, 1950, to Honorable Covell R. Hewitt, Supervisor of Liquor Control. We believe that this opinion answers your question in the negative, which is to say that if the nearest point of the church annex, which annex we assume has now become a part of the church, is within the prescribed distance from a premise where intoxicating liquor is sold, that the prohibition would apply, and that a license cannot be issued to such a premise in lieu of the consent by the governing body of the church.

Your second question is: "Assuming that the church is within the prescribed distance to the building occupied by the tavern, would it not be possible to partition off a portion of the building that houses the tavern thereby making the part of the building so used as a tavern without the prescribed limitation?"

Honorable Robert A. Dempster On January 17, 1938, this department rendered an opinion to Honorable Wallace I. Bowers, Chief Cler, Department of Liquor Control, in which we held that a place may be partitioned so as to constitute two premises. A copy of this opinion is enclosed. We believe that if the building to which you refer is partitioned, as described in the above opinion, and that if the portion of the premise on which liquor is sold, is, at its nearest point, more than the prescribed distance from the church, that sale on such premise would be legal. CONCLUSION It is the opinion of this department, that: (1) Where an annex, which is built onto a church and which becomes a part of the church, is, at its nearest point, within the prescribed distance from a premise where intoxicating

- liquor is sold, that the sale of intoxicating liquor on such premise is illegal, in lieu of consent.
- (2) That a building where intoxicating liquor is sold, which, at its nearest point, is within the prescribed distance from a church, may be partitioned and that if after being partitioned, a premise is created which at its nearest point is without the prescribed distance from a church, the sale of intoxicating liquor on such premise is legal.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW: lw

Enc .

CRIMINAL LAW: Secs. 12.010 and 12.020 RSMo 1949 divest State of Missouri of jurisdiction over violations of criminal law occurring on land occupied by Public Health Service Hospital, 525 Couch Avenue, Kirkwood, Missouri.

1.22-53



January 19, 1953

Honorable Phil M. Donnelly Governor of Missouri Executive Office Jefferson City, Missouri

Dear Governor Donnelly:

The following opinion is rendered in reply to your immediate predecessor's request reading, in part, as follows:

> "The Federal Bureau of Investigation has inquired as to the question of who has jurisdiction over violations of criminal law occurring on land occupied by the Public Health Service Hospital, 525 Couch Avenue, Kirkwood, Missouri."

In reply to our recent inquiry, the General Services Administration, Washington, D.C., gave the following information relative to the acquisition by the United States of title to the land on which is located Public Health Service Hospital, 525 Couch Avenue, Kirkwood, Missouri:

> "Titles to the land vested in the United States July 9, 1937, upon the filing of a declaration of taking in condemnation proceedings entitled United States of America v. Emma E. Craig, et al., numbered 12256 in the United States District Court for the Eastern District of Missouri."

For the purpose of this opinion it is conceded that the land in question was acquired by the United States by condemnation, and for the purpose of establishing a hospital. Sections 12.010 and 12.020 RSMo 1949, constitute Missouri's general grant of consent in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States of land to be used for hospital, and other purposes named in said sections. We quote the two statutes as follows:

"The consent of the state of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this state which has been or may hereafter be acquired, for the purpose of establishing and maintaining post offices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, and land for reforestation, recreational and agricultural uses. Land to be used exclusively for the erection of hospitals by the United States may also be acquired by condemnation." (Sec. 12.010 RSMo 1949).

"The jurisdiction of the state of Missouri in and over all such land purchased or acquired as provided in section 12.010 is hereby granted and ceded to the United States so long as the United States shall own said land; provided, that there is hereby reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon." (Sec. 12.020 RSMo 1949).

It should be noted that Section 12.010 RSMo 1949, quoted above, did not, as of July 9, 1937, contain its last clause relating to condemnation of land to be used exclusively for the erection of hospitals by the United States, for such provision was added by the Sixty-Fifth General Assembly of Missouri in 1949 (L-1949, p. 316). However, acquisition by "purchase" or grant was authorized by Section 12.010 RSMo 1949 as it stood on our statute books as Section 11072, R.S. Mo. 1929, and it had not been changed in that regard on July 9, 1937. In the case of Arledge v. Mabry, 52 N. M. 303, 197 Pac. (2d) 884, the Supreme Court of New Mexico was re-

ferring to the seventeenth clause, eighth section, of the first article of the Constitution of the United States, and spoke as follows at 197 Pac. (2d) 884, 1.c. 890:

"Although the United States constitution. in the clause quoted, mentions acquisition by purchase, it has long been settled that the same consequences attach from a jurisdictional standpoint where land is acquired through condemnation proceedings. Indeed, land so acquired is deemed to have been secured by purchase and the same consequences attach. Kohl v. United States, 91 U.S. 367, 23 L. Ed. 449; Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S. Ct. 442, 67 L. Ed. 809; United States v. Becktold Co., 8 Cir., 129 F. 2d 473; United States v. Beaty, D. C., 198 F. 284; United States v. 2.74 Acres of Land, D. C., 32 F. Supp. 55. Furthermore, the term 'exclusive legislation' employed in said Clause 17 of the federal constitution is held to be synomymous with and to carry the same meaning as if the term 'exclusive jurisdiction' had been employed."

From the language quoted from Arledge v. Mabry, supra, we rule that even though Section 12.010 RSMo 1949 did not, as of July 9, 1937, contain its present, final clause relating to acquisition of land by condemnation proceedings, a condemnation proceeding carried out in 1937 under the statute as then existing was as effective to convey jurisdiction to the United States as though acquisition of the land had been by purchase or grant.

Section 12.020 RSMo 1949, quoted above, discloses that the State of Missouri reserved unto itself "unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within such lands or the buildings thereon." We must now determine if this type of reservation is adequate to give the State of Missouri jurisdiction to prosecute crimes committed on land occupied by Public Health Service Hospital. Sections 12.010 and 12.020 RSMo 1949 disclose that such general act of consent, with its specific reservations, by the State of Missouri will cause any land so acquired by the United States to be considered as having been acquired by the "constitutional method" as that term is used when the Supreme Court of New Mexico laid down the following rule in Arledge v. Mabry, 197 Pac. (2d) 884, 1.c. 889:

"When acquisition is made in the constitutional method, ordinarily exclusive jurisdiction for all purposes over the lands acquired attaches in favor of the federal government, with the single exception of the right in the state to serve civil and criminal process through its officers on such land relating to acts and offenses outside such land."

As we read Missouri's general act of consent as found in Sections 12.010 and 12.020 RSMo 1949, we are constrained to the view that the legislature had in mind the general rule relative to exclusive jurisdiction in the United States over lands acquired by consent of the state, and that its incorporation, in its grant of consent, of the reservation relative to service of criminal and civil process must have been made with full knowledge of the rule quoted above from Arledge v. Mabry.

CONCLUSION

It is the opinion of this office that Sections 12.010 and 12.020 RSMo 1949, giving general consent to acquisition of land in Missouri by the United States divests the State of Missouri of jurisdiction over violations of criminal law occurring on land occupied by Public Health Service Hospital, 525 Couch Avenue, Kirkwood, Missouri, and such jurisdiction is vested in the United States.

Respectfully submitted.

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

JOHN M. DALTON Attorney General

JLO'M:lw

) (1) Resident of special road district may serve TOWNSHIP COUNTIES) as member of township board, and (2) residents of) special road district may vote in township elections.



1-31-53 January 31, 1953

Honorable James Q. Donaldson Representative - Stoddard County House Post Office, Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

> "It is requested that you furnish me with an opinion as to the power, right and authority of citizens of a Special Road District to vote and hold office in the Township organizations of the Township wherein such Special Road District is located. More specifically it is requested that you furnish answers to the following questions:

> "l. May a resident of a Special Road District qualify and serve as a member of the Township Board or as the Trustee of the Township in which the Special Road District is contained?

"2. May the residents of a Special Road District vote for members of the Township Board and for the Township Trustee of the Township in which such Special Road District is located?

"Your attention is specifically invited to the possibility that the number of

Honorable James Q. Donaldson

voters in a Special Road District could out-number the remaining voters in the Township. Thus the voters within the Special Road District could control the Township organization without any interest in the activities other than those of the Assessor and Collector.

"There are several such Special Road Districts in this county and of course we do have Township organization."

With respect to the first question which you have proposed we direct your attention to Section 65.150, RSMo 1949, relating to the eligibility of township officers in counties under township organization. This section reads as follows:

"Eligibility to office. -- No person shall be eligible to any township office unless he shall be a qualified voter and a resident of such town-ship."

You will note that one of the qualifications of such township officials is that the officer is a "qualified voter." Your attention is, therefore, further directed to Section 65.090, RSMo 1949, relating to the qualification of voters in township elections. It reads as follows:

"Qualification of voters. -- No person shall be a voter at any township election unless he be a qualified voter at general elections, and has been an actual resident of the township in which he offers to vote for sixty days next preceding such election."

No further qualifications appear pertaining to township officers, and, therefore, it is our opinion that the qualifications set forth are the exclusive criteria by which eligibility is to be determined.

What we have said heretofore also answers the second question which you have proposed with the following addenda:

Honorable James Q. Donaldson

Section 65.060, RSMo 1949, bears directly upon the conduct of township elections and reads as follows:

"The citizens of the several townships in all counties having adopted the town-ship organization law of this state, who are qualified by the constitution and laws of this state to vote at general elections, shall assemble biennially on the last Tuesday in March at their usual place of voting, or at such place in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

We have also examined all statutes relating to counties under township organization including particularly Sections 233.320 - 233.470, inclusive, relating to special road districts in counties under township organization and do not find anything indicative of a legislative intent to disqualify residents within special road districts from voting at township elections if otherwise qualified under the constitution and other state laws relating to the qualification of voters.

CONCLUSION

In the premises we are of the opinion that:

- (1) A resident of a special road district within a county under township organization is eligible to serve as an officer of such township provided that he is a qualified voter, therein; and
- (2) That the residents of a special road district in a county under township organization are eligible to vote at all township elections if otherwise qualified under the provisions of Section 65.090, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared

Honorable James Q. Donaldson

by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB/fh

CRIMINAL LAW: ASSAULT OF: WHEN:

A surgeon performing emergency operation upon AND BATTERY: NOT GUILTY a dead woman for the purpose of saving the life of her unborn child and no permission was given from any person who could legally give same, is not guilty of assault or battery, or any other offense under the criminal laws of Missouri.

M. DALTON

February 6, 1953

Mr. Thomas E. Dowling Circuit Attorney City of St. Louis St. Louis, Missouri

XXXXXXXX

J. C. Johnsen

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department based upon facts given in correspondence attached to your letter, which reads in part as follows:

> "The case in question is this. A woman on the delivery table in labor suddenly dies, the baby in her womb is still living. baby cannot possibly remain alive for more than three minutes without being delivered so that it may get oxygen into its brain. . The only way this can be accomplished is by an immediate Cesarean Section. It is impossible to get permission for the operation from the mother as she is dead. It is impossible to get permission from the father in time to get that baby out of the womb into the air inside of three minutes. If the surgeon on his own initiative does a Cesarean operation on the dead woman for the purpose of saving the life of the unborn child, is there any criminal or civil liability in his action? We are primarily interested in the criminal phase, but secondarily interested in the civil liability."

Section 27.040, RSMo. 1949, provides that the attorney general shall upon request give his written opinion, free of charge, to the officers mentioned upon any question of law relative to the offices, or the discharge of the duties of same. It is the duty of the circuit attorney to enforce the criminal laws of the state within his city, and under the circumstances related above the question

of criminal liability of the surgeon might involve some of the duties of the circuit attorney, although it does not appear that the civil liability of the surgeon would involve, or pertain to any question of law relating to the office, or the performance of the duties of same. It is believed that it would be improper to discuss the civil liability of the surgeon, consequently our opinion will be strictly confined to the criminal aspect of the question presented.

We are unable to find any section of the criminal laws of Missouri, which specifically makes it an offense for a surgeon to operate upon the body of a dead woman under above mentioned circumstances, so we turn to the decisions of other states to aid us in determining whether or not the surgeon would be guilty of any criminal offense, and if so the kind of such offense.

In the case of Hively v. Higgs, 253 Pac. 363, it was held that an unauthorized operation amounted to a technical assault and battery by the surgeon upon the body of his patient. The court in this case said:

"* * *It is very doubtful that plaintiff should ever be limited to nominal damages where he has been subjected to an operation without his consent. Such an operation constitutes technical assault and battery. * * *

Assault and battery has been defined in the case of Stark v. Epler, 117 Pac. 276, at l.c. 278, as follows:

"* * *It is text-book learning that an assault is an intentional attempt by force to do violence to the person of another; and that a battery is the actual application to such person of the attempted force and violence."

In this connection we wish to remind the reader that assault and battery, like other crimes must consist of a criminal intent coupled with criminal action, or necessary force to carry the intent into action.

From the facts given above it does not appear that the surgeon had any criminal intentions coupled with any criminal action, but if it were assumed that both of these elements were present at the time of the alleged wrongful act, the surgeon would still not be guilty of assault and battery under Missouri statutes.

Sections 559.180, 559.190 and 559.220, RSMo. 1949, define the various kinds of assaults that may be committed upon a person.

Section 559.180, reads as follows:

"Every person who shall, on purpose and malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years."

(Underscoring our s.)

Section 559.190, reads as follows:

"Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not herein-before prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

Section 559.220, reads as follows:

"Any person who shall assault or beat or wound another, under such circumstances as not to constitute any other offense herein defined, shall, upon conviction, be punished by a fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

In each of the above quoted sections, it is noted that the word "person" as used therein, constitutes a very important element in the definitions of assault, or assault and battery. From such definitions it is apparent that such crimes can only be committed by a person in or upon the body of another person. It is also apparent that the word "person" as used in these statutes is used in its common or ordinary sense, and since no different or other meaning has been ascribed, the word must be so interpreted.

It has long been a rule of statutory construction in Missouri that words used in a statute are to be given their common or ordinary meaning unless it appears from the words thus used that it was the intention of the legislature in the passage of the statute that such words were to be given a meaning other than the ordinary or commonly accepted meaning.

It appears that no statutes or court decisions of Missouri, insofar as we are able to ascertain, define the word "person" and it is necessary that we look to the decisions of other states for a satisfactory definition of the word, as used in its common, or ordinary sense.

In the case of Commonwealth v. Wolosky, 177 N.E. 656, it was held that the natural and obvious meaning of the word "person" is a living human being.

Again in the case of United States v. Crook, 25 Fed. Cases, 695, in discussing the meaning of the word "person" the court said at 1.c. 697:

"The most natural, and therefore most reasonable, way is to attach the same meaning to words and phrases when found in a statute that is attached to them when found in general use. If we do so in this instance, then the question cannot be open to serious doubt. Webster describes a person as 'a living soul, a self-conscious being; a moral agent; especially a living being; a man, woman, or child; an individual of the human race.'

* * *"(Underscoring ours.)

From the facts given in the opinion request, it is apparent that the criminal offense, if any, the surgeon might be guilty of would be that of an assault and battery upon the dead body of his woman patient. However, the sections of the Missouri statutes defining assaults quoted above, frequently refer to the word "person" and has no reference to assaults, or assaults and battery upon the dead bodies of human beings. The word "person" refers to living human beings and has no reference to dead human bodies, since a dead body is not a person within the commonly accepted, or ordinary meaning of the word.

In this connection we call attention to the case of BROOKS v. BOSTON & N. ST. RY. CO., 97 N.E. 760, in which the court said at 1.c. 760:

"An action at law implies, by its very terms, the existence of a person who has the right to bring the action. * * * It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is 'dust and ashes,' sacred to kin and friends, whose feelings and rights in this regard receive the protection of the law, but having no inherent capacity. * * *"
(Underscoring ours.)

While that portion of the opinion quoted above was a civil case it is our belief that the principle of law laid down therein is equally applicable to facts involving a criminal case, and to sustain our position in this respect, we call attention to the criminal case of Lawson et al. v. State, 23 S.E.(2d) 326. In this case the victim of a larceny, named in the indictment was a person who had died, and the court held the indictment to be insufficient for the reason that a corpse was not a "person" and could not own property.

At 1.c. 328, the court said:

"In the present case the indictment expressly alleged that the property stolen was the property of Eaton, and that it was stolen from the person of Eaton, but the evidence showed that Eaton was dead at the time of the finding of the indictment. A corpse is not a person and if Eaton was dead at the time of the finding of the indictment the latter was not supported by the evidence. A corpse is not a person nor can a corpse own property. * * * " (Underscoring ours.)

In view of the foregoing it is our thought that a corpse is not a "person" within the meaning of the Missouri criminal statutes, and that a surgeon who operates upon the dead body of a woman patient for the purpose of saving the life of her unborn child, without first obtaining permission from any person from whom such permission could be lawfully given, is not guilty of any assault or battery upon the body of such dead woman, since an assault or battery can only be committed in or upon the body of a living human being.

It is our further thought that the operating surgeon would not be guilty of any other criminal offense since no statutes in Missouri make it a crime for a surgeon to perform an emergency

operation upon the body of a dead woman in order to save the life of her unborn child.

CONCLUSION

It is, therefore, the opinion of this department that when a surgeon performs an emergency operation upon the dead body of a woman patient for the purpose of saving the life of her unborn child, and no permission was first obtained from any person who could legally give permission to perform the operation, the surgeon is not guilty of assault or battery or any other offense under the criminal statutes of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General CRIMINAL JURISDICTION OVER
WELDON SPRINGS ORDNANCE
PLANT AND SYNTHETIC FUELS
DEMONSTRATION PLANT:

JOHN M. DALTON

(1) That exclusive criminal jurisdiction of crimes committed on the 2,085 acre tract which comprises the U. S. Ordnance Plant area, is vested in the United States. (2) That exclusive criminal jurisdiction of crimes committed on the area which comprises the Synthetic Fuels Demonstration Plant, located in Pike County, at Louisiana, Missouri, is vested in the United States.

February 20, 1953



J. C. JOHNSEN

Honorable Phil M. Donnelly Governor of Missouri Capitol Building Jefferson City, Missouri

Dear Governor:

This department is in receipt of a request for an official opinion from your immediate predecessor in office. That request is as follows:

"The Federal Bureau of Investigation has asked for information concerning the question of who has jurisdiction over violations of law occurring on the land occupied by the Bureau of Mines at Louisiana, Missouri and the property known as the Weldon Springs Ordnance Works, Weldon Springs, Missouri. I am attaching a copy of part of the memorandum which was delivered to me at the time of the request."

The above letter concerns two separate areas, to wit, an area located in Pike County, Missouri, near the town of Louisiana, which originally was designated as an Ammonia Plant; and another area known as the Weldon Springs Ordnance Plant, located in St. Charles County, Missouri. We shall consider the latter first.

In a letter dated February 6, 1953, from the General Services Administration, Washington, D. C., we have received a great deal of factual information regarding the Weldon Springs situation. Because of the, to us, somewhat complicated nature of this situation we quote in detail from the aforesaid letter as follows:

"In answer to your first question as it pertains to the Weldon Springs Ordnance Plant and based on informal information provided by the Office of the Chief of Engineers, which originally acquired the property for the United States, you are advised that the property was acquired pursuant to authority of the following laws: (1) Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C., Section 258(a), (2) Act of June 2, 1917, 40 Stat. 241, amended by Act of April 11, 1918, 40 Stat. 518, U.S.C. 171, (3) Appropriation Act June 26, 1940, Public Law 667, 76th Congress.

"The Weldon Springs Ordnance Plant area encompassed 17,239 acres of land, comprised of 333 individual tracts of which 164 were acquired by condemnation and 169 by direct purchase. Nine thousand nine hundred and ten acres of the total area was acquired by condemnation. It is not known whether this general information will be adequate to serve your purposes, but to provide specific information as to which of the individual tracts were acquired by condemnation, and which were acquired by direct purchase would entail the copying of individual tract descriptions which cover 190 pages of single space typing. If information is required by you with respect to the actual location of individual tracts acquired by condemnation, as opposed to those acquired by direct purchase, it is suggested that you might make arrangements with the Regional Director of this Administration at Room 1800, Federal Office Building, Kansas City 6, Missouri for examination of the records pertaining to this installation which are available in his office.

"This Administration was not provided with copies of the condemnation proceedings pursuant to which the land was acquired, and we are therefor unable to comply with your request for a copy thereof. We have been informally advised by the Office of Chief of Engineers, however, that the declarations,

signed by the Secretary of War, contained the following statement concerning the purpose for which the lands were acquired:

"The said lands are necessary adequately to provide for the site of an ordnance munitions plant and for such other uses incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of the Weldon Springs Ordnance Plant, St. Charles County, Missouri and for such other uses as may be authorized by Congress or by executive order and are required for immediate use.

"Although the original Weldon Springs Ordnance Plant area comprised 17,239 acres, all of the property has been disposed of with the exception of 2,085 acres, being the site of the main industrial facilities which now comprise a part of the stand-by National Industrial Reserve under the jurisdiction of this Administration.

"The grant to the University of Missouri, to which you referred in your letter, was accomplished by deed dated November 30, 1948. The deed conveyed to the Curators of the University of Missouri 7,900 acres of land together with certain improvements located thereon, having a total value of \$253,250, without requiring the payment of any cash consideration by the University, but subjecting the transfer to a condition requiring: that for a period of twenty (20) years from the date of this deed said premises shall be continuously utilized by the grantee for the purposes set forth in the program included in the application for the acquisition thereof and in the report of the Unit ed States Office of Education . The deed contained other conditions providing for free use of the land by the United States in time of national emergency, and reverter of title to the United States in the event

of breach of any of the conditions by the University. The Federal Security Agency is now responsible for enforcement of the conditions of this deed under the provisions of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 484(k)(2)). If specific information with respect to the use being made of the property by the University is desired it is suggested you communicate with the Regional Director, Federal Security Agency, Kansas City, Missouri.

"The records pertaining to the transfer of land to the Missouri Conservation Commission are not available in this office, since the original transfer was made by the Farm Credit Administration which at that time was the disposal agency for the particular land transferred to the Conservation Commission. The disposal records of the Farm Credit Administration were supposed to have been transferred to the Regional Office of this Administration and should be available for inspection at that place. From information which is available in the files of this office, it appears that 6,935 acres of land were conveyed to the Commission by deed in October 1947. This transfer was for a monetary consideration and without restrictive covenants.

"An additional 106 acres of land was transferred to the Missouri State Highway Department without monetary consideration pursuant to authority of the Federal Highway Act (23 U.S.C. 18), by deed dated November 17, 1949. This land was acquired for the purpose of improving and widening State Highway No. 40.

"The records of this Administration reflect no information or data with respect to the action which was taken by the United States to obtain jurisdiction over the Weldon Springs Ordnance area at the time of the acquisition thereof. However, we have been informally advised by the Office of Chief of Engineers that jurisdiction was acquired pursuant to authority of the general statutory provision of the State of Missouri pertaining to cession of jurisdiction as it existed under the Act of 1943, and that the Secretary of War formally accepted such jurisdiction on behalf of the United States by letter to the Governor of Missouri dated September 2, 1943."

It will be noted that a discrepancy exists in the above letter in this respect, to wit, that the letter states that the Weldon Springs Ordnance Plant area originally encompassed 17,239 acres of land; that of this original acreage all has been disposed of except 2,085 acres; the dispositions consisting of 7,900 acres conveyed to the University of Missouri at Columbia, Missouri; 6,935 acres to the Missouri Conservation Commission; and 106 acres to the Missouri State Highway Department. The total acreage thus conveyed would total 14,941, which, subtracted from the original 17,239 acres, would leave a total of 2,298 acres, and not 2,085 acres, as is stated in the above letter. Thus on the basis of the figures quoted to us there is a discrepancy of 213 acres. We assume that there was a transfer of this 213 acres not noted in the above letter, and we will, perforce, accept the statement of the General Services Administration that the total acreage remaining in the Weldon Springs tract is now 2,085 acres.

We have no information relative to the location of this 2,085 acres with respect to the original 17,293 acres, nor as to whether the acreage disposed of is in contiguous tracts. We do not feel that it is incumbent upon us to locate this 2,085 tract which now comprises the Weldon Springs Ordnance Plant. Our further discussion of this matter will relate to this 2,085 acre tract, wherever it may be located.

We now direct attention to House Bill No. 397, Laws of Missouri, 1943, pages 627 and 628, which reads:

"Section 1. Authorizing acquisition by the United States of lands in this state as sites for customhouses, courthouses, post offices, arsenals, forts, etc. --The consent of the State of Missouri is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this State which has been acquired, prior to the effective date of this Act, as sites for customhouses, courthouses, post offices, arsenals, forts and other needful buildings required for military purposes.

"Section 2. Ceding exclusive jurisdiction over land and reserving right of taxation and right to serve processes .--Exclusive jurisdiction in and over any land so acquired, prior to the effective date of this Act, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the State of Missouri the right to serve thereon any civil or criminal process issued under the authority of the State, in any action on account of rights acquired, obligations incurred, or crimes committed in said State, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired.

"Section 3. Emergency. -- Whereas, there now exist within the boundaries of this State large areas of land occupied for military purposes, among which are those occupied by Lake City Ordnance Plant, Weldon Spring Ordnance Works, St. Louis Ordnance Plant, St. Louis Powder Farm, St. Louis Medical Depot. Fort Loonard Wood, Camp Crowder, Missouri Ordnance

Works, Vichy Airport, and Kansas City Quartermaster Depot, and there exists in the said areas uncertainty as to complete jurisdiction, which is resulting in duplication and misunderstandings between the State and Federal law enforcement agencies, and an emergency exists within the meaning of Article IV of the Constitution of this State, this act shall be in force from and after its passage and approval by the Governor.

"Approved July 30, 1943."

We now direct attention to Sections 12.030 and 12.040, RSMo 1949, which sections read:

"The consent of the state of Missouri is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this state which has been acquired, prior to the effective date of sections 12.030 and 12.040, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes."

"Exclusive jurisdiction in and over any land so acquired, prior to the effective date of sections 12.030 and 12.040, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the state of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the state of Missouri the right to serve thereon any civil or criminal process issued under the authority

of the state, in any action on account of rights acquired, obligations incurred, or crimes committed in said state, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

These sections were enacted by the Missouri legislature in 1947, and are to be found as enacted in Laws of Missouri, 1947, Vol. I, p. 366, paragraphs 1 and 2 respectively. They became effective on July 1, 1947.

We here note that the Weldon Springs area was acquired as a site for "needful buildings required for military purposes," which brings it within the compass of Section 12.030, supra.

We further note that the Weldon Springs area was acquired by the United States, by purchase and condemnation, prior to July 1, 1947, which, as we noted above, was the effective date of Sections 12.030 and 12.040, supra.

Our construction of Sections 12.030 and 12.040, supra, is that together they constitute an act of consent, to all acquisitions of land by the United States prior to July 1, 1947, for the purposes specified in Section 12.030, supra, and a grant of exclusive jurisdiction over such lands with the exception of certain rights of taxation and the service of civil and criminal process, which matters are not here in issue, the issue here being criminal jurisdiction over crimes committed on such area.

We further construe Sections 12.030 and 12.040, supra, to be specific acts of consent by the State of Missouri to the acquisition by the United States of the Weldon Springs area, since this acquisition was prior to July 1, 1947, the effective date of the aforesaid sections.

We now direct particular attention to the last portion of Section 12.040, supra, which reads:

" * * * * but the jurisdiction (exclusive jurisdiction with the exceptions noted above) so ceded to the United States shall continue no longer than the said United States shall own such lands and use the

were acquired. (Emphasis ours.)

We have stated above that the original Weldon Springs tract comprised 17,239 acres. As indicated in the letter quoted from the General Services Administration, certain dispositions have been made of certain parts of the original tract. This matter we will now consider from the viewpoint of whether such tracts as have been disposed of are now being used for "* * * the purposes for which they were acquired." (Section 12.040, supra.)

The aforesaid letter from the General Services Administration states that on November 30, 1948, the United States transferred by deed to the Curators of the University of Missouri at Columbia, 7,900 acres of the original tract "without requiring the payment of any cash consideration by the University, but subjecting the transfer to a condition requiring: 'That for a period of twenty years from the date of this deed said premises shall be continuously utilized by the grantee for the purposes set forth in the program included in the application for the acquisition thereof and in the report of the United States Office of Education.' The deed contained other conditions providing for free use of the land by the United States in time of national emergency, and reverter of title to the United States in event of breach of any of the conditions by the University."

It seems apparent, without detailed discussion, that this act constituted a discontinuance by the United States of the use for which the tract was acquired.

It would seem that this would be even more true of the 6,935 acres transferred in October, 1947, to the Missouri Conservation Commission, which transfer was for a monetary consideration and which appears to have been final; and the 106 acre tract conveyed to the Missouri State Highway Department on November 17, 1949, which latter tract is now being used for state highway purposes. As to the 213 acres which represents the difference between the acreage which the General Services Administration states comprised the original area, and the total acreage which the General Services Administration states has been disposed of, we can only assume that it also is no longer used for the purpose for which it was acquired.

We now approach the question of whether the 2,085 acre tract which now comprises the Weldon Springs area is now being used for

the same purpose for which it was acquired.

The fact situation in this regard is, we are authoritatively informed, that the major portion of this tract was acquired in 1941; that as soon as possible thereafter the United States entered upon the manufacture of ordnance upon this area; that such manufacture continued until sometime in the year 1945; that thereafter no manufacturing process of any kind has been conducted on this area, and that, for all practical purposes, it has not been "used" for anything whatever. It has, however, and now is, being held by the United States for use for military purposes if and when necessary. We do not believe that temporary nonuse constitutes such an abandonment of original purpose as to effect a reverter of jurisdiction such as is provided for by Section 12.040, supra. We believe, on the contrary, that it is but good public policy in such parlous times as these for our government to maintain itself in a position to proceed forthwith in matters of national defense if the necessity for so doing arises. We hold, therefore, that Section 12.040, supra, does not apply to the instant situation of the 2,085 acres which now constitute the Weldon Springs Area.

In the letter from the General Services Administration, frequently referred to above, we are informed that the original 17.239 acre tract which comprised the original Weldon Springs area, represented an aggregate of 333 individual tracts, of which 164 were acquired by condemnation, and 169 by direct purchase. Obviously it would be an endless task to attempt to segregate and locate these tracts in the remaining 2,085 acre tract which now comprises the Weldon Springs area, with the view of determining whether tracts acquired by purchase were in a different legal status, with respect to criminal jurisdiction, than those tracts acquired by condemnation. Nor do we feel that it is necessary to do so. All of these 333 tracts, whether acquired by purchase or condemnation, were acquired by the United States for the same purpose, to wit, to secure an area for the site of buildings required for military purposes; all of these 333 tracts were acquired by the United States under its general power to acquire land for the purpose stated above, and we believe that the manner of acquisition is immaterial. To the acquisition of all of these tracts, irrespective of the manner of acquisition, the State of Missouri has given its consent by Sections 12.030 and 12.040, supra. It will be noted that Section 12.030, supra, specifically consents to all acquisitions by the United States prior to its effective date, July 1, 1947, whether by "purchase, condemnation, or otherwise."

We therefore hold that exclusive criminal jurisdiction of

crimes committed on the 2,085 tract, wherever it may be located, which comprises the Weldon Springs area, is vested in the United States.

We now direct attention to the matter of the area located in Pike County, near the town of Louisiana.

So far as appears from information furnished us, this area is well defined and is not a matter of question.

It further appears that this area was acquired by the United States in or near the year 1941; that it was acquired by the United States as a site for buildings "required for military purposes;" that it was originally designated as "Missouri Ordnance Works," and was operated as an Ammonia Plant. Whether this land was acquired by "purchase, condemnation, or otherwise" does not appear, and we do not believe it to be material for the reasons given in our discussion of the same situation in regard to the Weldon Springs area.

It appears that in the case of the Louisiana plant use by the United States has been continuous, but that at this time the plant is no longer used to manufacture ammonia, but is now used as a pilot plant in the manufacture of gasoline from coal, and is officially known as a Synthetic Fuels Demonstration Plant. Here, as in the case of the Weldon Springs area, we do not believe that it can be said that this plant is no longer being used for the purpose for which it was acquired, to wit, for military purposes. It is a matter of common knowledge that gasoline is a vital ingredient in modern warfare and that, without it, in enormous quantities, military operations cannot be conducted.

We therefore hold that exclusive criminal jurisdiction of crimes committed on the tract of land which comprises the Synthetic Fuels Demonstration Plant in Pike County, at Louisiana, Missouri, is vested in the United States.

CONCLUSION

It is the opinion of this department:

- 1. That exclusive criminal jurisdiction of crimes committed on the 2,085 acre tract which comprises the Weldon Springs Ordnance Plant area, is vested in the United States.
 - 2. That exclusive criminal jurisdiction of crimes committed

on the area which comprises the Synthetic Fuels Demonstration Plant, located in Pike County, at Louisiana, Missouri, is vested in the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW:1rt

CONSTITUTIONAL LAW: MAGISTRATES:

Bill to provide increase in salary PROBATE JUDGES AND EX OFFICIO: for probate judges where an activated armed services camp is located is constitutional.

XXXXXXXXX

JOHN M. DALTON

March 24, 1953



XXXXXXX J.C. Johnson

Honorable J. Ellis Dodds Representative, Pulaski County Capitol Building Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department regarding the constitutionality of a bill proposed to be introduced in the Missouri Senate. The proposed bill reads as follows:

> "Section 1. 1. In all counties which now or may hereafter have a population of 30,000 or less inhabitants and in which there is now, or may hereafter be, located an activated armed services camp having a personnel of at least 10,000, the probate judge and ex officio magistrate, shall, in addition to the salary now provided by law, receive additional compensation so long as an activated armed service camp is in said county in an amount equal to 50 per cent of that now provided by law; provided however that no such judge shall receive more than \$6,000 per annum.

"2. The additional compensation provided for in this section shall be paid in the same manner as now provided by law for the payment of such judges' salaries."

Several constitutional provisions might give rise to questions relative to the validity of this bill. (Unless otherwise noted, constitutional provisions referred to are

Missouri Constitution of 1945).

1. Increase in compensation during term.

Section 24 of Article V of the Constitution provides in part:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judges salary shall be diminished during his term of office."

(Emphasis ours.)

Section 13 of Article VII provides:

"The compensation of state, county and municipal offices shall not be increased during the term of office; nor shall the term of any offices be extended."

The question of application of Section 13 of Article VII to increase in compensation for members of the judiciary during their terms was considered quite thoroughly in an opinion prepared by Assistant Attorney General Harry H. Kay, dated July 28, 1947, addressed to Hon. B. H. Howard. The conclusion was reached that, in view of Section 24 of Article V, above quoted, there was no constitutional prohibition against increasing the salaries of members of the judiciary during their terms. The conclusion there reached disposes of constitutional objections on such grounds to the present bill. For your information, a copy of said opinion is enclosed herewith.

2. Special Law.

Section 40 of Article III of the Constitution provides in part:

"The general assembly shall not pass any local or special law:

* * *

(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially

determined without regard to any legislative assertion on that subject;"

The proposed bill applies only to counties having a population of less than 30,000 inhabitants in which an activated armed services camp is located. Does this make it a special law such as is prohibited by Section 41 of Article III? In the case of State ex rel. v Smith, 353 Mo. 807, 184 S.W. (2d) 593, the court considered the question of validity of a statutory scheme for fire protection districts in counties of 200,000 to 400,000 inhabitants. The act was attacked as a special law. In upholding the act, the court stated, at 184 S.W. (2d) 1. c. 595:

"The question of classification is primarily for the Legislature. If there is any reasonable basis for the classification made the court must sustain it.

* * *

St. Louis County is the only county now within the population bracket stated in the act. Such fact alone does not make the act a special law for the reason the act will also apply to other counties which will attain the same population in the future. Where an act is potentially applicable to other counties which may come into the same class it is not a local law."

In the case of State ex inf. Wallach v. Loesch, et al., 350 Mo. 989, 169 S.W. (2d) 675, an act was attacked as a special law which provided for county zoning and planning in "any county in which, or in a county immediately adjoining which, there is now or may hereafter be located and constructed any permanent camp, cantonment, post, fort or training area of the United States Army, or any ordinance or ammunition plant or factory owned and operated by the United States or owned by the United States and operated under contract with the United States, except any county which now contains or may hereafter contain a population of not less than four

hundred thousand (400,000) nor more than six hundred thousand (600,000) inhabitants, * * " Laws of Missouri, 1941, p. 465, Section 15348.

In upholding the act, the court stated at 169 S.W. (2d) 1.c. 680:

"Appellant also asserts that counties such as Pulaski are arbitrarily thrown in with large counties like St. Louis county merely because they may have an army camp within them or may adjoin a county in which there is such a camp. It must not be overlooked that providing for the health and welfare of a rapidly growing community, caused by the location of an army plant, etc., was the very purpose for which the law was enacted. To take care of an emergency arising from such a mushroom growth section 1535la was enacted so that the local authorities could protect the health and safety of the people. We think the classification is founded upon a sound basis."

We are of the opinion that the legislature's determination that the duties of the probate judge and ex officio magistrate in counties in which an activated armed services camp is situated increase to such an extent that such official is entitled to receive additional compensation would be sufficient upon which to base a classification for such purpose.

3. Lack of uniformity of salary in each class of counties.

Section 11 of Article VI of the Constitution provides,

in part:

"Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of counties."

The proposed bill does not refer to the constitutional classification of counties at all. If this is a defect which would render it invalid, the same would be true of Section 482.150, RSMo 1951 Supp., fixing the compensation of magistrates generally, which sets up a system that entirely ignores the constitutional classification of counties (Section 48.020 RSMo 1949).

It will be noted that Section 11 of Article VI refers to "compensation of county officers." In the case of State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S.W. 783, the question presented was whether or not the probate judge of Buchanan County was within Section 12 of Article IX of the Constitution of 1875 which provided: "The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population." That provision was found in the article headed "Counties, Cities and Towns." Article VI of the 1945 Constitution is entitled "Local Government." In the Imel case, the court stated (242 Mo. 1.c. 301):

"(W)e observe that said section 12 of article 9 of our Missouri Constitution, declaring that all laws regulating the fees of 'county officers' shall be uniform in their operation, is not found in that article of the Constitution which creates and prescribes the duties and jurisdiction of probate judges; but is part of article 9, entitled 'Counties, Cities and Towns.'

"In this last named article (9), nothing is found specifically referring to probate

judges, their duties or compensation; but instead, that article treats of the organization and change of boundaries of counties, cities and townships (sections 1 to 9), the offices of sheriff and coroner (sections 10 and 11), a limitation on the fees of executive and ministerial officers of counties and municipalities (section 13), the creation of new county, township and municipal officers by the General Assembly (section 14), and other provisions for the government and consolidation and enlargement of cities. In this article we would not expect to find any provision respecting or affecting the judiciary of the State.

"Judges of the probate court are not charged with the performance of any governmental functions of the counties for which they are elected; in fact, some of them do not have jurisdiction coextensive with the counties where their offices are held. Their functions are to administer the laws pertaining to estates of deceased persons, minors and persons of unsound mind.

"From the context of said section 12 of article 9, supra, it will be seen that there is very little if any better reason for classifying probate judges as 'county officers' than for so designating judges of the circuit court when their circuits are composed of a single county.

"After a careful review of said section 12 of article 9 of the Constitution of Missouri, we are fully convinced that it was not intended to embrace or include judges of probate courts; * * *".

In view of the holding in this case, we are of the opinion that Section 11 of Article VI of the 1945 Constitution is not applicable to probate judges and ex officio magistrates, and, therefore, that section would not affect the validity of the proposed bill.

4. Application of Section 8 of Article VI.
Section 8 of Article VI of the Constitution provides:

"Provision shall be made by general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

The proposed bill applies to the compensation of probate judges and ex officio magistrates. This compensation is paid by the state. Section 482.150, Mo. R.S., supra. This would not appear to be a matter governing the organization and powers of counties, and, therefore Section 8 of Article VI would not be applicable. State ex inf. Taylor v. Kiburz, 357 Mo. 309, 208 S.W. (2d) 285, 287; Inter-City Fire Protection Dist. v. Gamball, 360 Mo. 924, 231 S.W. (2d) 193, 197 (1). Further, under the reasoning of the Imel case, supra, none of the limitations found in Article VI is applicable to legislation relative to the judiciary.

This department is of course not concerned with the wisdom of this bill or the difficulty of its practical application. We do point out, however, that some difficulty might arise by reason of the requirement that the armed services camp must have a personnel of at least 10,000. It appears to us that some difficulty might arise in determining the number of personnel based in a particular camp.

CONCLUSION

Therefore, this department is of the opinion that a proposed bill to provide for the increase in compensation for probate judges and ex officio magistrates in counties of less than 30,000 inhabitants in which an activated armed services camp

having a personnel of at least 10,000 persons is located, if enacted into law, would not violate the Missouri Constitution.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Very truly yours,

JOHN M. DALTON Attorney General

RRW:mm

CRIMINAL LAW: EXPOST FACTO: STATUTES: Effective date of Section 563.374, Mo. R.S. Cymulative Supplement 1951, 90 days subsequent to adjournment of 66th General Assembly on April 30, 1952. Conviction for an offense prior to effective date of statute convicted under is invalid.

April 4, 1953

FILED

24

Honorable Edward L. Dowd Circuit Attorney for the City of St. Louis St. Louis, Missouri

Attention: George W. Draper II, Assistant Circuit Attorney

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"On February 19, 1953, one Robert Harris Jr. was found guilty of possession of gaming devices under Chapter 563.374, of the Missouri Revised Statutes cumulative supplemental 1951, and sentenced to a year in the City Workhouse and a one thousand dollar find.

"This defendant was arrested May 30, 1952, by the St. Louis Police, and at that time certain gambling paraphernalia was found on his person.

"The defendant's attorney has filed motion for a new trial under which he claims that Section 563.374 did not become effective as a law until 90 days after April 30, 1952. Therefore, it is his contention that the Court did not have jurisdiction to give the jury an instruction of this section of the statute.

"In reading the aforementioned section, this writer notes that it was sent to the Governor on March 11, 1952, and approved by the Governor on March 24, 1952. However, there is nothing in the statute to indicate the date that it was passed by the Legislature. Furthermore, it is noted that although laws passed by the Legislature prior to its adjournment on April 30, 1952, did not ordinarily become effective until 90 days after the adjournment of the Legislature that certain resolutions were adopted by the Legislature for the recess beginning December



Honorable Edward L. Down

1951 and January 22, 1952, and that these resolutions specified that laws previously passed should become effective on March 18, 1952, and April 22, 1952, respectively.

"The problem that this writer is confronted with is whether or not Section 563.374 was passed by the Legislature prior to January 22, 1952, and if so, did the resolutions passed by the Legislature making said bills laws and effective on March 18, 1952, and April 22, 1952, respectively apply to this section. In other words, the question that I am directing to you is when did this Section 563.374 become law here in the State of Missouri insofar as to make the punishment of one year in the City Workhouse and a one thousand dollar fine applicable.

"Would you please advise as soon as possible, for said motion is to be heard within the next week. Further, it will be appreciated if you can forward to me any data which you feel will aid me in arguing this motion."

Section 29, Article III, Constitution of Missouri, provides in part that if the General Assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess.

The first question to determine is how to construe the words used hereinabove "laws previously passed." The Supreme Court in State v. Toberman, 250 S.W. (2d) 701, 1.c. 704-705 (1) (2), held that such words cannot be limited to laws passed by the General Assembly and approved by the Governor. Therefore, in order for a bill to come within the foregoing constitutional amendment, it must have passed both bodies of the General Assembly, and it is not necessary that the Governor must have approved said bill prior to the adoption of the joint resolution as provided in said constitutional amendment. In so holding the court said:

"(1) The phrases 'law passed by the general assembly' and 'laws previously passed', as used in \$29, cannot be limited to laws passed by the general assembly and approved by the governor. The governor is no part of

the general assembly. The Constitution, §1, Art. III, expressly states: 'The legislative power shall be vested in a senate and house of representatives to be styled "The General Assembly of the State of Missouri."! Thus only the general Assembly passes laws. When it has passed a bill, if that word is preferred, the bill is a law insofar as the legislative power is vested in the general assembly to make it so; and we think that is the clearly intended meaning of the word 'law' as used in the aforesaid phrases of §29. "(2) The fact that the governor did not approve the bill until after the beginning of the recess does not arrest its becoming effective ninety days after the beginning of the recess if he signed it within forty-five days thereafter, which he did. * * *"

S.C.S.S.B. 226 passed by the Sixty-sixth General Assembly was reported enrolled in the Senate on March 10, 1952, signed by the President of the Senate on March 11, 1952, and was sent to the Governor on the same day. Said bill was approved by the Governor on March 24, 1952.

The last concurrent resolution introduced in the Sixty-sixth General Assembly for a recess was S.C.R. 13. (See Laws of Missouri 1951, pages 891-892.) Said resolution provided for a recess beginning January 22, 1952, ending February 25, 1952, and it resolved that all laws passed by said General Assembly on or before the 22nd day of January, 1952 shall take effect and be in force on the 22nd day of April, 1952.

Section 29, Article III, Constitution of Missouri 1945, provides in part that no laws passed by the General Assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, with certain exceptions that are not applicable in the instant case.

In view of the foregoing resolution and constitutional amendment and the further fact that said bill was passed on March 11, 1952, subsequent to January 22, 1952 and in view of the fact that it was approved by the governor on March 24, 1952, said bill could not have become effective until ninety days after adjournment of the Sixty-sixth General Assembly which happened on April 30, 1952. (See Laws of Missouri 1951, page 889.)

Section 13, Article I, Constitution of Missouri, provides that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted. The decisions hold that an act of the Legislature must be held to operate prospectively only, unless a different legislative intention is clearly to be gathered from their terms.

An ex post facto law is one which makes an action done before the enactment of a statute penal or criminal, which was innocent when committed or which aggravates a crime by making it greater than when committed or inflicts a greater punishment than existed when the offense was committed. (See State ex rel. vs. Works, 249 Mo. 702, 156 S.W. 967.)

The term "ex post facto" as used in the Constitution has reference to crimes and their punishment, and the term "retrospective" as used refers exclusively to a law related to civil rights and remedies. (See ex parte Betherm, 66 Mo. 545.)

Under the foregoing constitutional amendment and decisions to apply the provisions of S.C.S.S.B. 226 passed by the Sixty-sixth General Assembly, especially Section 1 thereof, known as Section 563.374, Revised Statutes of Missouri, Cumulative Supplement 1951, to such an offense committed prior to January 22, 1952, and long prior to said law becoming effective would be in fact an attempt to convict one on an expost facto law and illegal.

CONCLUSION.

In view of the foregoing, it is the opinion of this department that the effective date of Section 563.374, Revised Statutes of Missouri, Cumulative Supplement 1951, is ninety days after adjournment of the Sixty-sixth General Assembly on April 30, 1952. Furthermore, in view of the fact that the offense in the instant case was committed prior to the effective date of Section 563.374, supra, the sentence is invalid.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General COUNTY COURT ?

TAXATION:

Real property held by a trustee under Section 140.260, RSMo 1949, is subject to the lien of a special tax bill for public improvement provided for in Section 88.333; that such special tax bill may not be enforced PUBLIC IMPROVEMENT:) against the county court as a claim against general) revenue; and that the county court has no authority) to order such property conveyed to the general contrac-) tor in satisfaction of the lien of the special tax) bill, although it may be sold and conveyed subject to) the lien.



April 17, 1953

Honorable John E. Downs Prosecuting Attorney Buchanan County St. Joseph, Missouri

Dear Mr. Downs:

We render herewith our opinion on the request contained in your letter of March 25, 1953. The request reads as follows:

> "Pursuant to Section 140.260, R.S. Mo., 1949, one Pat Carver is the title holder to three lots located within the city of St. Joseph, Missouri. Said city has duly issued special tax bills against the three lots for paying a nearby street.

"It appears that Section 88.333, R.S. Mo., 1949, authorizes the issuance of special tax bills against county or other public property, therefore, the county court would like to know, One: Whether or not the county is liable to the city for the payment of special tax bills for property held by trustees appointed pursuant to Section 140.260. Two: If it is liable, does the county court have the authority to order the trustee to convey the property to the contractor in full satisfaction of its (the contractor's) lien? Three: What happens to the lien the county has and is protecting for all taxing authorities involved if No. Two is answered in the affirmative?"

Honorable John E. Downs

Section 88.333, RSMo 1949, to which you refer is as follows:

"Public improvement -- tax bills against public property (first class cities) .--In all cities of the first class in this state wherein any public improvement is made for which special tax bills are issued against private property for the payment thereof, such tax bills shall also be issued against all county or other public property, church property and all cemeteries, railroad rights of way and property under the control of or owned by public school districts, in the same manner and to the same effect as such tax bills are issued against other private property chargeable for such public improvements; provided, that payment of such tax bills may also be enforced as a prior claim against any general revenue that may have been or shall be received by the authorities managing such property, and suit or other proceedings may be prosecuted therefor the same as any other action at law or in equity."

Section 140.260, RSMo 1949, the other section to which you refer, reads in part as follows:

"Purchase by county or city, whenprocedure.--1. It shall be lawful
for the county court of any county, and
the comptroller, mayor and president of
the board of assessors of the city of
St. Louis, to designate and appoint a
suitable person or persons with discretionary authority to bid at all sales
to which section 140.250 is applicable,
and to purchase at such sales all lands
or lots necessary to protect all taxes
due and owing and prevent their loss
to the taxing authorities involved
from inadequate bids.

"2. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant

to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold.

"3. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold.

"4. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the city of St. Louis.

"5. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the county court of the respective counties and the comptroller, mayor and president of the board of assessors of the city of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed prorata to the funds entitled to receive the taxes on the lands or lots so disposed of."

The first question is: Whether property held by a trustee under Section 140.260 is "county or other public property" within the meaning of Section 88.333. We believe that it is.

Probably such property could not be said to be "county * * * property" since the property is not beneficially owned by the county. We conclude, however, that it is "other public property" within the meaning of the statute. It is beneficially owned by the various taxing authorities entitled to the taxes for which the property was sold, including county, school district, road district, state, etc. Property held under like circumstances, where the question involved was whether it was exempt from general taxation under Article X, Section 6, Missouri Constitution of 1945, has been held in effect to be public property and so exempt. Spitcaufsky v. Hattan, 353 Mo. 94, 182 S.W. (2d) 86, (Property held in trust for various taxing authorities by Land Trust under Land Tax Collection Act, Section 141.800 et seq., RSMo 1949.)

If this property be not public property, then it is private property and, of course, subject to the lien for special tax bills.

We have not overlooked the possibility of the trustee's being subrogated to the lien for general taxes for which he bought the property, which general taxes would have priority over the special tax bill. However, we are unable to find any support for the subrogation theories in this instance. Certainly a private individual would not have any such right of subrogation; and the municipality, county, state, etc., purchasing at a tax sale stands in no better position than an individual purchaser. 3 Cooley on Taxation, Section 1448. Furthermore, it is a general rule that the lien of the general taxes is extinguished by sale absent any statutory provision for subrogation of the purchaser under Section 137.085, RSMo 1949, which provides in part:

"* * * said lien shall continue to be enforced until * * * the land shall be sold * * * as provided by law."

We, therefore, conclude that the property held by the trustee under Section 140.260, RSMo 1949, is subject to the lien of the special tax bill for public improvement provided for in Section 68.333, RSMo 1949.

It is further our opinion, however, that the tax bill may not be enforced against general revenue received by the county court. While Section 88.333 provides that

such special tax bill may be enforced as a prior claim against any general revenue received by the "authorities managing such property," we believe that the county court does not "manage" this property. "Manage" is defined in Webster's New International Dictionary, Second Edition, as follows:

"2. To control and direct; * * * to conduct; guide; administer."

The only "management" contemplated by Section 140.260 is the sale of the property. Subsection 5 provides only that the "lands or lots * * * shall be sold" without specifying who shall attend to the selling; but Subsection 7, relating to compensation of the trustees, provides that such compensation shall not exceed ten per cent of the price for which the lots are "sold by the trustees." It appears that the statute contemplates that the duty and authority to sell is in the trustee, implying negotiation, leading up to a sale, albeit under the supervision of the county court. We believe that the supervisory power, vested in the county court, including the power to order the sale, execution and delivery of deeds, is somewhat akin to the supervisory power of a probate court in ordering and approving the sale of real estate by an executor or administrator, and that it could not be said to be "management" as contemplated by the statute. This view is further supported by practical considerations in that it would be unjust to allow recovery of special tax bills from the county's general revenue when the land or lots is owned by the various taxing authorities and the county beneficially has only a small interest in the property.

A further question is this: Whether the county court may order the land conveyed to the contractor owning the special tax bills in full satisfaction of his claim. We think not. The county court is a court of limited jurisdiction and power, and statutory authority must be found for its every act. While under Section 49.270, RSMo 1949, the county court has rather broad authority in dealing with county property, we take this to mean property to which legal and beneficial title is in the county. Notice that the county has neither under Section 140.250 except as it is one of the several beneficiaries of the trust thereby created. The only way in which the land may be dealt with is that it may be "sold." (Subsection 5.) In its ordinary meaning a "sale" is a conveyance of property in exchange for money paid or to be paid and does not include

Honorable John E. Downs

a conveyance in satisfaction of a lien or debt. In Williamson v. Berry, 49 U.S. (8 How.) 495, 544, 12 L. Ed. 1170, the court said:

"'Sale' is a word of precise legal import, both at law and in equity. It means of itself a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold. No departure from the manner in which the sale is directed to be made, either under a judgment at law or a decree . in equity, is permitted. So, under a decree authorizing a trustee to sell lands and with the proceeds to pay debts, a conveyance of the land to a creditor in payment of a debt is not a sale and conveys no title."

That this is the meaning intended is further indicated by the provisions for distribution of the proceeds (Subsection 5) and for payment of the compensation of the trustees "solely" out of the proceeds of the sale. (Subsection 7.)

We do not mean to say that the property so held by the trustee may not be conveyed simply because it is subject to the lien of the special tax bill, but that any conveyance of the property will be subject to the said lien.

CONCLUSION

It is the opinion of this office that real property held by a trustee under Section 140.260, RSMo 1949, is subject to the lien of a special tax bill for public improvement provided for in Section 88.333; that such special tax bill may not be enforced against the county court as a claim against general revenue; and that the county court has no authority to order such property conveyed to the general contractor in satisfaction of the

Honorable John E. Downs

lien of the special tax bill, although it may be sold and conveyed subject to the lien.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

SCHOOLS:)

FILED 34 Board of Trustees of the Retirement System can legally make payment of retirement allowances to a teacher who attained age seventy prior to July 1, 1952, who did not request a retirement allowance who served in a district included in the retirement system subsequent to July 1, 1952, and who is now requesting a retirement allowance; and to a teacher who attained age seventy prior to July 1, 1952, who requested a retirement allowance and received one or more monthly payments, who returned to teaching after July 1, 1952, and who is again requesting a retirement allowance.

May 22, 1953

Honorable G. L. Donahoe Executive Secretary Public School Retirement System of Missouri Room 801, Jefferson Building Jefferson City, Missouri

Dear Mr. Donahoe:

We render herewith our opinion based on your request of May 5, which request reads as follows:

"It is provided in Section 169.050, RS Mo 1949, that membership in the retirement system shall be terminated by retirement based on either age or disability.

"Section 169.060(1), RS Mo 1949, provides:

"1. A member who is seventy years of age or more one year after the date the retirement system becomes operative shall be retired as of that date and shall be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service. Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; provided, however, the compulsory retirement age shall not be effective for the duration of World War II.

"In Section 169.070, the formula for determining retirement allowances is prefaced with the statement: 'The retirement allowance of a member whose age at retirement is 65 years or more shall be the sum of the following items.'

"It appears that in each instance where reference is made to a retirement allowance, it is indicated that a member is eligible for this allowance. We are unable to find any provision in the law for the payment of a retirement allowance to a person whose membership in the system was terminated before his retirement became effective.

* * * * * * *

"We are not able to find any specific provision of the law which is applicable in instances in which the teacher who was automatically retired under the provision of Section 169.060, RS Mo 1949, continued to serve in a district included in the retirement system after July 1, 1952, and who is now requesting a retirement allowance.

"We are requesting an official opinion which will state whether the Board of Trustees of the retirement system can legally make payment of retirement allowances under the following conditions:

- "(1) To a teacher who attained age 70 prior to July 1, 1952, who did not request a retirement allowance, who served in a district included in the retirement system subsequent to July 1, 1952 and who is now requesting a retirement allowance.
- "(2) To a teacher who attained age 70 prior to July 1, 1952, who requested a retirement allowance and received one or more monthly payments, who returned to teaching after July 1, 1952 and who is again requesting a retirement allowance."

Honorable G. L. Donahoe

The law providing for the retirement system or that portion thereof relating to the time at which a member of the system becomes entitled to benefits, Section 169.060, RSMo 1949, reads in part as follows:

"* * Thereafter, a member shall be retired automatically on the first day of July next following the school year in which he reaches the age of seventy years, and shall thereupon be entitled to benefits, as provided in sections 169.010 to 169.130, on the basis of his creditable service; * * *"

(Emphasis ours.)

In a previous opinion written to you from this office under date of May 29, 1952, it was held that a member of the retirement system, who had attained the compulsory retirement age of seventy, was not eligible for a retirement allowance so long as he continued to teach.

However, nothing is said in the law providing for the retirement system about a member's forfeiting his claim to benefits by his continued teaching after having reached the compulsory retirement age or by his delay in claiming benefits. Nor, have we discovered any judicial decision indicating that result. There is apparently no requirement that such benefits be paid or claimed immediately upon July 1 following the member's reaching the compulsory retirement age, but presumably could be claimed and paid at any time after that date when he meets the other conditions of retirement (i.e., his actual retirement from teaching -- see our opinion to you dated May 29, 1952). Therefore, we advise that in the first situation you have presented, wherein the member continues to teach after the date fixed by the law for compulsory retirement, the board of trustees is legally permitted to make benefit payments to the teacher who has made application for benefits after his actual retirement.

In the second situation presented in which a member of the system having arrived at the compulsory retirement age and having actually retired and received the benefits, then having resumed teaching, and who has now retired again and is again requesting a retirement allowance, our conclusion is that he also is entitled to a retirement allowance, and Honorable G. L. Donahoe

that the board of trustees may legally make payment to him.

There is no provision in the law that resumption of teaching after once having retired shall forfeit a teacher's claim for subsequent benefits -- although he would not be entitled to benefits during the time he was teaching. During the time he was employed in teaching after once having retired and received an allowance his right to benefits would be in a state of suspended animation, but would revive upon his ceasing to teach and again requesting the allowance.

CONCLUSION

It is the opinion of this office that the board of trustees of the retirement system can legally make payment of retirement allowances to a teacher who attained age seventy prior to July 1, 1952, who did not request a retirement allowance who served in a district included in the retirement system subsequent to July 1, 1952, and who is now requesting a retirement allowance; and to a teacher who attained age seventy prior to July 1, 1952, who requested a retirement allowance and received one or more monthly payments, who returned to teaching after July 1, 1952, and who is again requesting a retirement allowance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

SENATE:

Board of Election Commissioners for City of St. Louis cannot make any division of city

ELECTIONS:

into senatorial districts, new districts having already been established under last

decennial census.

JOHN M. DALTON



June 5, 1953

John C. Johnsen

Honorable Michael J. Doherty Chairman Board of Election Commissioners City of St. Louis 208 S. Twelfth Boulevard St. Louis 2, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I have been directed by the Board of Election Commissioners for the City of St. Louis to write this letter to you and request herein a written opinion concerning the authority and right vested in this Board to redistrict the seven senatorial districts within the City of St. Louis.

"This Board feels that the redistricting as declared and certified by its predecessor Board is unfair and illegal. This Board has declared its policy with respect to redistricting by the adoption of the following resolutions:

'The Board of Election Commissioners is unanimously of the opinion that the redistricting of Senatorial Districts in the City of St. Louis as declared, ordered and certified under the last redistricting is unfair, irregular and illegal; that it was drawn arbitrarily, and capriciously and that it is unjust

and unfair to the voters of the City of St. Louis. But before this Board can embark upon another redistricting program, or attempt such redistricting, it wishes to be satisfied that it is acting and performing its duties under and within the enacted and declared laws of this State. For such reason it has requested one of its counsel to be present and advise the Board as to its rights and authorities to proceed and undertake another redistriction. Article III, Section 10 which concerns and relates to the instant question, is as follows:

'The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require.

"The Board sincerely believes that another and new redistricting is urgently required in the public interest and to provide more compact and contiguous districts. It clearly appears that the present districts are arbitrary and unfair and in direct conflict with public convenience.

"Under such circumstances, as aforesaid, it is our intention to redistrict the seven senatorial districts within the City of St. Louis, if you are of the opinion that we possess such legal authority and right so to do.

"Incidentally, we also take this opportunity to direct your attention to the case of PAUL W. PREISLER vs. PAUL C. CALCATERRA, et al., Docket No. 43596, which presently is pending in the Missouri Supreme Court. It is our understanding that Count II of the action involves the question of redistricting. Perhaps such issue might be specifically injected therein and some decision obtained thereon."

Honorable Michael J. Doherty

The establishment of senatorial districts in the counties entitled to more than one senator is provided by Section 8 of Article III, Constitution of Missouri, 1945, which reads as follows:

"When any county is entitled to more than one senator the county court, and in the City of St. Louis the body authorized to establish election precincts, shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be, in each of which one senator shall be elected."

Section 10 of Article III of the Constitution of Missouri, 1945, provides:

"The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require."

The only statutory enactment relative to the matter is found in Sections 22.020 and 22.030, RSMo 1949. Section 22.020 provides for the certification of the number of senatorial districts by the secretary of state to the bodies authorized to establish the districts. Section 22.030 provides:

"On or before March first following the certification by the secretary of state as provided in section 22.020, the board of election commissioners of the city of St. Louis and the county courts of those counties which by said report are entitled to more than one senator, shall certify to the secretary of state a complete statement of the senatorial districts established therein; and in the event that said board of election commissioners of the city of St. Louis or the county courts of such

counties fail to comply with this section, the number of senators in such districts to be elected at the next election shall be nominated and elected by the electorate from the state at large; provided the persons so nominated and elected shall reside in the city or the county entitled to such senators."

We are of the opinion that the answer to your inquiry is to be found in the decision of the Supreme Court of Missouri in the case of State ex rel. Major v. Patterson, 229 Mo. 373, 129 S.W. 888. That case involved an attempted redivision of Jackson County into legislative districts under the Constitution of 1875. Section 3 of Article IV of the Constitution of Missouri, 1875, authorized the county court to divide counties entitled to more than one representative into legislative districts. Section 6 of Article IV of the Constitution of Missouri, 1875, authorized the circuit court to divide into senatorial districts any county entitled to more than one senator. Section 9 of Article IV of the Constitution of Missouri, 1875, provided:

"Senatorial and Representative districts may be altered, from time to time, as public convenience may require. When any Senatorial district shall be composed of two or more counties, they shall be contiguous; such districts to be as compact as may be, and in the formation of the same no county shall be divided."

In the Patterson case, supra, it was contended that, under the provisions of Section 9 of Article IV of the Constitution of 1875, the county court had the authority to make new representative districts for Jackson County. The court held that such authority was not to be found in Section 9 of Article IV, and its decision and opinion cover the question asked by you. In the course of its opinion the court stated (229 Mo. 1.c. 381):

"To start with, this section gives, within itself, no power to the county court. The county court is not mentioned and if it was intended to give it power, such fact must be gathered from the context of the article and not from the section itself. Going to the section itself, it mentions

both senatorial and representative districts. That the county courts have no power as to senatorial districts must be conceded. That the power here conferred as to senatorial districts had reference to a legislative power reserved by the Constitution to that branch of the government, can not well be disputed. For as to most of the senatorial districts the Legislature has the right to fix the boundaries. If then it appears that the Constitution was reserving to the Legislature the right to legislate as to senatorial districts, is it not reasonable to construe that such was the intent as to representative districts? Both are mentioned together. One clearly refers to a reservation of power in the Legislature, why not the other? But the section says that such districts may be altered 'from time to time. How must this be read? That senatorial districts cannot be rearranged oftener than once in ten years is more than evident from the Constitution.

The court further stated (229 Mo. 1.c. 388):

"If it be said that these two sections grant a power to the county court in the one instance and to the circuit court in the other, yet the exercise of this power must be within constitutional and legal prescriptions. The power confided to both is dependent upon prior legislative action. In the matter of senatorial districts, nothing is said as to a rearrangement of them by the circuit court or any other body. In neither case can the legislative sanction be given oftener than once in every ten years, and in both cases the contemplation of the law is that the subdivision shall be at once made, and remain made until the next decennial period. It might be said that injustice would follow in later years from the division made of senatorial districts in a county entitled to more than

one senator, yet there is no legal way to escape it. What would be a fair division of a county at one time, might be apparently inconvenient, if not unfair, later, but no authority is vested anywhere to authorize a change. If this be true as to the senatorial districts of a single county, why should there be a different rule as to representative districts? If circuit courts were not to be invested with plenary power to redivide such counties ad libitum, by what reason can it be urged that county courts were given such powers by mere implication?

"It is true that section 9 of article 4 says that 'senatorial and representative districts may be altered, from time to time, as public convenience may require, ' yet this language is applied to all senatorial districts and not merely to districts within a single county. It is clear that as to all senatorial districts save and except those within a single county, the power to fix the lines thereof lies with the Legislature, or in the event of its failure to act, with the Governor, Secretary of State and Attorney-General. Could it then be said that as to senatorial districts, this section 9 referred more to the powers of the circuit courts than to the powers of the Legislature? We think not. Yet the language is as definite as is the language referring to legislative districts. As stated before there is an evident reservation of power in this clause, but it is to the Legislature and not to the courts, either circuit or county."

The court further stated (229 Mo. 1.c. 391):

"* * This section 9 of article 4 is merely directory in terms, and in our judgment reserves to the Legislature the right to provide for the alteration of legislative districts once established as per the terms of the Constitution. In other words the Constitution contemplates

that these districts shall be established at decennial periods, but has reserved a power in the Legislature to provide by law for a change in the same. This, upon the theory that there is a difference between dividing a county into districts, and afterward changing the boundary lines of those districts. That this power is reserved to the Legislature is further emphasized by the fact that section 9 does not. within itself, undertake to prescribe the conditions under which the changes or alterations should be made. Nor does it undertake to prescribe the method of determining the requisites for such changes. These things were evidently left for legislative determination, and the Legislature has not acted. This section 9 only speaks of changes when 'public convenience may require. It places no restrictions as to compact and contiguous territory. It contains no safeguards whatever. Upon its face it is not self-executing, but clearly indicates that there was to be legislative action. If so, then how does it authorize action upon the part of the county court. Unless it can be said that this section is self-executing, the whole of respondents: claims fail. So that, in addition to the construction to be given to the words 'from time to time as applied to both senatorial and representative districts, we are confronted with this further barrier. To give section 9 the construction contended for by respondents, it must stand alone. As above indicated, the use of the phrase 'from time to time. if not considered as the decennial period, precludes the idea of making both sections 3 and 9 stand together. If section 9, to give it respondents' construction, must stand alone, then as above indicated, (1) it fails to confer any power upon the courts, either as to senatorial or representative districts, and (2) it upon its face is not self-enforcing, and contemplates and requires legislative action. In other words, it is a reservation of power to the Legislature and not a conference of power upon the

courts. We hardly think the language of this section self-enforcing. (State ex rel. v. Gibson, 195 Mo. 1.c. 260.)

"Let it be said that there is a direction therein contained to the effect that both senatorial and representative districts may be altered between decennial periods for public convenience, yet it is not therein said by whom to be altered, nor what guideposts shall be observed in the alteration. This strongly tends to show that this clause of the Constitution was intended to give legislative authority to act, and by proper laws provide for such alteration or changes in previously established districts, but not to confer upon courts a power not usually exercised by them."

The court further stated (229 Mo. 1.c. 394):

"So when we take the context of the present article 4, and the origin of section 9 therein, it appears to us clear that there is a reservation of power to the Legislature, and until the Legislature acts with reference to the alteration of the districts established under section 3, there can be no action by the courts. The Legislature perhaps can act by laws duly passed, and in so doing can delegate its constitutional powers over the subjectmatter but up to this time it has not been done. Until such time as the Legislature may legally provide for the alteration of legislative districts, there is no such power in the county courts."

This decision appears to us to preclude any new redistricting at the present time as a matter of "public convenience" under Section 10 of Article III of the Constitution of 1945.

Whether or not the districts as presently constituted are "of contiguous territory, as compact and nearly equal in population as may be," is a question of fact. State ex rel. Davis v. Ramacciotti (Mo. Sup.), 193 S.W. (2d) 617. We cannot determine whether or not the districts as presently formed comply

with the constitutional requirements, and do not attempt to do so.

You state that the Board has determined that "the last redistricting is unfair, irregular and illegal; that it was drawn arbitrarily, and capriciously and that it is unjust and unfair to the voters of the City of St. Louis." We find, however, no authority conferred upon the Board to make such a determination and to order a redistricting based thereon.

Courts may pass upon the validity of a redistricting.
59 C. J., States, Section 50, page 83. In the case of Preisler
v. Calcaterra, referred to in your opinion request, plaintiff
sought to have the redistricting here in question declared
invalid and to have the court order, under the provisions of
Section 22.030, RSMo 1949, quoted above, that senators from
the city of St. Louis should be elected at large. The petition
was dismissed in the circuit court, and the matter is now before
the Supreme Court on appeal.

In view of the policy of this office not to render opinions on matters pending in litigation, we will not attempt to pass upon the question of what the effect of a decision of a court holding the previous redistricting invalid would be, in view of the provisions of Section 22.030, supra. We do note that that section requires the Board to act prior to March 1, after receiving notice from the secretary of state of the number of senators to which the city of St. Louis is entitled, and that it does provide that upon failure of the Board to act within that time the senators from the city of St. Louis shall be elected from the state at large, and that there is no provision for action by the Board subsequent to March 1. Should the Supreme Court fail to pass upon the question in the Preisler case, and should the Board or someone else entitled to do so properly bring before a court of competent jurisdiction the question of the validity of the redistricting, the question of the effect of an adjudication of invalidity could be determined judicially at the same time.

CONCLUSION

Therefore, it is the opinion of this department that, the Board of Election Commissioners of the City of St. Louis having previously divided the city of St. Louis into senatorial districts following the 1950 Decennial Census, Section 10 of

Honorable Michael J. Doherty

Article III of the Constitution of Missouri, 1945, which authorizes the alteration of senatorial districts from time to time as public convenience may require, does not confer any power upon the Board of Election Commissioners of the City of St. Louis to order a redistricting at this time.

This conclusion is based upon the premise that the previous redistricting is legal and valid until declared otherwise by a tribunal having authority to do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

COUNTY CLERK:

Governor to fill vacancy in the office of county clerk, who shall hold office between the next general election, when the regular term should be filled, and the beginning of such regular term.

JOHN M. DALTON



June 19, 1953

XXXXXXX

J. C. Johnsen

Honorable Phil M. Donnelly Governor of Missouri Jefferson City, Missouri

Dear Governor Donnelly:

This will acknowledge receipt of your letter of June 2, 1953, in which you ask for an opinion from this office as follows:

"Under Section 51.090, RSMo 1949, should I appoint a person to fill a vacancy in the office of clerk of the county court caused by the death or resignation of a person whose term expired December 31, 1954; when would the term of the person appointed by me to fill such vacancy expire?

"If it expires on the date of the general election held in 1954, how is the office to be filled between that date and January 1, 1955, the beginning of the regular term of the person who will be elected at the 1954 general election?"

In this connection the Constitution of Missouri, 1945, provides as follows:

"Article IV, Sec. 4--The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

"Article VII, Sec. 7--Except as provided in this Constitution, the appointment of all officers shall be made as prescribed by law."

Honorable Phil M. Donnelly

Pursuant to the authority contained in the above provision of the Constitution the Legislature has enacted two statutes pertaining to the filling of vacancies by appointment by the Governor. The general statute which covers vacancies in all elective offices with enumerated exceptions is found in Section 105.030, RSMo. 1949, and reads as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election -- at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election; provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office, until such other date."

The enactment specifically applying to the office of county clerk, which was first enacted by the Legislature in 1945, is found in Section 51.090, and reads:

"When any vacancy shall occur in the office of clerk of the county court by death, resignation, removal, refusal to act, or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected or appointed and qualified, unless sooner removed."

The office of clerk of the county court is established and the terms thereof set out by Section 51.020, RSMo. 1949, which provides as follows:

"At the general election in the year 1946, and every four years thereafter, the qualified electors of the county at large in each county in this state shall elect a clerk of the county court, who shall be commissioned by the governor and who shall hold his office for a term of four years and until his successor is duly elected or appointed and qualified. Each clerk of the county court shall enter upon the duties of his office on the first day of January next after his election; provided, that the term of office of persons holding the office of clerk of the county court at the time this section shall take effect shall not be vacated or affected thereby."

Also pertaining to the term of office of both officers elected and those appointed under the provisions of the Constitution of Missouri, 1945, we find the following in Article VI, Section 10 and Article VII, Sec. 12:

"Article VI, Sec. 10 .-- The terms of city or county offices shall not exceed four years."

"Article VII, Sec. 12--Except as provided in this Constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified."

Pursuant to the authority in these last above quoted provisions the Legislature enacted a general provision concerning the terms of office of officials of this state. Section 105.010, Mo. RS 1949.

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

From the above statutory provision, it is seen that the general statute concerning the filling of vacancies in elective offices, Section 105.030, presents a clear, concise and all-inclusive system which provides for all anticipated contingencies in connection with a vacancy in an elective office, whereas the statute which concerns specifically the office of county clerk, Section 51.090, leaves several questions to be answered.

According to the established canons of statutory construction these two statutes should be read together and if they are not compatible that one pertaining to the specific subject involved should govern. See State ex inf. Major v. Amick, 247 No. 271(En Banc, 1912.)

Section 51.090, RSMo. 1949, provides that a person appointed to fill the vacancy by the Governor "shall discharge the duties thereof until the next general election at which time a clerk shall be chosen for the remainder of the term." From this it appears that the Legislative intent was that the Governor's appointee should hold office only until the time of the next general election. This conclusion is buttressed by the determination of the Supreme Court that the word "until" is a word of limitation and that when it is used the court is not justified in the construction of the statute authorizing a longer holding of the office by the appointee. See State ex rel. v. Perkins, 139 Mo. 106, (Division 2, 1897) where the Court said:

"Section 3276, it will be noted, uses the preposition 'until.' This is a restrictive word, a word of limitation; this is its ordinary and usual meaning, and under our statutory provisions (R.S. 1889, Sec. 6570), as well as under the general rule of construction, this is the meaning which should be ascribed to it. This is the ordinary meaning of the term as has been expressly adjudicated. Webster v. French, 12 Ill. 302; Abel v. Alexander, 45 Ind. 523; People v. Walker, 17 N. Y. 502; Nichols v. Ramsel, 2 Mod. 280; Wicker v. Norris, Cas. Temp. Hardw. 116. See, also, Kendall v. Kingsley, 120 Mass. 94.

"Besides, the legislature, at the revising session of 1879, enacted section 3276, and retained section 7121, and therefore must be deemed cognizant of the difference between those sections, and intentionally used the limiting word 'until,' and purposely refrained from using in section 3276 words granting the right to hold over after the expiration of a given time. Nay, more, they made express provision that the residue of the term should be filled by election. This amounts to the exclusion of a conclusion."

The case of State ex rel. v. Amick, supra, considered the situation arising from a vacancy of circuit judge wherein a statute of similar import to that we are here considering was involved. The statute, Section 3869, RSMo. 1909, reads as follows:

"'Sec. 3896. If the office of the judge of any court of record of this State shall become vacant

from death, resignation, or from any other cause, such vacancy shall be filled by the appointment of the Governor until the next general election held after such vacancy occurs, when the same shall be filled by election for the residue of the unexpired term. "

After careful consideration, the Supreme Court decided that under its provisions the term of the judge a pointed by the Governor to fill a vacancy expired on the day after the general election at which one was elected to fill the residue of the unexpired term. The court stated at 1.c. 294:

"We are clearly of the opinion that upon both principle and authority respondent's term of office expired on the day following the general election held on November 5, 1912.

"The questions involved are legal propositions about which minds of honest men might and have heretofore differed, and this proceeding has presented a favorable opportunity for this court to finally settle that vexed question."

The same conclusion was expressed by the Supreme Court in the case of State ex rel. v. Perkins, 139 Mo. 106, (Division 2, 1897) and by the Kansas City Court of Appeals in Aiken v. Sidney Steel Scraper Co.(1917) 197 Mo. App. 673, 678, 198 S.W. 1139, (See also opinion to Honorable James P. Hawkins by the Attorney General under date of November 12, 1940).

The above conclusion is not in contradiction to the decision of the Missouri Supreme Court in the case of State ex inf. v. Schweitzer, 258 S.W. 435, (En Banc 1924) since that case concerned an entirely different statute applying to prosecuting attorneys and in that case the court cited with approval the Amick case, supra, Likewise the case of State ex rel. Hostetter, 137 Mo. 636, 39 S.W. 270, which deals with vacancies in the office of county clerk, is not authority for a holding contrary to that here expressed since in that case the successor did not qualify until January 4 following the election and the court based its decision upon the question of whether or not a woman could qualify to fill the office and did not consider the possibility of the incumbent's term having ended at the date of the general election. Also the case of State ex inf. v. Herring, 208 Mo. 708, 106 S.W. 984, (Division No. 2, 1907) considered the filling of a vacancy under a statute which was the forerunner of our present statute, Section 105.030, as applied to the vacancy in the office of county collector and does not require a holding different to that set out above.

In the general election to be held in 1954, the regular term for the office of county clerk is to be filled. The person who is

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elected to such regular term at such general election cannot assume his duties prior to the first day of January mext after his election since such is the commencing date of his regular term as specifically provided by Section 51.020, quoted above, and since if he were to enter upon the duties of his office sooner such action would be in contravention of Article VI, Section 10 of the Constitution of Missouri, 1945, above quoted. See State ex inf. v. Herring, 208 Mo. 708, supra.

Thus it would appear that under the constitutional and statutory provisions so far considered the term of the person appointed to fill the vacancy by the Governor will expire on the day after the general election held in 1954, and the term of office of the person elected to fill the regular term at such election will not begin until the first day of January, 1955. It would appear from the statute that it was the contemplation of the Legislature that at such general election in 1954 one should be elected to fill the short term from the date of such election to the first of the following year. The statute, Section 51.090, specifically provides for filling the vacancies by appointment of the Governor until the next general election "at which time a clerk shall be chosen for the remainder of the term. No provision of the Constitution or statutes has been found which would prohibit either the Governor's appointee or the candidate for the regular term from being a candidate for this short term and likewise there is nothing to prevent the Governor's appointee from being a candidate for the regular term.

The constitutional and statutory provisions quoted at the first of this opinion providing that all officials including those appointed to fill vacancies by the Governor shall serve until their successors are appointed or elected and qualified, do not change this conclusion since it appears to be the meaning of Section 51.090 that a successor for the remainder of the term shall be elected at the general election in 1954. These provisions would allow the appointee to continue in office until such successor qualified and if there were no one elected for the short term between November 1954, and January 1, 1955, the one previously appointed by the Governor could hold over and act during such time even though the official term would have ended on the day after the general election in 1954.

It also appears that during said period he would at least be a de facto officer and his actions during such period would be legal. See Aiken v. Sidney Steel Scraper Co., supra, where the Court of Appeals said, lc. 679, 680:

"But the question remains, whether having acted, unchallenged, his acts are not valid, under the rule relating to de facto officers. We think, undoubtedly, in all official actions had by him in the few weeks between the election

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and the first Monday in Jamuary, 1917, which were not objected to on the ground that he was not clothed with official authority, his acts are valid. * * **

CONCLUSION

For the reasons above given it is the opinion of this office that the term of one appointed by the Governor to fill a vacancy in the office of county clerk would expire at the date of the general election to be held in 1954; that he can remain in office until his successor is elected and qualified; that the statute requires that a successor for the remainder of the term be elected at such election to serve from the date thereof until January 1, 1955; and that the person elected at such election for the regular term cannot qualify and enter upon the duties of such office until January 1, 1955.

This opinion, which I hereby approve, was written by my assistant Mr. Fred L. Howard.

Yours very truly,

JOHN M. DALTON Attorney General

FLH:mw

ELECTIONS:

No constitutional or statutory provisions to prevent the use of voting machines as provided by Senate Committee Substitute for Senate Bills Nos. 134 and 135.

July 6, 1953



Honorable Michael J. Doherty Chairman Board of Election Commissioners For the City of St. Louis 208 South 12th Boulevard St. Louis 2, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"The Election Board of the City of St. Louis has obtained copies of Senate Bills Nos. 134 and 135 which it understands have been passed by the Missouri Sixty-Seventh General Assembly.

"It is also understood by said Board that these Bills will become effective prior to September 1, 1953.

"It has been proposed that a Bond Issue election be held in the City of St. Louis in September, 1953.

"Sections 22, 23, 24 and 25 of said Bills above referred to contain particular provisions with reference to election laws in force at the time of the passage of said Bills.

"The Election Board of the City of St. Louis requests your official

opinion as to whether any statutory or constitutional restriction such as the provision that each ballot be numbered would prevent it from properly using at such September Bond Issue election or subsequent elections, voting machines if the provisions of said Bills Nos. 134 and 135 were otherwise properly complied with."

You inquire whether any constitutional or statutory provisions such as the provision that each ballot shall be numbered would prevent the use of voting machines in elections as authorized by Senate Committee Substitute for Senate Bills Nos. 134 and 135, passed by the Sixty-seventh General Assembly, and approved by the Governor, May 29, 1953. Since said bill does not contain an emergency clause it will not become effective until ninety days after the adjournment of the session, which date was May 31, 1953.

Section 3 of Article VIII of the Constitution of Missouri 1945, prescribes the methods of voting as follows:

"All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted: provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted compared with the list of voters and received as evidence."

(Emphasis ours.)

This provision allows two distinctive methods of voting, its terms being expressly in the disjunctive. 1. by ballot, 2. by any mechanical method as provided by law. Said section further provides that every ballot voted shall be numbered, etc. It is our opinion that this requirement applies only to ballots cast in the customary and established manner and not to votes cast by the use of mechanical devices as may be authorized by law. We find no other constitutional provision which would prohibit the use of voting machines.

The question of possible conflict between existing statutory, charter and ordinance provisions relating to voting procedure and the use of voting machines has received the consideration of the General Assembly. Sections 24 and 25 of Senate Committee Substitute for Senate Bills Nos. 134 and 135 provide as follows:

"Section 24. The provisions of all state laws relating to elections and of any city charter or ordinance not inconsistent with this chapter shall apply to all elections in districts or precincts where voting machines are used.

"Section 25. Any provision of law, or of any city charter, or ordinance which conflicts with the use of voting machines set forth in this act, shall not apply to districts, wards, or precincts in which voting machines are used. All acts, or parts of acts, or city charters, or ordinances, in conflict with any of the provisions of this act, are of no force or effect in election districts, wards or precincts where voting machines are used."

Under the above provisions all state laws, charter or ordinance provisions relating to elections, and which are not in conflict with the use of voting machines, shall apply to elections in districts or precincts where voting machines are used. In the event of conflicts, such provisions are of no force or effect. Said provisions clearly indicate the legislative intention that the provisions of the Bill should be construed to prevail over other inconsistent provisions and we so view it.

Honorable Michael J. Doherty

CONCLUSION

Therefore, in the premises, it is the opinion of this office that there are no existing constitutional or statutory provisions which would prevent the use of voting machines after Senate Committee Substitute for Senate Bills Nos. 134 and 135 of the Sixty-seventh General Assembly becomes effective and its provisions are otherwise complied with.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General SUPPORT OF DEPENDENTS: EXTRADITION:

Uniform Support of Dependents Law does not obligate the state to pay costs incident to extradition for the crime of failing to support.



October 29, 1953

Honorable John E. Downs Prosecuting Attorney Buchanan County St. Joseph, Missouri

Attention: Mr. Frank D. Connett, Jr.
Assistant Prosecuting Atterney

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"This office would like to know whether Section 454.450 R.S. Mo., 1949 effective August 29, 1953, which reads in part as follows:

'The Governor of this State may (1) demand from the governor of any other state the surrender of any person found in such other state who is charged in this state with the crime of failing to provide for the support of an obligee in this state;'

"My question is this: Does this mean that the governor of this state will now pay the cost of extradition of a person charged with the failure to support under Section 559.350 of Missouri R.S., 1949, even though Section makes the crime a misdemeanor?"

You refer to Section 454.450, RSMo. 1949, effective August 29, 1953, however, we believe that you mean Section 454.050, Mo. RS Cum. Supp. 1951. While the 67th General Assembly did in effect amend some provisions of the Uniform Support of Dependents Law, so far as we are able to ascertain Section 454.050, referred to remains

Hon. John E. Downs

unchanged. Said section provides as follows:

"The governor of this state may:

- "(1) Demand from the governor of any other state the surrender of any person found in such other state who is charged in this state with the crime of failing to provide for the support of an obligee in this state; and
- "(2) May surrender on demand by the governor of any other state any person found in this state who is charged in such other state with the crime of failing to provide for the support of an obligee in such other state. The provision for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he has not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or the other state."

This provision sets out the procedure for the extradition of persons charged in this state with the crime of failing to support. Paragraph (1) provides that the Governor may demand from the Governor of any other state the surrender of a person charged with the crime of failing to support. This provision in itself confers upon the Governor no new power not already possessed under the provision of Chapter 548, RSMo. 1949, and applicable federal extradition laws.

Paragraph (2) authorizes the Governor on demand of the Governor of another state to surrender a person charged with the crime of failing to support. Again, this in itself confers no new power not already possessed by the Governor. However, this section further provides that the demand, oath, etc., need not state or show that a person whose surrender is sought is a fugitive from justice, or, at the time of the commission of the crime, in the demanding state. This, of course, is a far less stringent procedure than existed under prior extradition authority.

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Conversely, it is to be assumed that the Governor of this state in making a demand upon a Governor of another state which has a similar law, need not show that the person sought was in the demanding state at the time of the commission of the crime or that he fled therefrom. As we view this provision it is fully consistent with, and should be construed along with, already existing provisions relating to extradition.

The Uniform Support of Dependents Law does not attempt to establish a new method of paying the costs of extradition or even refer to such item.

Section 454.030, RSMo. 1949, specifically provides that "the remedies herein provided are in addition to, and not in substitution for, any other remedies."

It has been for many years the duty of the county to pay the expenses incident to the extradition of the person charged under the provisions of Section 559.350, RSMo. 1949, (Grime of failing to support). See Sections 548.220 and 548.230, RSMo. 1949. We find nothing in the Uniform Support of Dependents Law which would abrogate or relieve the county of this obligation and place such obligation upon the state.

CONCLUSION

Therefore, it is the opinion of this office that the Uniform Support of Dependents Law does not place upon the state the obligation of paying the costs incident to an extradition for the crime of failing to support as provided in Section 559.350, RSMo. 1949 but that the obligation of paying these costs rests, as in the past, with the county.

This opinion which I hereby approve was written by my assistant, Mr. D. D. Guffey.

Respectfully submitted,

DDG:mw

JOHN M. DALTON Attorney General CORPORATIONS: EMPLOYEES!

COMPENSATION: PAYMENT PERIOD:

No Missouri statutes require any corporation doing business in state to pay compensation to employees as often as once each week.



March 5, 1953

Honorable L. L. Duncan Division of Industrial Inspection Department of Labor and Industrial Relations Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which request reads as follows:

> "In regard to your request for clarification of the question for which we recently asked you to write an opinion, please be advised that the specific inquiry is as follows:

"Is there any statute or statutes of the State of Missouri which requires that employees of a corporation doing business in this State shall be paid weekly."

Section 290.090, RSMo 1949, provides that the employees of all manufactories operated within this state shall be paid in full for all wages due them at least once in every fifteen days. Said section reads as follows:

> "The employees of the operators of all manufactories, including plate glass manufactories, operated within this state shall be regularly paid in full of all wages due them at least once in every fifteen days, in lawful money, and at no pay day shall there be withheld from the earnings of any employees

Honorable L. L. Duncan

any sum to exceed the amount due him for his labor for five days next preceding any such pay day. Any such operator who fails and refuses to pay his employees, their agents, assigns or anyone duly authorized to collect such wages, as in this section provided, shall become immediately liable to any such employee, his agents or assigns for an amount double the sum due such employee at the time of such failure to pay the wages due, to be recovered by civil action in any court of competent jurisdiction within this state, and no employee, within the meaning of this section, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions hereof."

Section 444.270, RSMo 1949, provides that all persons or corporations engaged in any mining business within this state shall pay their employees' wages once in every fifteen days. Said section reads as follows:

- "l. All persons or corporations engaged in operating any mines, stone or granite quarries in this state shall pay their employees once in every fifteen days in lawful money of the United States, and at no pay day shall there be withheld any of the earnings due any such employee; provided, persons or corporations operating coal mines may withhold not to exceed five days of the earnings of employees.
- "2. Any such operator or employer failing or refusing to pay his employees, their agents or assigns or anyone duly authorized to collect such wages as in this section provided, shall become immediately liable to such employees, his agent, assigns or anyone authorized to collect such wages for an amount double the sum due such employees at the time of such failure or refusal to pay the amount due, to be recovered by civil action in any court of competent jurisdiction within this state."

Section 290.080, RSMo 1949, provides that all corporations doing business in this state shall pay their mechanics, laborers, or other servants as often as semi-monthly, and reads as follows:

Honorable L. L. Duncan

"All corporations doing business in this state, and all persons operating railroads or railroad shops in this state, which shall employ any mechanics, laborers or other servants, shall pay the wages of such employees as often as semi-monthly. Such corporations and persons shall either, as a part of the check, draft or voucher paying the wages, or separately, furnish the employee at least once a month a statement showing the total amount of deductions for the period. Any corporation or person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars. nor more than five hundred dollars, for each offense."

From the provisions of the above quoted statutes it is apparent that only three types of employers and employees have been referred to; namely, manufacturing, as provided by Section 290.090, supra; mining, as provided by Section 44.270, supra; and all other corporations not included in the two former classes, and which are referred to in Section 290.080, supra.

The employees covered by above quoted statutes are required to be paid at least once semi-monthly, or once in every fifteen days, depending upon the statutory provisions applicable to each business, as previously noted.

It is therefore our thought that no Missouri statutes require any corporation doing business within the state to pay its employees as often as once each week.

CONCLUSION

It is therefore, the opinion of this department that no Missouri statutes require any corporation doing business within the state to pay wages or other compensation to its employees as often as once each week.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General EMPLOYEES: HOLIDAYS: WAGES: Missouri statutes do not require extra compensation to employees of private persons or corporations for work performed on Missouri public holidays listed.



March 23, 1953

Honorable L. L. Duncan
Director
Division of Industrial Inspection
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Mr. Duncan:

Your letter of February 3, 1953, requesting an official opinion of this office, was phrased as follows:

"On numerous occasions requests have come to this department, such as the one you will please find attached to this letter.

"This department desires an opinion concerning this matter."

The letter which you attached is quoted:

"Missouri Division of Employment Security, Box 59, Jefferson City, Mo.

Re: Accounty No. 15688 096 5131

"Gentlemen:

"We wish to bring our records up to date. What holidays in your State are we required to pay other than straight time should an employee work on any one of them?

Very truly yours,

Star Expansion Bolt Company B. W. Cole Treasurer" Honorable L. L. Duncan

Section 10.010, RSMo 1949, designates the following holidays:

"The following days, namely: The first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the first Monday in September, the eleventh day of November, any general primary election day, any general state election day, any thanksgiving day appointed by the President of the United States or by the governor of this state, and the twenty-fifth of December, are hereby declared and established public holidays; and when any of such holidays falls upon Sunday, the Monday next following shall be considered such holiday."

Section 10.020, RSMo 1949, declares the twelfth day of October to be a public holiday:

"The twelfth day of October of the year of our Lord 1909, and the twelfth day of October of each year thereafter, is hereby declared a public holiday, to be known as 'Columbus Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing or interfere with judicial proceedings."

Section 10.030, RSMo 1949, declares the thirteenth day of April to be a public holiday:

"The thirteenth day of April of the year 1932, and the thirteenth day of April of each year thereafter is hereby declared a public holiday to be known as 'Jefferson Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing, or to interfere with judicial proceedings."

Section 10.050, RSMo 1949, declares the twelfth day of February to be a public holiday:

"The twelfth day of February of the year 1916, and the twelfth day of February of each year thereafter, is hereby declared a public holiday, to be known as 'Lincoln Day,' and the same shall be recognized, classed and treated as other legal holidays under the laws of this state; provided, that this section shall not be construed to affect commercial paper, the making or execution of agreements or instruments in writing, or to interfere with judicial proceedings."

Section 117.240, RSMo 1949, declares certain election days in Kansas City to be legal holidays.

"The days upon which the general, state, county or primary elections shall hereafter be held in such city shall be holidays and shall, for all purposes whatever as regards presenting for payment or acceptance and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes and as regards days of grace upon commercial paper be treated and considered as is the first day of the week, commonly called Sunday."

Section 118.180, RSMo 1949, declares certain election days in St. Louis to be legal holidays, and reads as follows:

"The days upon which the general, state, county or primary elections shall hereafter be held in such city shall be legal holidays and shall for all purposes whatever as regards presenting for payment or acceptance and the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes and as regards days of grace upon commercial paper be treated and considered as is the first day of the week, commonly called Sunday."

Although Sections 10.020, 10.030 and 10.050 do not expressly provide that when the declared holidays falls on Sunday, that the following Monday shall be considered such holiday, the Kansas City Court of Appeals, in Byrne Real Estate Co. v. Welsh, et al., 215 Mo. App. 652, predicated their express decision that the Monday following a Columbus Day which was on Sunday was a public holiday, upon the clause "and the same shall be recognized, classed and treated as other legal holidays under the laws of this state," which clause appears in the Lincoln Day, Jefferson Day, and Columbus Day

Honorable L. L. Duncan

statutes; we quote the court, (1. c. 661):

"* * *It is apparent that when section 5849 (now 10.020) refers to other legal holidays it refers to the general holidays theretofore existing and mentioned in section 5848 (now section 10.010) and says that Columbus Day shall be recognized, classed and treated as the holidays mentioned in said last-mentioned section. This is broad language and if we give it full meaning, we must construe it as providing that if Columbus Day falls on Sunday the following Monday shall be considered the holiday, precisely as those holidays mentioned in section 5848. * * * (now 10.010)"

The days listed in the above quoted statutes are the only holidays declared by Missouri statutes.

There is no provision under Missouri law for extra compensation to employees of private persons or corporations who work on such holidavs.

CONCLUSION

It is therefore, the opinion of this office that:

- (1) The following days are public holidays in Missouri:
 - (a) First day of January;
 - (b) Twelfth day of February;
 - (c) Twenty-second day of February;
 - Thirteenth day of April:
 - Thirtieth day of May; Fourth day of July; (e)
 - (f) (g) First Monday in September;
 - (h) Twelfth day of October; Eleventh day of November;
 - (j) (k) Any general primary election day;

 - Any general state election day; Any Thanksgiving Day appointed by the President of the United States or by (1)the Governor of this state:
 - Twenty-fifth day of December.

When any of such holidays falls upon Sunday, the Monday next following shall be considered such holiday.

(2) Missouri law does not require extra compensation to employees of private persons or corporations for labor performed on Honorable L. L. Duncan

public holidays.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

MATTRESSES: USED BEDDING: Section 421.070: RSMo. 1949:

Section 421.070, RSMo. 1949, regulates the sale of used bedding only. Said section does not regulate SALE OF USED BEDDING: the renting of used bedding.

JOHN M. DALTON XXXXXXXXX



April 13, 1953

XXXXXXX

Mr. L. L. Duncan Director, Division of Industrial Inspection Department of Labor and Industrial Relations Jefferson City, Missouri

J. C. Johnsen

Dear Mr. Duncan:

This opinion is rendered in accordance with your recent request relative to Section 421.070, RSMo. 1949, and the question posed in the attached letter of Mr. H. H. Goetze, under the date of January 22, 1953, the pertinent part taken from Mr. Goetze's letter, is as follows:

> "If that is the case, kindly give me your interpretation of the following wording in the very chapter you refer me to. Elsewhere, mattresses are defined as bedding. On Page 38, Paragraph 421.070 reads 'No person shall deliver or have in his possession with intent to deliver any bedding which has been used unless the said bedding shall be first thoroughly sterilized by a process approved by the Division of Health. If you can rent out for use without delivering, I wish you would please tell me how you can do it."

Section 421.070, RSMo. 1949, reads as follows:

"No person shall sell, offer for sale, deliver, consign for sale, or have in his possession with intent to sell, deliver or consign for sale, any article of bedding which has been used unless the said article of bedding shall first be thoroughly sterilized and disinfected by a process approved by the division of health."

Mr. L. L. Duncan

After studying the above set-out section it is our opinion that the statute applies to only the sale, offering for sale, delivering or consigning for sale or having in possession with the intent to sell, any article of bedding which has been used the said article or articles shall first have been sterilized and disinfected by a process approved by the Division of Health. Therefore, you see it only has to do with the selling of bedding and not with its rental.

The word "delivery" has acquired a fixed meaning in law. When used regarding a delivery upon a sale it means the permanent transfer of the title of the article sold from the seller to the buyer. Where delivery is made upon an article rented there is no transfer of title or ownership of the article delivered only a temporary transfer of its possession and use from the owner to the renter, the article to be returned to the owner.

We, after a thorough search, have been unable to find any statute regulating the sterilization and disinfection of used bedding which is rented.

CONCLUSION

It is, therefore, the opinion of this department that Section 421.070, supra, is a regulatory statute regulating the sale of used bedding only and does not regulate the rental of used bedding.

This opinion, which I hereby approve, was written by my assistant, Mr. A. Bertram Elam.

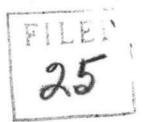
Yours very truly,

JOHN M. DALTON Attorney General STATE HOSPITAL ELEEMOSYNARY INSTITUTIONS:

WOMEN:

HOURS OF LABOR:

State hospitals are not "public institutions" within the meaning of Section 290.040, RSMo 1949.



April 17, 1953

Mr. L. L. Duncan
Director
Division of Industrial Inspection
Department of Labor and Industrial Relations
Jefferson City, Missouri

Dear Mr. Duncan:

We render herewith an opinion on your request of February 27, 1953, which request is as follows:

"On numerous occasions this department has been asked to interpret as to whether or not female State employees employed at the various State hospitals came under Section 290.040, Hours of Labor of female employees.

"This department requests an opinion as to whether or not they do come within the jurisdiction of this above mentioned section."

The section to which you refer, Section 290.040, RSMo 1949, reads as follows:

"No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the divers kinds of establishments and places of industry, herein described, or

Mr. L. L. Duncan

by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a number of days not to exceed ninety in any one year; provided further, that nothing in this section shall be construed and understood to apply to telephone companies."

The basic question involved in your request is whether peculiar problems raised by your request, the term "public institution, incorporated and unincorporated," as contemplated by the statute.

Although state hospitals appear to fit snugly into the judicial definitions of the term "public institution," it is a settled rule of statutory construction that a state and its agencies are not to be considered within the purview of a statute unless an intention to include them is clearly manifest. The rule is thus stated in 59 C.J., Statutes, Section 653, page 1103:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. * * *"

The rule should be especially applicable in construing a penal statute such as Section 290.040, RSMo 1949.

Mr. L. L. Duncan

The use of the phrase "public institution, incorporated or unincorporated," is not sufficiently clear and definite clearly to manifest a legislative intent to include state hospitals therein.

CONCLUSION

It is the opinion of this office that female employees of state hospitals in Missouri do not come within the provisions of Section 290.040, RSMo 1949.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

CHILD LABOR: Children 12 years or older not prohibited RADIO BROADCASTING: from participating in radio broadcasting.

JOHN M. DALTON



July 30, 1953

XXXXXXX

J. C. Johnsen

Mr. L. L. Duncan
Director, Division of
Industrial Inspection
Department of Labor and
Industrial Relations
Jefferson City, Missouri

Dear Mr. Duncan:

This is in answer to your letter of recent date requesting an official opinion of this department, which letter reads as follows:

"Quite often this department is called upon to interpret the State Child Labor Laws concerning the use of children, under the age of fourteen years, to participate and appear upon radio broadcasts.

"Is this a violation of the State Child Labor Laws? This department requests an opinion on this matter."

Section 294.010, RSMo. 1949, prohibits employment of a child in this state under the age of 14 years with certain exceptions. Said section reads as follows:

"It shall be unlawful for any child in this state under the age of fourteen years to be employed, permitted or suffered to work at any gainful occupation except in:

- "(1) The sale and distribution of newspapers, magazines and periodicals;
- "(2) Agricultural labor and domestic service; or

"(3) Any service performed for parent or guardian."

Section 294.020, RSMo. 1949, enacted in the same bill with Section 294.010, supra, however, provides that in certain circumstances children between the ages of 12 and 16 years may be gainfully employed. Such section provides as follows:

"It shall be unlawful for any child in this state under the age of sixteen years to be employed, permitted or suffered to work at any gainful occupation unless such employment is authorized as in this chapter, or otherwise by law provided; provided, that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

A child 12 years or older therefore, may be employed, permitted or suffered to work at a gainful occupation, if the requirements of Section 294.020 are complied with and no other prohibitory sections are violated. It is our view that there are no provisions prohibiting the employment of children of 12 years and over in radio broadcasting as such in Sections 294.040, 292.040, 564.670 or 564.680 of the Revised Statutes of Missouri, 1949.

Of course all the provisions of Chapter 294 relative to such employment must be complied with. This opinion refers, of course, only to those children who are employed to take part and participate in radio broadcasting.

CONCLUSION

It is the opinion of this office that a child 12 years or older may be employed to participate in and appear upon radio broadcasts if all requirements found in Section 294 RSMo. 1949, are complied with.

This opinion, which I hereby approve, was written by my assistant, Mr. C. B. Burns, Jr.

Yours very truly,

CBB:mw

JOHN M. DALTON Attorney General

EMBALMING:

BOARD OF: DEATH CERTIFICATE: VITAL STATISTICS: No legal requirement that a licensed embalmer sign death certificate of one not embalmed.



January 13, 1953 1-21-53

Hon. Henry G. Edwards, Secretary Missouri State Board of Embalming Bevier, Missouri

Dear Mr. Edwards:

This is in reply to your request for an opinion which we restate as follows:

Is it necessary that a licensed embalmer sign the back of the death certificate in the case of bodies which are not embalmed?

The general provision setting forth the requirements as to the forms of certificates is found in Section 193.160 RSMo 1949 and is as follows:

"The forms of certificates shall include as a minimum the items required by the respective standard certificates as recommended by the national office of vital statistics subject to approval of and modification by the division. The form and use of such certificate shall be subject to the provisions of section 193.240."

Hon. Henry G. Edwards

The section making provision for the signing of death certificates is Section 193.240, RSMo 1949 which reads as follows:

"The records and files of the bureau of vital statistics are open to inspection, subject to the provisions of this law and regulations of the division; but it is unlawful for any officer or employee of the state to disclose data contained in vital statistical records, except as authorized by this law and by the division.

- "2. Disclosure of illegitimacy of birth or of information from which it can be ascertained, may be made only upon order of a court in a case where such information is necessary for the determination of personal or property rights and then only for such purpose; or upon the request of the individual whose birth registration is involved, when such information is necessary to the extablishment of any claim against the federal government.
- "3. The state registrar shall not permit inspection of the records or issue a certified copy of a certificate or part thereof unless he is satisfied that the applicant therefor has a direct interest in the matter recorded and that the information therein contained is necessary for the determination of personal or property rights. His decision shall be subject, however, to review by the division or a court under the limitations of this section.
- "4. The division may permit the use of data contained in vital statistical records for research purposes only, but no identifying use thereof shall be made.
- "5. Subject to the provisions of this section the division may direct local

Hon. Henry G. Edwards

registrars to make a return upon the filing of birth, death and stillbirth certificates with them of certain data shown thereon to federal, state or municipal agencies. Payment by such agencies for such services may be made through the state registrar to local registrars as the division shall direct."

We are unable to find either in the statutes or in the rules and regulations of the Division of Health any requirement that the death certificate of a person not embalmed be filled out by a licensed embalmer.

CONCLUSION

Therefore, it is the conclusion of this Department that there is no legal requirement that a licensed embalmer fill out a death certificate of a person not embalmed.

Respectfully submitted

JOHN R. BATY Assistant Attorney General

APPROVED:

JOHN M. DALTON ATTORNEY GENERAL

JMD: A

ELECTIONS: VOTING MACHINES:



1) Propositions to be voted upon should appear on the ballot in the same order in which they appear in petitions circulated among voters;

2) In precincts where voting machines are used there need be no rotation of the names of candidates; 3) Not legal to reconstruct election precincts so that each precinct would have approximately 800 voters instead of the number now provided by law.

December 16, 1953

Board of Election Commissioners Kansas City, Missouri.

Gentlemen:

This department is in receipt of your recent request for an official opinion. The opinion request reads as follows:

- "1. When there are to be five separate propositions to be submitted at a special bond election is there any requirement that the order of the propositions appear on the ballots in the same order as they appeared on the petitions which were circulated and signed by the requisit number of qualified voters and taxpayers of Kansas City, Missouri. In other words if the voting machine proposals appeared in numerical order 1 and 2 in the petitions and the provisions for the courthouse improvements and a new courthouse appeared as 3, 4 and 5 on the voter's petition would it be necessary to have these propositions appearing in the same order on the ballot.
- "This question has come up because the County Judges desire to place propositions three, four and five as it appeared on the petitions in numerical order one, two and three. This for the reason it would more readily come to the attention of the voters.
- "2. Under the new voting machine law there is no requirement made for the rotation of candidate's name as is presently required under Section 120.450 R.S.Mo. I 1949. The board should like to know if in the event voting machines are adopted would this conflict prevent the practicable application and use of such voting machines or does the voting machine law which was enacted subsequent to the above Section 120.450 supersede the above section in so far as it conflicts therewith.
- "3. The election board has found by research and survey that it would be practical to divide the voting precinct into numbers approximating eight-hundred voters each and

that would be the plan in the event voting machines are adopted. However, Section 117.200 would seem to restrict the number of voters in a section to approximately five-hundred. Therefore, the board would like to know if they are required to restrict the number of precincts to five hundred voters in view of the fact they will be operating under the new voting machine law which was passed subsequent to 117.200. It might be pointed out that there is no provision for the number of voters in a voting precinct under the new voting machine law.

"We would appreciate your opinion on the above matters as soon as practicable."

Your first question is whether the five separate propositions to be voted on must appear on the ballot in the same order in which they appeared on the petition which was circulated for signature by voters, or whether that order can be changed.

In answer to this question we will state that we have been unable to find any law which directly or indirectly indicates that the order in which propositions appear on a circulated petition is the order in which such propositions must appear on the ballot. In the absence of any directive in this matter we feel that the order of the propositions in the petition should be maintained on the ballot. We believe, therefore, that the five propositions which you mention should appear upon the ballot in the order in which they appeared in the petitions.

Your second question is whether, when voting is by means of a voting machine, there must be a rotation of the names of candidates such as is required by Section 120.450, RSMo 1949.

We believe that there need not now be compliance with Section 120.450, supra, insofar as the rotation of names is concerned. In an opinion rendered on July 6, 1953, to Honorable Michael J.Doherty, Chairman, Board of Election Commissioners of St. Louis, a copy of which is enclosed, we held that the constitutional provision which requires that ballots be numbered did not apply when voting was by machine. This holding was bottomed upon the theory that the Constitution (Section 3, Article IV) provides one procedure when voting is by ballot and another procedure when voting is by machine, and that the procedure of voting by ballot does not apply to machine voting when there is a conflict between the two procedures.

In this regard Paragraph 4 of Section 8 of Senate Bills Nos. 134 and 135, reads as follows:

"The order of the arrangement of parties and candidates shall be as now provided by law not in conflict herewith except that the conditions for nomination for any one office at any primary election shall be listed in the order of filing, and the order of the arrangement of the parties on the state and county primary elections shall be as now provided by law for general elections."

We here call particular attention to the word "conditions" above. In the position in which it is placed we are unable to attribute any meaning to it. We feel that it is a typographical error and that the word intended was "candidates". We shall, therefore, proceed on the assumption that the word meant is "candidates". The paragraph would then read:

"The order of the arrangement of parties and candidates shall be as now provided by law not in conflict here with except that the candidates for nomination for any one office at any primary election shall be listed in the order of filing, and the order of the arrangement of the parties on the state and county primary elections shall be as now provided by law for general elections."

(Emphasis ours.)

The underlined portion of the above paragraph is believed to be in direct conflict with the provision of Section 120.450, supra, which requires rotation of names, and since it is in conflict prevails in view of Sections 22, 23 and 24 of the Voting Machine Law which sections read as follows:

"Section 22. All of the election laws now in force, and not inconsistent with the provisions of this act, shall apply with full force and effect to elections in cities and counties using voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures.

"Section 23. Where voting machines have been adopted under the provisions of this act for use at general or special elections, such machines may be used at primary elections. When so used all provisions of the law applying to their use at general or special elections not inconsistent with the provisions of this act, and all provisions of this act so far as applicable shall apply to the use of such voting machines at such primary elections.

"Section 24. The provisions of all state laws relating to elections and of any city charter or ordinance not inconsistent with this chapter shall apply to all elections in districts or precincts where voting machines are used."

And finally, we direct attention to Section 7 of the Voting Machine Law, which states that: "Any kind or type of voting machine shall be approved which is so constructed as to fulfill the following requirements:", after which is a list of thirteen requirements none of which touches upon the matter of rotation of names. It is, therefore, our belief that when voting is by a machine, rotation of names of candidates is not necessary.

Your third question is whether, if voting machines are adopted, it would be legal to divide the voting precincts in numbers of approximately eight hundred voters each instead of having approximately five hundred voters in each precinct as is now provided by Section 117.200, RSMO 1949.

We here note that Section 117.200 RSMo 1949 was repealed by Senate Bill 111 which was enacted by the 66th General Assembly. However, this section, which was re-enacted as Section 117.190, does not change the repealed section in respect to the number of voters in a precinct.

It is our opinion that these precincts could not be changed to have approximately eight hundred voters each instead of the five hundred which is now provided by Section 117.190, supra.

As we have pointed out above, and as is pointed out in the Doherty opinion, a copy of which is enclosed, when there is a conflict between State laws relating to elections and the Voting Machine Law, the latter law shall prevail in those places where voting machines are used, but that State laws which are not in conflict with any of the provisions of the Voting Machine Law shall apply to elections in precincts where voting machines are used. Since, as you point out, there is no provision in the Voting Machine Law regarding the voters in a precinct, there can be no conflict with the provisions of Section 117.190, supra, that this number shall be approximately five hundred, and accordingly, Section 117.190 will apply in precincts where voting machines are used.

CONCLUSION

It is the opinion of this department:

1) That propositions to be voted upon should appear on the ballot in the same order in which they appear in petitions

Board of Election Commissioners

circulated anong voters;

- 2) That in those precincts where voting machines are used there need be no rotation of the names of candidates;
- 3) That it would not be legal to redistrict election precincts so that each precinct would have approximately eight hundred voters instead of the number which is now provided by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON Attorney General ARMORIES; ADJUTANT GENERAL; AND DEEDS: Conditions and limitations in deeds reserving control under armories for non-military uses not affected by subsequent law vesting control in the adjutant general.



January 8, 1953 - 1-9-53

C. H. Engelbrecht Colonel, AUS (Ret.) Director of Facilities Adjutant General's Office Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion which is as follows:

"A number of the deeds covering sites on which state-owned armories were erected under the WPA Program, and authorized by the 59th and 60th General Assemblies, contain reservations in favor of the local governmental unit or agency providing the site.

"These reservations in some instances, vest the control and management of the building for non military use in the local agency.

"A copy of one such deed, that at
Kennett, Missouri, is enclosed and your
opinion is requested as to what affect
the provisions of Sec. 23.13 (Page 8)
of the act approved 9 October 1951,
designed as H. B. 133, 66th General Assembly has on the easements and reservations contained in the enclosed deed."

House Bill 133 of the 66th General Assembly is to be found in Laws of Missouri, 1951, and, in particular, Section 33 (13) thereof at page 660, which is as follows:

"He shall have control of all armories that are owned, erected, purchased, leased or provided by the state. The adjutant general, in the name of the state of Missouri, may accuire by purchase and may receive by donation or dedication any

property which may be used for military purposes. For the control and management of armories described in this section, the adjutant general may establish armory boards, the personnel of which shall serve without pay. Such boards, subject to the direction of the adjutant general, shall control, manage and supervise all activities in such armories and may rent such armories to persons or organizations not connected with the organized militia."

The primary and fundamental factor in construction of a statute is the ascertainment of lawmakers' intention. Turner v. Kansas City, 191 S.W. (2d) 612, 354 Missouri 857. It is to be noted that the deed which accompanied the request for an opinion provided for certain conditions and limitations. This deed was given under Section 643 R.S. 1929. Reenacted, Laws 1933, p. 251. That section reads as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the state board of education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said board, so that the right and title to shall pass to and vest in this state; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish the commission heretofore created to accept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the state board of education."

Therefore, it is to be seen that the deed to the land upon which the armory was later constructed was accepted by the state on the terms, conditions and limitations set forth in said deed. Since the acquisition and construction

of the amory, these conditions and limitations have been in force and effect. We do not believe that it was the intention of the legislature to remove such terms, conditions or limitations found in such deeds by the enactment of House Bill 133. We believe that the correct construction to be placed on this statute is that the adjutant general has control of armories subject to valid conditions and limitations contained in deeds to the land on which the armories are located. We do not believe that the import of House Bill 133 is to remove those conditions and to grant full control in the adjutant general without regard to the conditions and limitations contained in the deeds conveying the property to the State of Missouri.

CONCLUSION.

Therefore it is the opinion of this department that reservations in deeds vesting control and management of armory buildings for nonmilitary use in a local agency have not been offected by House Bill 133 of the ooth General Assembly providing generally that control and management of armories shall be under the control of the adjutant general.

a

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

Attorney General

JRB:sw

ADJUTANT GENERAL'S OFFICE: TITLE:

Examination of quitclaim deed and abstract of title to land located in Mexico, Mo., as site for construction of two-place hangar for Army liaison aircraft.

JOHN M. DALTON



January 21, 1953



Colonel C. H. Engelbrecht Director of Facilities Adjutant General's Office Jefferson City, Missouri

Dear Col. Engelbrecht:

This will acknowledge receipt of your request to examine the two enclosed abstracts of title, compiled and certified to by the Audrain County Abstract Company under date of July 29, 1952, to the following described land located in Audrain County, Missouri:

"Commence at the Northeast corner of Section Thirty-two (32) of Township Fifty-one (51) North, Range Eight (8) West, in Audrain County, Missouri, and run West along the North line of said section six hundred sixty (660) feet, thence South forty (40) feet, more or less, to the South line of the right of way of U.S. Highway 54, and thence South two hundred seventy (270) feet for the point of beginning. Run thence West one hundred fifty (150) feet, thence South parallel to the East line of said section one hundred twenty (120) feet, thence East one hundred fifty (150) feet, and thence North parallel to the East line of said section one hundred twenty (120) feet to said point of beginning:"

Subsequent to your request to examine these abstracts of title and on September 17, 1952, we requested certain requirements be met before we could approve said abstracts of title. These requirements have now been met to conform with our request as of that date.

This is to certify that title to the real estate located in the City of Mexico, Audrain County, Missouri, and as described in Quitclaim Deed from the City of Mexico to the State of Missouri, dated the 12th day of January, 1953, is adequate, subject to no encumbrances, and vested in the State

John C. Johnsen

Col. C. H. Engelbrecht Page Two

of Missouri, under local laws and ordinances, to the use for which the facility is intended.

Respectfully submitted,

AUBREY R. HAMMETT, JR. Assistant Attorney General

APPROVED:

JOHN M. DALTON Attorney General

ARH: VLB

COUNTY CORONER:

Duty of county coroner in making a transcript of testimony at inquest proceedings involving several persons.



March 6, 1953

Honorable Irvin D. Emerson Assistant Prosecuting Attorney of Jefferson County Hillsboro, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"The county coroner here in Jefferson County has requested this office to obtain an opinion as to whether his duty requires him to make separate copies of transcript and jury verdict on each individual where the inquest on seventeen individuals was held jointly. A further question is whether the county court is liable for the costs of preparing separate transcripts or just one transcript covering the entire seventeen persons."

You inquire whether a county coroner of a county of the third class has the duty of making separate copies of a transcript of the evidence and jury verdict at an inquest involving several persons who came to their death at the same time and by the same casualty.

Section 58.260, RSMo 1949, authorizes a coroner to issue warrant to summon a coroner's jury. Other provisions authorizes the coroner to administer oaths to juries and witnesses. Section 58.350 provides that the evidence taken shall be reduced to writing as follows:

"The evidence of such witnesses shall be taken down in writing and subscribed by them, and if it relate to the trial of any person concerned in the death, then the

Honorable Irvin D. Emerson

coroner shall bind such witnesses, by recognizance, in a reasonable sum for their
appearance before the court having criminal
jurisdiction of the county where the felony
appears to have been committed, at the next
term of court thereof, there to give evidence;
and he shall return to the same court the inquisition, written evidence and recognizance
by him taken."

Section 58.360, RSMo 1949, provides that the jury verdict shall be in writing as follows:

"The jury having viewed the body, heard the evidence, and made all the inquiry in their power, shall draw up and deliver to the coroner their verdict upon the death under consideration, in writing under their hand, and the same shall be signed by the coroner."

The purpose of a coroner's inquest is to ascertain the cause of death. In the case of Boisliniere v. The Board of County Commissioners, 32 Mo. 375, the court said:

"The object of an inquest, of course, is to ascertain the cause of death - whether it was the result of violence or criminal agency; * * *."

In a case where several persons came to death at the same time and as a result of the same calamity, and the inquest is held jointly, the witnesses would be testifying as to the same cause and would return the same verdict. In such a case we are of the opinion that the coroner would be required to make but one transcript of the testimony.

You will note that Section 1.030, RSMo 1949, provides that whenever any person or party is described or referred to by words importing the singular number, several persons shall be deemed to be included. Said section provides in part as follows:

"2. When any subject matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

Honorable Irvin D. Emerson

Therefore, keeping in mind that the purpose of an inquest is to determine the cause of death and if the cause be a result of a common calamity, we believe that the term "body" as used in the law relating to a coroner, would include the plural and only one inquest would be held and therefore, only one transcript of the testimony would be required.

Having thus determined that the coroner would be required to make but one transcript, we believe that your second question stands answered since certainly the coroner would not be entitled to costs in any form for duties which he is not required to perform.

CONCLUSION

Therefore, it is the opinion of this office that where several persons come to their death at the same time by the same calamity, the coroner would only be required to make one transcript of the testimony and jury verdict at the inquest proceedings.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

APPROPRIATIONS FOR LEASE:

A state agency may enforce its option on the renewal of a lease beyond the period for which appropriations are made if new appropriations can be obtained for payment of the rentals for the renewal period.

JOHN M. DATTON

March 11, 1953

KXXXXXX

J. C. Johnson

Colonel C. H. Engelbrecht Director of Facilities Adjutant General's Office Jefferson City, Missouri

Dear Colonel Engelbrecht:

We have given careful consideration to your request for an opinion, which request is as follows:

"Enclosed herewith please find copy of a lease between the Central Broom Company of Jofferson City, Missouri, and the State of Missouri, covering a structure in Jefferson City new used as an armory.

"There is also enclosed, copy of a notification signed by both seller and buyer to the effect that said structure had been sold by Central Broom Company to Shryack-Hirst Grocery Company, and the lease assigned the buyer effective 30 September 1952.

"Further, there is enclosed a letter from the Shryack-Hirst Grocery Company wherein the new owner challenges the legality of the renewal clause. Said renewal clause has been used for many years in armory leases (we find no record as to when this form was first adopted) and seemingly the question as to whether this renewal clause is legal has never previously arisen.

"Your opinion is requested as to whether the renewal provision as set forth in Paragraph 5 of enclosed lease is binding upon the owner provided the State gives the required renewal notice." Colonel C. H. Engelbrecht -2-

The renewal clause of said lease is as follows:

"This lease may, at the option of the State of Missouri, be renewed from year to year at a fixed rental of three thousand dollars (33,000.00) per annum and otherwise upon the terms and conditions specified, provided notice be given in writing to the Lessor at least sixty (60) days before this lease or any renewal thereof would otherwise expire: Provided that no renewal thereof shall extend the period of occupancy of the promises beyond the 30th Day of June 1954."

The purchaser of the leased property questions the legality of this clause on the ground that "it does not legally fulfill the full obligation to both parties as there are no funds that can be appropriated for the payment of rent past the biennial ending June 30, 1953."

The Constitution of Missouri places certain restrictions upon the expenditure of public funds.

Section 23 of Article IV is as follows:

"Fiscal year-limitations on appropriations specification of amount and purpose. -- The fiscal year of the state and all its agencies shall be the twelve menths beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the 63rd General Assembly shall also make appropriations for the six months ending June 30, 1915. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose."

Section 28 of Article IV is as follows:

"Withdrawals from treasury--limitations on authority to incur obligations--certifications by comptroller and auditor--expiration of appropriations.--No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifics it for payment and

the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six menths after the end of the period for which made."

It seems that the Constitution makes it perfectly clear that the legislature cannot appropriate funds for expenditure beyond the current biannial period, and it has been held that a state agency cannot enter into contract for the expenditure of state funds after the end of said period. White v. Jones, 177 S.W. (2d) 603.

The case now under consideration, however, does not belong in this category. The renewal clause of the lease is not a contract already entered into. It is simply an option which may be exercised by the State if appropriations can be obtained in time to permit the State to give notice as required in said renewal clause. The Legislature, now in session, may appropriate funds for payment of the rentals for the year beginning July 1, 1953. The State then could make use of this option by giving notice in writing to the lessor at least sixty days before the lesse would otherwise expire.

CONCLUSION

It is the opinion of this office that the renewal alause contained in paragraph 5 of the lease made and entered into on the first day of July, 1951, by and between the Central Broom Company and the Adjutant General for the State of Missouri, is valid and may be enforced on the option of the State if appropriations for the renewal year can be obtained and notice given thereafter to the lessor as required in said renewal clause.

The foregoing opinion, which I hereby approve, was pre-

Very truly yours,

JOHN M. DALTON Attorney General TAXATION: Proceeds of erroneous sale for delinquent real property taxes to be reimbursed owner from county treasury.



May 1, 1953

Honorable Irvin D. Emerson Assistant Prosecuting Attorney Jefferson County Hillsboro, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"There has been an issue arise between the Collector of Jefferson County and the County Clerk of Jefferson County over who is obligated to pay the 1947 tax back where it has been collected once and also included again in a subsequent tax sale and the real owner wishes to redeem the tax certificate. The facts briefly stated are thus:

"The taxes on a tract of land in Jefferson County, Mo., described in the tax office as 8 acres being part of lots 4 and 5 of Survey 1972 * * * were in arrears for 1947, 1948, 1949, 1950, and 1951 up to the 24th day of December 1951, when the owner through an agent paid the taxes for the year 1947 which payment was not recorded paid on the Collector's books although a paid receipt was issued for such payment. On August 27, 1952, the Collector sold the above described property at a sale for \$65.00 * * * for the taxes due from 1947, 1948, 1949, 1950, and 1951. The owner now wishes to redeem the tax certificate.

"The question is whether Chapter 140

Section 530 applies to this situation and the year 1947 taxes should be paid out of the County Treasury or whether Chapter 140 Sections 300 and 340 apply and the Collector is liable on her bond to the real owner of the land for 1947 tax being included in the sale of his land for taxes?"

At the outset it becomes pertinent to determine the effect of the purported sale for the taxes for the year 1947 which in fact had been paid by the owner of the real property. That such payment had the effect of invalidating the sale for that year appears from the provisions of Section 140.530, RSMo 1949, which reads as follows:

"140.530. No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

(Emphasis ours.)

Apparently no actual "conveyance" of the real property described in the tax certificate of purchase, mentioned in your letter of inquiry, has been made by the collector. This being true, it seems that the provisions of Section 140.540, RSMo 1949, become controlling with respect to the procedure now to be followed. This statute reads as follows:

"140.540. 1. Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the

county treasury to the purchaser, his representatives or assigns, on the order of the county court. * * * "

(Emphasis ours.)

We assume, of course, that the 1947 taxes actually paid by the owner of the real property were duly accounted for by the county collector and transmitted to the county treasury. Should a contrary factual situation exist, then the owner of the real property would be relegated to an action against the collector and the sureties on his official bond for recovery.

CONCLUSION

In the premises, we are of the opinion that the refund of the proceeds arising from the sale of land erroneously included in a sale for delinquent taxes, by reason of such taxes having been paid prior to such sale, should be refunded to the owner of the real property out of the county treasury, under the provisions of Section 140.540, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB:1rt

COUNTY COUNSELOR

County court of Jackson County authorized to appoint county counselor for a term ending December 31, 1954.



February 4, 1953

Honorable Henry H. Fox, Jr. Judge of County Court Western District Court House Kansas City 6, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, which request reads as follows:

"During the month of July, 1952, the County Court of Jackson County made an order concurred in by the Eastern and Western Judges and voted against by the Presiding Judge, which order appointed the county counselor for Jackson County for a period of two years ending during the month of July, 1954. Since that time both the Eastern and Western Judges have been succeeded by the newly elected judges.

"It is contended by the county counselor, who is the recipient of this appointment, that the newly sworn county court, which became operative January 1st, 1953, can not alter that authority and that he can not be discharged from office until the expiration of the appointment. He further contends that if this court should move to discharge him and secure a new county counselor, he will litigate the matter in such a manner as to tie the hands of the court in making payment to other county offices.

"In particular, we call your attention to the phrase in Section 56.630, which reads as follows:

"And the county court shall appoint and commission as other officers are commissioned, a county counselor."

"My questions are as follows:

- "(1) Has the county court the authority to select a county counselor of its own choosing as of January 1st, 1953.
- "(2) Is there any method by which the court would be prohibited from paying other county officers in the event the answer to question one is in the affirmative.
- "(3) Aside from the statutory provisions for such other officers, what is the particular method by which officers of the county are commissioned.

"Your official opinion is requested regarding the above matters."

You have proposed three separate and distinct questions which we will answer in the same order as they appear in your opinion request. The first question which you have proposed is:

"(1) Has the county court the authority to select a county counselor of its own choosing as of January 1st, 1953."

The statutes relating to the office of county counselors and providing for the appointment of such official are found originally in the Laws of 1887, pages 129 to 131, inclusive. They first became the subject of construction by an appellate court in the case of State ex rel. Rosenthal v. Smiley et al., Judges, reported 263 S.W. at page 825. In that case, through inadvertence, it was held that the commencement of the term of the county counselor provided for in the statutes mentioned would, in each county affected by such statutes, be the date upon which the original appointment was first made.

It was further held that the term of two years therein provided for would expire two years from the date of such original appointment, and that each successive term would be related to such original term in continuity. With respect to this portion of the opinion the court reached an erroneous conclusion as appears from a subsequent opinion of the same court in the case of State ex rel. Jones v. Smiley et al., Judges, reported 300 S.W. 459. The reason for such later declaration by the court appears from the opinion in the last case mentioned. We direct your attention to the following excerpt from the opinion, l.c. 464:

"The right result was reached in the Rosenthal Case in ruling that the new county court, coming into office on January 1, 1923, could appoint a county counselor. The opinion was in error, however (as we now see in view of section 2, Laws of 1887, p. 130, which was not repealed by the revising act of 1889), in holding that the term of office of the county counselor of St. Louis county then established and which began on December 1, 1922, continued for two years thereafter.

"In construing only sections 783, 784, and 786, R. S. 1919, the opinion in the Rosenthal Case was eminently correct. The existence of section 2, Laws of 1887, p. 130, as a valid and existing statute, was not suggested by counsel for either party, and certainly was not known to counsel contending for the validity of the order of the county court made January 2, 1923, else its existence would have been suggested. The judges of this court have enough to do without tracing the origin and subsequent history of statutes presented for construction, when no question concerning such origin and history is presented by counsel.

"As section 2, laws of 1887, p. 130, is still a valid and existing law and

fixes the term of the office of county counselor of St. Louis county, to which office the respondents had the right, in January, 1925, to appoint a county counselor, to a term of two years, beginning January 1, 1925, the order of respondents on January 3, 1925, appointing John A. Nolan as county counselor for St. Louis county was a valid and lawful order and the trial court very properly refused to quash such order."

Section 2 of the Act of 1887, referred to in the quoted excerpt, read as follows:

"Immediately upon the going into effect of this act the county court of such county may, in their discretion, appoint a county counselor, who shall enter upon the discharge of his duties at once, and shall discharge the duties of said office until the first day of January, 1889, and until his successor is duly appointed and qualified, and thereafter a successor shall be appointed, who shall hold his office as is provided in section one of this act."

From the foregoing it is quite apparent that in all counties affected by the original county counselor's act the term of such officer commenced on January 1 of the odd numbered calendar years and terminated on December 31 of the even numbered calendar years, and that without regard to the date upon which the original appointments in the various counties had been first made. We, therefore, are of the opinion that throughout the entire period from the date of passage of the original county counselor's act mentioned, supra, until the adoption of the Constitution of 1945, there was in existence, either in fact or potentially, the office of county counselor in Jackson County with a term commencing and ending in accordance with the above rule.

With the adoption of the Constitution of 1945 a new question presented itself. The constitution became effective on March 30, 1945. As the situation then existed in Jackson County, there was a county counselor whose term would not

expire until December 31, 1946. In connection with this phase of the opinion we direct your attention to Section 3 of the Schedule appended to the Constitution of 1945. It reads as follows:

"Effect on existing terms of office.
--The terms of all persons holding
public office to which they have
been elected or appointed at the time
this Constitution shall take effect
shall not be vacated or otherwise
affected thereby."

The provision quoted, as we view it, had the effect of preserving the tenure of the incumbent of the office of county counselor in Jackson County until the expiration of the then current term, to-wit: December 31, 1946. Support is given this construction by virtue of the opinion of the Supreme Court in State ex inf. Taylor, Attorney General, v. Kiburz, reported 208 S.W. (2d) 285. There in construing the effect of Section 3 of the Schedule, quoted supra, that court said, 1.c. 288:

"* * * \$ 3 of the Schedule says,
'The terms of all persons holding
public office to which they have
been elected or appointed at the
time this Constitution shall take
effect shall not be vacated or
otherwise affected thereby.' This
provision was intended to protect
the then incumbents, and conferred
upon them the right to hold for the
remainder of their respective terms;
but it has no reference to their
successors because it does not purport to speak with reference to the
office itself. * * *"

It remains to also inquire as to the effect of the adoption of the Constitution of 1945 upon Section 2 of the act found Laws of 1887, pages 129 to 131, inclusive. This is of significance for the reason that in the case previously mentioned, viz., State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459, the fact that such Section 2 was still

in force at the time the opinion in that case was written was declared by the court to be the determining factor in the conclusion reached.

We have examined the acts of the intervening General Assemblies and do not find any repeal having been effectuated of Section 2 of the act found Laws of Missouri, 1887, pages 129 to 131, in the period between the date of the decision and the present date.

To determine whether or not the adoption of the constitution had the effect of repealing this section we must again resort to the Schedule appended to the Constitution of 1945. We direct your attention to Section 2 of such Schedule, which reads as follows:

"Effect on existing laws.--All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

In view of the fact that Section 2 of the act found Laws of Missouri, 1887, pages 129 to 131, is in no wise inconsistent with any of the provisions of the Constitution of 1945, we are of the opinion that such section yet remains in full force and effect. Therefore, the adoption of the Constitution of 1945 did not affect the office of county counselor as it then existed in Jackson County.

No action was taken by any General Assembly convening subsequent to the adoption of the Constitution of 1945 with respect to county counselors generally until the passage of an act of the 64th General Assembly, found Laws of Missouri, 1947, Volume II, page 210, effective July 18, 1948. It is apparent that this act was passed pursuant to the directive contained in Section 8, Article VI, Constitution of 1945, reading as follows:

"Classification of counties -- uniform laws. -- Provision shall be made by

general laws for the organization and classification of counties except as provided in this Constitution. The number of classes shall not exceed four, and the organization and powers of each class shall be defined by general laws so that all counties within the same class shall possess the same powers and be subject to the same restrictions. A law applicable to any county shall apply to all counties in the class to which such county belongs."

You will observe that the repealing portion of this act did not refer to nor purport in any manner to repeal Section 2 of the act found Laws of 1887, pages 129 to 131.

The newly enacted county counselor's act read in part as follows:

"Section 12990. Law department established in first-class counties--appointment, qualifications, and salary of county counselor.--There is hereby established in counties of the first class a law department, and the county court shall appoint and commission, as other officers are commissioned, a county counselor who shall be in charge of the law department and who shall possess the qualifications required by law of judges of the circuit court. The salary of the county counselor shall be \$6500.00 per annum, payable monthly.

* * * * * * *

"Section 12992. Term of office--appointment of assistants.--The county counselor shall hold office for a term of two years and until his successor is duly appointed, commissioned and qualified, * * *"

What was the legal effect of the passage of these statutes? Primarily, it brought the laws relating to the

office of county counselor into harmony with the constitutional provision, quoted supra. Comparison of the prior acts relating to the same office indicates that no substantial change was made in the office itself or the duties thereof. Those duties remained substantially those at all times discharged by the county counselor, viz., the rendering of legal advice to the various divisions of county government and officers upon matters of a civil nature and the representation of the county in civil litigation. We do not believe that the repeal and re-enactment had the effect of creating a new office. The general rule is that the mere repeal of an act creating an office and the continuation of the duties previously discharged by another officer or by one filling an office mentioned in the re-enacting statutes does not create a new office. To this effect see 67 C.J.S., "Officers," Section 9, citing Allen v. U. S. Fidelity and Guaranty Company, 109 N.E. 1035 (Ill.), and State v. Powell, 142 N.E. 401 (Ohio).

It has further been held that the repeal of a statute creating an office and the re-enactment of a replacement statute, containing provision for appointment, does not create a new office when the old duties are continued nor is reappointment of the then incumbent required.

In Ford v. Boyd County, 197 N.W. 953 (Nebraska) the Supreme Court of Nebraska had for consideration that precise situation. In disposing of the contention that the then incumbent of an office must necessarily be reappointed the court said:

"Defendant contends that plaintiff's appointment was valid only until the taking effect of section 2395, Comp. St. 1922, and that thereafter she was not authorized to act as clerk of the county court, because she was not reappointed and there was no approval of the appointment nor salary fixed by the county board after the new act took effect. We think this position is untenable. The law in force in 1919 authorized the appointment of an assistant to act as clerk of the county court, and further provided that such appointment should be approved and salary fixed by the county board. While the law of 1919 was repealed, yet these

provisions, in effect, were carried forward and re-enacted into the law of 1921. The provisions of section 2395, relative to the appointment of a clerk of the county court and the fixing of salary, was but a continuation of the law previously in force. Under the circumstances, no new appointment was necessary. Gage County v. Wright, 86 Neb. 347, 125 N.W. 626, 36 Gyc. 1223."

(Emphasis ours.)

The General Assembly itself recognized the desirability of continuing the terms of the various county counselors as they then existed by incorporating in the act Section 12993, reading as follows:

"Law does not affect present incumbents. -- Any county counselor heretofore appointed and commissioned and now acting under the provisions of Article 4 of Chapter 85 of the Revised Statutes of Missouri, 1939, or under the provisions of said Article and Chapter as amended, Laws of Missouri, 1941, page 317, shall continue in office until the expiration of his commission and until a successor is duly appointed and commissioned under the provisions of this Act."

It, therefore, becomes necessary to re-examine the situation as it existed in Jackson County following the passage of the legislative act referred to.

There then existed in Jackson County the office of county counselor having a term expiring on December 31, 1948, determined in accordance with the rule declared in State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459. That term of office was specifically preserved by Section 12993, cited supra. It must also be kept in mind that, as we have pointed out heretofore, Section 2 of the act found Laws of 1887, pages 129 to 131, was still in full force and effect, definitely fixing the end of each ensuing term as being the 31st day of December in the even numbered years.

It is our opinion that this precise condition continued to exist, and that the last term prior to the date of this opinion of the county counselor of Jackson County expired on the 31st day of December, 1952. It is our further opinion that at any time thereafter the county court of Jackson County was empowered to appoint a county counselor for the ensuing term to end on the 31st day of December, 1954.

That the conclusion we have reached is in accord with common law principles and with the public policy of the State of Missouri appears from what was said in State ex rel. Rosenthal v. Smiley et al., Judges, 263 S.W. 825, 1.c. 828, from which we quote:

"* * * It is a rule of the common law, founded in sound public policy, that 'the appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' * * *"

This same public policy was reiterated in State ex rel. Jones v. Smiley et al., Judges, 300 S.W. 459, 1.c. 464, wherein the court again said:

"It was apparently the policy of the General Assembly in enacting Laws of 1887, pp. 129 to 131, to enable a county court, entitled to the benefits of said act, to be advised by a county counselor of its own choosing, and not by one foisted upon it by an outgoing and possibly unfriendly county court. * * *"

The conclusion we have reached attains this desired result.

We have given due regard to the copies of various orders made by the county court of Jackson County, but for the reasons mentioned in State ex rel. Jones v. Smiley, et al., Judges, 300 S.W. 459, we do not consider them pertinent. We have also given consideration to the amendatory act found as House Bill No. 475, and incorporated in the Missouri Revised Statutes Cumulative Supplement, 1951, page 50. How-

ever, following Ford v. Boyd County, cited supra, and the rule as declared in 67 C.J.S., "Officers," Section 9, we do not think the act has any relevancy to this opinion.

The second question you have proposed is:

"(2) Is there any method by which the court would be prohibited from paying other county officers in the event the answer to question one is in the affirmative."

We are not aware of any legal proceeding that might be brought to interfere with the Jackson County court making its regular disbursements even though litigation might ensue with respect to the office of county counselor. At most such litigation could only affect the payment of the salary of that office.

The third question which you have proposed is:

"(3) Aside from the statutory provisions for such other officers, what is the particular method by which officers of the county are commissioned."

There appears to be no particular mode by which county officers are commissioned. The officer elected or appointed derives his title to the office from his election or appointment, and the commission at most is merely evidentiary of such election or appointment. However, we direct your attention to Section 5, Article IV, Constitution of Missouri, 1945, reading as follows:

"Commissions of State Officers.--The governor shall commission all officers unless otherwise provided by law. All commissions shall be issued in the name of the state, signed by the governor, sealed with the Great Seal of the state and attested by the secretary of state."

In view of the fact that no specific provision has been enacted by the General Assembly relating to the commissioning of persons appointed to the office of county counselor, it is our thought that the above constitutional provision should be followed.

CONCLUSION

In the premises we are of the opinion:

- (1) That at any time subsequent to January 1, 1953, the county court of Jackson County is empowered to appoint a county counselor for a term ending on the 31st day of December, 1954;
- (2) That no litigation based upon such appointment can have the effect of interfering with the payment of the lawful salaries of other county officials and employees with the exception of the claimant to the office of county counselor and such persons as have been appointed by such official under statutory authority to do so; and,
- (3) That the Governor of the State of Missouri should commission persons appointed to the office of county counselor in counties of the first class.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB/fh

MAGISTRATE FEE:

Magistrate fee in criminal case allowed for each proceeding, and not for each defendant.

April 1, 1953



Honorable J. Arthur Francis
Judge of Probate and Magistrate Court
Iron County
Ironton, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would be pleased to have your opinion on Sec. 483.610, clerk's fees in the Magistrate Court, as to whether or not the Magistrate Court is entitled to only one fee of \$2.50 in a criminal proceeding and in each preliminary hearing instituted in the Magistrate Court, under paragraph 2 of said section where there are two or more defendants in a joint information or complaint.

"The question is, are we supposed to charge only \$2.50 on each criminal proceeding, or shall we charge \$2.50 for each defendant named in said criminal proceeding?"

The provision of Section 483.610, RSMo, 1949, about which you inquire, reads as follows:

* * * *

"2. In each criminal proceeding and in each preliminary hearing instituted

in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto.

" * * * *."

In the case of In the Matter of Murphy and Spillane, 22 Mo. App. 476, the St. Louis Court of Appeals considered the question of whether or not the prosecuting attorney was entitled to a single fee or a fee in respect of each defendant, in a case where two defendants had been proceeded against jointly in a single information. The Court in that case stated at 22 Mo. App., 1.c. 477:

"The question in the narrowest form of statement is, whether the word 'conviction' in the above clause is to be interpreted as meaning a judgment, in favor of the state, in a criminal case, upon the merits, irrespective of the number of defendants against whom it is jointly rendered, or such a judgment in its operation against each of several defendants, rendered upon a single information, and after a single trial.

"I am of opinion that the former is the correct view of the meaning of the statute. * * *."

The Court further stated at 22 Mo. App., 1.c. 479:

" * * * The question clearly appears to be whether there was more than one prosecution, one trial, one verdict, one judgment. If there was, then the prosecuting attorney is entitled to a separate fee in each case; if there was not, then he is entitled to but one fee."

The Court also stated at 22 Mo. App., 1.c. 480:

" * * But the statute contemplates the payment of fees for actual services only. The payment of fees beyond this is illegal and is to be discountenanced. An officer who makes a journey to serve a writ upon two defendants at the same place is entitled to mileage in but one case, unless the statute provides otherwise, because he has performed but one journey. A clerk of a court of record, who enters a judgment against several defendants is entitled to but one fee, because he has performed but one act of service. So, in this case, the prosecuting attorney has performed but one act of service. He has drawn but one information and has represented the state at but one trial, which has resulted in but one judgment or conviction. He has rendered substantially the same service which he would have rendered if the information had been filed against one of the defendants, and a trial had taken place thereon, resulting in a conviction. Any reasoning, which entitles him to a duplication of his fee, would entitle the jury to double fees for serving at the trial, and the justice to a double fee for entering the judgment. The case can not be one case for every purpose except that of the fees of the officers, and two cases for that." (First Emphasis Ours.)

The statute involved in your question provides for the fee for "each criminal proceeding." As the Court in the above case pointed out, when there is a single information, there is only a single proceeding, regardless of the number of defendants. We think that the holding of the Court in this case is applicable in the present situation.

We might point out that following the decision in the Murphy and Spillane case, the statute providing for the fees of the prosecuting attorney was amended (Laws of Mo., 1887, p. 188) to provide that his fee should be "for the conviction of every defendant", as is now provided by Section 56.310, RSMo, 1949. However, the statutory provision for the fee here in question is not so prescribed.

CONCLUSION

Therefore, it is the opinion of this department that under Section 483.610 (2), RSMo, 1949, the magistrate court

Honorable J. Arthur Francis

fee of \$2.50 allowed in each criminal proceeding, and in each preliminary hearing, is to be charged for each such proceeding, and any such proceeding in which two or more persons are charged jointly, is but a single proceeding under said section.

This opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

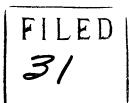
JOHN M. DALTON Attorney General

RRW: lw

PROSECUTING ATTORNEYS:

Special prosecuting attorney to be appointed by court having jurisdiction of criminal case.

April 24, 1953



Honorable Patrick O. Freeman, Jr. Attorney at Law Thayer, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, approved by the Honorable Percy W. Gullie, Prosecuting Attorney, Oregon County, Missouri, and reading as follows:

"Hon. T. W. Mesara, Magistrate of Oregon County, Missouri, has requested that I write to your office requesting an opinion on the following matter.

"There is now pending in the Circuit Court of Oregon County, Missouri, two civil actions brought by a plaintiff, Mary Clark, against defendant, William Cantrell, both residents of Oregon County, Missouri, These actions are in the nature of replevin and money paid by mistake as a result of an automobile sale transaction.

"Subsequent to the filing of these civil actions by the plaintiff, Mary Clark, the defendant, William Cantrell, filed a criminal action in the Magistrate Court of Oregon County complaining that Mary Clark had displayed a dangerous weapon in his presence in a threatening manner, etc. Upon this criminal action being filed the Hon. Percy Gullic, prosecuting attorney of Oregon County, Missouri, disqualified himself on the grounds

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that he represented the defendant, Mary Clark, in a civil action and on the grounds that the civil and criminal actions have resulted from virtually the same transaction and that evidence in both the civil and criminal actions would entertwine.

"Upon Mr. Gullic disqualifying himself the Hon. Gordon Dorris, Judge of the Oregon County Circuit Court, appointed me as special prosecutor to prosecute Mary Clark on behalf of the State of Missouri. The case is further complicated by the fact that I represent Mr. Bill Cantrell, the prosecuting witness, in the same civil actions upon which Mr. Gullic disqualified himself.

"It is my opinion that I am also interested in the same action and it would be inconsistent for me as well as Mr. Gullic to prosecute in the criminal case.

"The preliminary hearing which was set by the magistrate court for February 20th was continued until an opinion from your office could be obtained as to who is the proper person to appoint such special prosecutor and also whether or not Mr. Gullic and I would be acting inconsistent in prosecuting the criminal case.

"It is my opinion that your office is the proper source to handle the prosecuting of this case on behalf of the State of Missouri, or some disinterested attorney.

"We would appreciate receiving an opinion at your earliest convenience."

Your inquiry resolves itself into two questions:

- (1) Where is the appointing power for the appointment of a special prosecuting attorney when the regular prosecuting attorney is disqualified to act in a criminal case; and
- (2) Are you disqualified from serving as a special prosecuting attorney under the facts outlined in your letter of inquiry.

Honorable Patrick O. Freeman, Jr.

With respect to the first question you have proposed, we direct your attention to Section 56.100, RSMo 1949, reading as follows:

"If interested in case, court to appoint substitute, -- If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

The power of appointment granted by this statute to the court having jurisdiction of a criminal cause is a continuing Therefore, if after having been appointed as special prosecuting attorney, as was done in your case, it is determined that such special prosecuting attorney is disqualified from acting therein, the same court retains the power to appoint another and different special prosecuting attorney. "Court," as used in the statute quoted, may mean either the magistrate court or the circuit court. In the particular instance referred to in your letter of inquiry it is to be construed to refer to the Circuit Court of Oregon County, Missouri, as the crime which is mentioned in your letter of inquiry, that is to say, the display of a dangerous and deadly weapon in a threatening manner, is made a felony under the provisions of Section 564.610, RSMo Original jurisdiction in felony cases has been conferred upon Circuit Courts in the respective counties by Article V, Section 14, Constitution of Missouri, 1945, and Section 478.070, RSMo 1949.

It is also noted in your letter of inquiry that there is some thought the Attorney General of the State of Missouri might or should assist the special prosecuting attorney. It is true that the Attorney General is authorized to assist a prosecuting attorney even without a directive from the Governor. To this effect, see State v. Hayes, 23 Mo. 287, l.c. 293, and State v. Naylor 40 S.W.2d 1079. However, it is the policy of this office to refrain from doing so in the absence of such a directive from the Governor. We believe the proper procedure in each instance to be followed is that outlined by Section 27.030, RSMo 1949, reading as follows:

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"To aid prosecuting and circuit attorneys, when. -- When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries, and when so directed by the trial court, he may sign indictments in lieu of the prosecuting attorney."

(Emphasis ours.)

Under this statute upon the request to the Governor of Missouri for assistance in the trial of the case, the Governor would direct the Attorney General to carry out his statutory duties as outlined above.

From the foregoing we reach the view that the Circuit Court for Oregon County, Missouri, is the proper appointing authority to name a special prosecuting attorney to act in the case based upon the facts outlined in your letter of inquiry.

We do not express any opinion with respect to the second question you have proposed, as matters of that nature are peculiarly within the province of the Bar Administration Committee of the State of Missouri. Your inquiry in that regard should be directed to the Honorable Fred B. Hulse, General Chairman, Bar Committee of Missouri, Sedalia, Missouri.

CONCLUSION

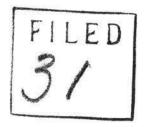
In the premises, we are of the opinion that the power to appoint a special prosecuting attorney to act in a felony case pending or to be tried in the Circuit Court for Oregon County, Missouri, is vested in such court.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

TAXATION: COLLEGE DORMITORIES EXEMPT FROM: WHEN:



A nonprofit educational corporation's dormitories and some other buildings used as housing facilities for its students and no space is rented to any others for residential or business purposes and transaction was not entered into by the college for investment purposes, then such buildings are used exclusively for educational purposes within meaning of Sub-section 6, Section 137.100 RSMo 1949, and buildings are exempt from taxation as long as they are thus used.

August 17, 1953

Honorable W. C. Frank
Prosecuting Attorney of
Adair County
Kirksville, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"The County Collector of Adair
County has just informed me that
the assessor assessed several buildings, owned by the Kirksville College
of Osteopathy and Surgery, used as
dormitories and housing facilities
for students. The school is organized
and incorporated as an educational
institution for nonprofit as provided
by Chapter 352-R.S. Mo., 1949, and they
are taking the position that this property is not subject to taxation.

"It is my belief that the school's position is sound but the collector requests that I ask your opinion.

"If you already have an opinion on this subject please send me a copy of same and if not, I respectfully request your opinion regarding this school's liability for taxation of their real estate since they are an incorporated organization for nonprofit under the provisions of Chapter 352-R.S. Mo., 1949."

Sub-section 6 of Section 137.100, RSMo 1949, provides that all real and personal property actually and regularly used exclusively for the purposes therein mentioned shall be exempt from taxation for city, county and school purposes. Said section reads as follows:

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempt from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational or charitable purposes."

The opinion request states that the Kirksville College of Osteopathy and Surgery is an educational institution incorporated as a nonprofit institution under the provisions of Chapter 352, RSMo 1949.

The statement of facts of the opinion request is not in detail, consequently, for the purpose of discussion herein, it will be necessary to assume the existence of certain facts in connection with said request.

While it is not so stated in the last paragraph of your letter, we assume that the inquiry as to the liability or non-liability of the college for taxes on its real estate, has reference only to the dormitories and other buildings used as housing facilities for its students.

The opinion request does not indicate whether or not the buildings here in question have ever been, or are now being used

wholly or partly for any other purpose than to provide dwelling places for those attending college. For example, if any or all of the space in said buildings has ever been used for a hotel operated by the college, or any other person, or whether any space has ever been rented out to the general public for commercial purposes and such activities have been entered into by the college for investment purposes, and apart from those purposes for which the institution was founded.

In the absence of any evidence to the contrary, it is assumed that the college buildings referred to above, have not been, and are not now being used for any other purposes than to provide dwelling places for students attending the college, and that such housing project was not entered into for investment purposes, but in connection with the educational program and activities of the college, and in furtherance of the purposes for which the institution was founded.

If the dormitories and other buildings of the college are exempt from taxation, it is by virtue of that portion of Section 137.100 quoted above, and not for the reason that the college was incorporated as a nonprofit corporation under the applicable provisions of Chapter 352, RSMo 1949. This principle was held to be the law in an opinion of this department rendered to the Honorable Roy A. Jones, Prosecuting Attorney of Johnson County, Missouri, on May 15, 1947. In that opinion it was held that the real estate and tangible personal property of a nonprofit corporation was not exempt from taxation merely because of the fact that the corporation was incorporated as a nonprofit organization. A copy of that opinion is enclosed for your consideration.

We wish to re-emphasize the statement that if the real and personal property of educational institutions are exempt from taxation under Section 137.100, supra, such property must be used exclusively for educational purposes, and to further the purposes for which such schools and colleges were founded, and not those for engaging in commercial activities and investment and which have no connection with the primary purposes for which said institutions were founded. This brings up the question as to what is meant by an exclusive use of property for educational purpose so that the school or college might be entitled to the tax exemption on that ground.

The phrase "exclusively used" was defined in the opinion of the case of State ex rel. Johnson 214 Mo. 656, and at 1.c. 663 and 668 the court said:

"(b) The phrase 'exclusively used' has reference to the primary and

inherent use as over against a mere secondary and incidental use. (People ex rel. v. Lawler, 77 N.Y. Supp. l.c. 842, et seq.) If the incidental use (in this instance residing in the building) does not interrupt the exclusive occupation of the building for school purposes, but dovetails into or rounds out those purposes, then there could fairly be said to be left an exclusive use in the school on which the law lays hold (First Unitarian Society v. Hartford, 66 Conn. l.c. 375.)

* * * * * * * * * * * * * *

"(d) In interpreting the phrase, 'used exclusively,' commonly found in constitutional and statutory tax-exempting provisions, it has uniformly been held that if certain parts of the school building be rented for stores or other income purposes, not merely incidental to the school itself, it destroys the exemption. * * *"

In the case from which the last above quoted excerpts were taken, it was held that the Kemper Military School, a private educational institution where the students, faculty members and their families were boarded, was exempt from taxes upon the school property. However, this case nor any others decided in Missouri, insofar as we are able to find, has ever passed upon the proposition referred to in the opinion request; namely, as to whether or not the dormitory buildings and other facilities for housing students, and owned and operated by a college are exempt from taxes under the Missouri statutes.

The general rule with reference to the taxation of dormitories of educational institutions has been stated in Section 781, Volume 2, Cooley on Taxation, and reads as follows:

"Dormitories for the use of students are generally held to be a part of exempt property of educational institutions. This is so although a certain sum is charged for the use of each of the apartments therein. But a building used partly as a dormitory and partly for commercial purposes is not exempt where

the exemption is based on the use made of the property."

Again, the general rule on this subject has been stated more in detail in Section 622, Taxation, 51 Am. Jur., page 598, and reads as follows:

"The principle that the exemption of educational institutions extends only to property used for the purposes of the institution is frequently applied in the case of endowed universities, colleges, academies, etc. Dormitories and dining halls furnished by a college for the use of its students are clearly exempt. But a building used in part as a dormitory and dining hall will not be exempt if the part not required for such purposes is used as a hotel. As a general rule, residences for teachers erected upon or near the college grounds are held to be exempt, and similarly, the exemption of a school is not lost because the principal of the school and his family reside in the school building. In the final analysis, the exemption depends upon the particular statutory or constitutional provision involved and the facts and circumstances to which its application is invoked. Moreover, the occupancy of real property by an educational institution or its officers for the purposes for which it was established, in order to exempt the property from taxation must have, or be supposed to have, a direct connection with such purposes, and dwelling houses belonging to a college and rented by teachers for their own convenience and not for the benefit of the college are not exempt."

In the case of Yale University v. Town of New Haven, 42 A. 87, it was held that the dormitories occupied by students, buildings used as dining halls, and some other buildings used in connection with the college were exempt from taxes in the State of Connecticut, under the provisions of Section 3820 of the general statutes. In discussing the taxability of the college dormitories and other buildings of the college, the court said at 1. c. 88, 91 and 94:

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"* * *If the buildings used by the college exclusively as dormitories and dining halls for its students are buildings exclusively occupied as a college, then the action complained of, in adding to the list dormitories and dining halls, was illegal; if such use is not a college occupation then said action was legal.

* * * * * * * * * * * *

"The settled meaning of 'college' as a building or group of buildings in which scholars are housed, fed, instructed, and governed under college discipline, while qualifying for their university degree, whether the university includes a number of colleges or a single college, is now attacked. We have deemed it proper to trace this meaning with sufficient detail to demonstrate the utter unreason of the attack. This peculiar function of a college is inherent in the best conception of the university. This meaning has been attached to the English word for 800 years; it was the only meaning known at the time our first American colleges were founded; it was recognized and distinctly affirmed in the charter of Yale College; it has since been affirmed by repeated acts of legislation, and has received the sanction of constitutional confirmation. It was impossible for the legislature to express its meaning more clearly than in the language of section 3820, 'buildings occupied as colleges,' If it had, 'dormitories, dining halls, and other buildings occupied as colleges, the meaning would have been the same, and the amplification would have added nothing to the precise certainty of the language used.

* * * * * * * * * * * * *

"For the reasons before given, we think that students' fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and that land occupied and reasonably necessary for the plant of the college is not productive real estate, within the meaning of the proviso in the act of 1834. The vacant lots added by the assessors are exempt from taxation. The dwelling houses and factories added by the assessors are also exempt, unless some one or more of these must be added to the list returned by the plaintiff in order to reduce its net income from all its other real estate within the prescribed limit."

In the case of Troy Conference Academy etc. v. Town of Poultney, 66 A. 2, it was held that dormitories and dining halls furnished for use of their students are regarded as devoted to college purposes and the fact that certain sums are paid for the use of the rooms therein does not affect their exemption from taxes.

The court held that the residence halls or dormitories and facilities for furnishing young men and boys with food and lodging, particularly those of the low income groups was incidental to and a part of the purpose for which the Y.M.C.A. had been incorporated, and that buildings used for those purposes, and owned by the organization, were exempt from taxes, in the case of Young Men's Christian Association v. Sestric, 242 S. W. (2d) 497, at 1.c. 506, the Supreme Court of Missouri said:

"The trial court found as a fact from the evidence in the record: 'That the purpose of the plaintiff in maintaining residence halls or dormitories in its three buildings on the properties hereinbefore described, together with the provision for service of meals, and for barber and laundry service and the sale of incidentals, including candy, periodicals, smoking and other supplies, and conveniences as shown by the evidence, is to provide for the welfare of young men and boys, especially and preferably those of lower earning capacity and income, by various desirable means, including particularly the maintenance of places and facilities of study, recreation and abode of a homelike and

Christian character and with wholesome and decent enviornment and guidance designed to foster good citizenship and Christian ideals and character; that the provision of board and lodging in a protected and educational and religious environment for the purposes and under the circumstances shown by the evidence is in itself a charitable activity intimately related, incidental to and part of the charitable, educational, religious and eleemosynary activities of the plaintiff; that the provisions of said facilities is not for the purpose of making profit but is for the purpose of providing charity of a practical sort, and the provision and maintenance thereof dovetails into and rounds out the charitable purposes of plaintiff.' We rule that this finding is supported by the record and is correct."

In view of the above cited cases setting forth the general rule prevailing in most jurisdictions with reference to the non-taxability of dormitories operated by educational institutions for the benefit of their students, it is our thought that if the dormitories and other buildings of the Kirksville College of Osteopathy and Surgery, an educational nonprofit corporation, are used for the sole purpose of providing housing facilities for its students and such activity was not entered into for investment, or for commercial purposes, and no apartments in said buildings are ever rented to any persons for residential purposes except to its own students, nor any space therein is ever rented for business purposes, then such buildings are used exclusively for educational purposes within the meaning of Sub-section 6, Section 137.100, supra, and they are exempt from taxation.

CONCLUSION

It is therefore the opinion of this department that a college incorporated as a nonprofit educational institution whose dormitories and some other buildings are used as housing facilities for its students; no space in said buildings being rented to any other persons for residential or business purposes, and the transaction was not entered into by the college for investment purposes, then such activities are in furtherance of

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the purposes for which the institution was founded and such buildings are used exclusively for educational purposes within the meaning of Sub-section 6, Section 137.100, RSMo 1949, and they are exempt from taxation as long as they are thus used under the provisions of said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PNC:hr encl.

TAXATION: Charter of the City of St. Louis may be ST. LOUIS CITY CHARTER: amended so as to authorize the levy of a city earnings tax on income earned by residents and income earned by nonresidents employed in such city, and statute is unnecessary.



July 9, .1953

Honorable Edward W. Garnholz 101 S. Meramec Avenue Clayton 5, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

> "If the charter of the City of St. Louis were amended by vote of the people of St. Louis so as to specifically authorize the levy of a city earnings tax on all income earned by residents and nonresidents employed in that city, would it then be necessary for the Missouri Legislature to pass enabling legislation further authorizing the City of St. Louis to levy the city earnings tax, or would the specific amendment to the charter in itself be sufficient?"

Section 1 of Article X of the Constitution of Missouri provides as follows:

> "Taxing power -- exercise by state and local governments .-- The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

The question is then whether or not the provisions of Section 1 of Article X of the Constitution, supra, would prohibit the imposition of a city earnings tax by the City of St. Louis if the charter of such city were amended so as to authorize the imposition of such a tax. We believe that

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the provisions of Section 1 of Article X of the Constitution do not prohibit the imposition of an earnings tax by St. Louis if the charter were amended so as to authorize the imposition of such a tax. In the case of Kansas City v. Frogge, 176 S.W. (2d) 498, the Supreme Court discussed the effect of the adoption of a city charter in the following language, 1.c. 501:

"The General Assembly may impose taxes upon municipal corporations or upon the inhabitants thereof for other than strictly municipal purposes. Section 1, Article X, Constitution of Missouri; State ex rel. Faxon v. Owsley, 122 Mo. 68, 26 S.W. 659. The General Assembly may not impose taxes upon municipal corporations or upon the inhabitants thereof for municipal purposes but may, by general laws, vest in the corporate authorities the power to assess and collect taxes for municipal purposes. Section 10, Article X, Constitution of Missouri.

"'A charter framed by a city for itself under direct constitutional grants of power so to do has, within the limits therein contemplated, the force and effect of one granted by an act of the Legislature when unrestrained by constitutional provision.' (Our italics.) Ex parte Siemens v. Shreeve, supra (317 Mo. 736, 296 S.W. 416). See also State ex rel. Carpenter v. St. Louis, supra; and Morrow v. Kansas City, 186 Mo. 675, 85 S.W. 572.

"By the grant to plaintiff city of the right to frame and adopt a charter, the people of the state transferred or granted part of the legislative power of the state (subject to constitutional limitation in the grant, Section 16, Article IX) to the people of plaintiff city. The power so granted to the people of plaintiff city was the legislative power to frame and adopt a charter for its own government.

Morrow v. Kansas City, supra. The people of a city which has been granted the

right by the people of the state to frame and adopt a charter may not deem it desirable or needful to delegate under the charter of their city all of those powers which may be delegated by the legislature to cities organized under general law. So the powers which plaintiff city may exercise, through the constitutional grant of the right to frame and adopt a charter, are those powers which the people of the city delegate to it under its charter, if unrestrained by constitutional limitation.

"The plaintiff city's power to impose taxes is, therefore, not the power to impose any tax, except as 'limited by the power reserved in its charter' and uncontrolled by general law; but is the power to impose those taxes which has been delegated by the General Assembly under statute or by its people under its charter, if unrestrained by constitutional limitation."

In the Frogge case, supra, the Supreme Court held invalid an ordinance of Kansas City imposing a compensating use tax because the Court held that there was no authorization in the charter of such city for the imposition of such a tax, and there was no general statute enacted by the General Assembly authorizing Kansas City to impose such a tax.

In the case of Kansas City v. Threshing Machine Company, 87 S.W. (2d) 195, the Supreme Court held that an occupation tax, based upon the amount of space occupied by the business to be taxed, was invalid because the ordinance contravened a state statute. However, the Court indicated that if such a tax had been authorized by the city charter, and no statute had been in existence contrary to such provision, an ordinance authorizing such a tax would have been valid. The Court said at 1.c. 206:

" * * * However, the present charter of Kansas City was adopted in 1925, when Kansas City was a city of more than 300,000 inhabitants (324,410, census of 1920). It, therefore, could only adopt in that charter the method for taxing the occupation of merchants and manufacturers which the Legislature had provided and any provisions of its new charter are void if they conflict with the statute. * * *"

We believe it to be clear under the holding of such case that the provisions of a charter are subordinate to the provisions of the State Constitution, and the state atatutes only.

There is no statute prohibiting the imposition of an earnings tax by the City of St. Louis.

The case of Carter Carburetor Corporation v. City of St. Louis 203 S.W. (2d) 438, was the case which held that Ordinance No. 43783 of the City of St. Louis which imposed an earnings tax was invalid. At the time such case was decided there was no state statute authorizing the imposition by the city of such a tax, and the Court held that there was no provision in the city charter authorizing the imposition of such a tax by the city. The Supreme Court in that case did not specifically decide whether or not an ordinance imposing an earnings tax upon the residents of St. Louis and upon nonresidents employed in St. Louis would be valid if the city charter were amended so as to authorize the imposition of such a tax. In discussing the Frogge case cited and quoted, supra, the Court said, l.c. 441:

"As we read the Frogge opinion it held the following. It started with the thesis that the power to tax is an extraordinary one, which does not inhere in municipal corporations, and will not be implied unless the implication be necessary and the grant unmistakable. Thence it reasoned as follows. A constitutional grant of power to a city to frame and adopt a special charter, is a grant to the people of that city. But the city's people may not deem it desirable to delegate to the city in its charter all of the powers they could have granted under the constitutional sanction. Therefore, the City's power to impose taxes is not the uncontrolled power to impose any tax except as limited by its charter, or general law. On the contrary, it is only the power to impose such taxes as have been authorized by the General Assembly in a general law, or by the people in its charter -- if not in conflict with the Constitution. Then the opinion went on to hold that neither any general statute nor any of the detailed provisions of the charter authorized Kansas City to impose the compensating use tax provided for in the ordinance; and that the power could not be implied.

"Following that the decision discussed the ordinance and tax from the viewpoint of the City's general police power under its charter, but held it would be better not to decide that question—except in its relation to the State Sales Tax Act. Mo. R.S.A. Sec. 11407. As to that, the opinion held the condition sought to be remedied was not one of purely local or municipal concern, but was a matter of State concern; and that the legislature had not attempted to deal with it in the Sales Tax Act, nor had it delegated that power to the City. Thence the conclusion was reached that the ordinance was void.

"In a per curiam on motion for rehearing, at the end of the opinion, the decision held that art. 1, sec. 1, Par. 2 of the Kansas City charter broadly authorizing the City to 'classify the subject and objects of taxation' did not furnish a basis for the tax; and that art. 1, Sec. 3 of the charter, providing the enumeration of particular powers should not be construed as limiting or impairing any grant of general powers therein, could not be treated as authorizing the City to impose the tax, since it was nowhere sanctioned by charter or statute, and the rule of strict construction applied to the power of taxation."

Discussing the question of whether or not there was authorization in the general statutes or the charter for the imposition of an earnings tax, the Court said, l.c. 443:

"Now as to the instant case, there admittedly is no specific authorization in the statutes or the St. Louis charter for an 'earning' tax. And the General Assembly has more than once forbade all cities to impose certain kinds of taxes. Sec. 11454, R.S. 1939, Mo. R.S.A., does that with respect to sales taxes—which would impinge on our State sales tax. And Sec. 7440, R.S. 1939, Mo. R.S.A. since 1889 has further required a specification by statute, or in the charters of all cities, of the vocations

Honorable Edward W. Garnholz

subjected to license taxes. The General Assembly has never authorized municipalities to impose an income tax--which would diminish pro tanto the State's revenue from the State income tax--and no city has ever tried to do it so far as appears.

Finally in discussing the question of the authority of the City of St. Louis to authorize the imposition of such a tax by so providing in its charter, the Court said, l.c.

"But it is not true. As earlier stated in the Carpenter case in italics 318 Mo. loc. cit. 892, 2 S.W. 2d loc. cit. 719, There are many matters local to the city, requiring governmental regulation, which are foreign to the scope of municipal government. The impact of the 'earnings' tax contemplated by the ordinance under adjudication here would fall on non-residents of the City who might be residents of any and every county and city of the State -- and other States. And if there be now or hereafter other cities in the State with charters containing a provision as broad as Sec. 1, Art. 1, Par. 1 of the St. Louis charter, they could retaliate with a corresponding ordinance which would equally bind citizens of St. Louis and all other like cities. Certain such ordinances would not be matters of purely local concern, from the viewpoint of the State government.

"It is true that as regards the police regulations of a city, all who go there must obey them. So too, perhaps, of some excise taxes, especially if they are pseudo-regulatory and therefore partake of the police power. One who buys gasoline in St. Louis must pay the tax thereon, and one who purchases cigarettes must pay the stamp tax. But in general such taxes are imposed only on citizens or residents of the jurisdiction. That is true of our State income tax, Sec. 11343, R.S. 1939, Mo. R.S.A. And the tax considered in the

Frogge case, supra, was imposed on the use of property in the City, and was evidently aimed at residents. The same was true of the tax on the storage of gasoline in the People's Motorbus case, supra. But in the instant case a pure revenue tax is imposed on non-residents who perform work or services within the City. We are not holding the ordinance that far invalid, but are ruling merely that it is not authorized by the abstract provisions of art. 1, Sec. 1, Par. 1 of the charter." (Last emphasis ours.)

It is to be noted that the Court in the underlined portion of the last quotation did not rule on the question of whether or not an earnings tax would be valid if authorized by a city charter, but we believe that the implication in such holding is that the power to authorize the imposition of such an earnings tax may be delegated to the city by the people thereof in amending the city charter.

We are not unmindful of the holding of the Supreme Court in the case of Walters and Williams vs. City of St. Louis et al, No. 43648, decided by the Supreme Court en banc, April Session, 1953, which opinion upheld the validity of ordinance No. 46222, which was the ordinance imposing an earnings tax as authorized by Laws of Missouri 1951, page 334, which opinion has not yet been reported. The court said in that opinion:

"Respondent's contention fails, however, to take into consideration the provisions of Article X, Sec. 11(f), of the Constitution, which is as follows: 'Nothing in this constitution shall prevent the enactment of any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes. (Emphasis ours.) By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law. We can attach no other meaning to it. Of course, this does not mean that a general law permitting the levy of such a tax would be local or special because it was operative only in the City of St. Louis, provided it was prospective in its terms so

Honorable Edward W. Garnholz

as to become operative in other cities as they come within the classification therein specified. State ex rel. Zoological Board of Control v. City of St. Louis, 318 Mo. 910, 1 S.W. 2d 1021, 1027; State ex rel. Carpenter v. City of St. Louis, 318 Mo. 870, 2 S.W. 2d 713, 718."

We believe that the holding above quoted means only that where an earnings tax is authorized by a statute, such statute must be a general law and cannot be a special law. It is to be noted that the court was answering in the quoted portion the contention that the statute authorizing the imposition of an earnings tax by the City of St. Louis was unconstitutional because it was a special law. We do not believe that the court in this case intended to hold that an earnings tax could be imposed only if it was authorized by a statute enacted by the general assembly.

CONCLUSION.

It is the opinion of this office that if the charter of the City of St. Louis were amended so as to authorize the levy of a city earnings tax on income earned by residents of St. Louis, and nonresidents employed in St. Louis, that it would be unnecessary for the Legislature to pass a statute authorizing the City of St. Louis to levy such a tax.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

CBB:sw

SCHOOLS:

SCHOOL DISTRICTS:

SCHOOL TRANSPORTATION:

Board of education in reorganized district has authority to sell district-owned buses in manner and number deemed advisable by the board; sale must be for cash; board may contract with private bus owners to transport children of public schools and such contract may extend beyond one year's duration.



November 10, 1953

Honorable Meredith Garten Pierce City, Missouri

Dear Senator Garten:

This is in response to your request for an opinion dated October 24, 1953, which reads, in part, as follows:

"I am requested by some of my constituents to obtain the opinion of your office on these matters:

"Does a school board in a reorganized school district have authority to sell district owned buses?

"Can the buses be sold individually or would they all have to be sold if some were and to one purchaser? What would be procedure of the sale?

"Must sale be entirely for cash or part payments? Can the board of education enter into a contract with private purchasers of buses for transportation of public school pupils and can they contract for more than one year?"

Section 165.687, RSMo 1949, provides for the election of six directors in reorganized districts and that such directors shall be governed by the laws applicable to six director districts. The law governing districts generally is found in Sections 165.010 through 165.160, RSMo 1949, and that governing six director districts, i.e., city, town and consolidated districts, is found in Sections 165.263 through 165.653, RSMo 1949.

Section 165.327 reads, in part, as follows:

"The board of education of any town, city or consolidated school district, shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state; * * *"

Section 165.317 vests the government and control of such a district in the board of education. Section 165.700 states that the board of education in a reorganized district is authorized to provide free transportation for pupils under certain circumstances. That section reads:

"In all school districts enlarged under the provisions of sections 165.657 to 165.707, and in all school districts heretofore enlarged and which are hereafter approved by the state board of education as enlarged districts, the board of education is authorized to provide for the free transportation of pupils living more than one mile from any central school building and state transportation shall be granted to such districts in the amount and in the manner as provided in section 165.143."

The power of a board of education in a consolidated district was questioned in the case of Crow v. Consolidated School Dist. No. 7, Mo. App., 36 S.W. (2d) 676. There the board was proposing to change the school site and to purchase land for that purpose. Plaintiffs contended that the board did not possess this power, that it was vested in the voters of the district. The court. however, refuted this contention by saying that the powers of the board of education of a consolidated district are restricted to the same extent "as the boards of other school districts acting under the general school laws of the state" (See Sec. 165.327), but that there was no section applicable to six director districts or to districts generally which purported to vest the power to change school sites in the voters of the district. The only section which so provided was applicable only to common school districts. Since the board of education was vested with the government and control of the district and no statute applicable to such a district vested in the voters of the district the authority to change sites, the court said it was clear that the

Honorable Meredith Garten

Legislature intended to vest this authority in the board of education.

With regard to the question submitted herein, the law is the same today as it was at the time of the decision in the Crow case. The board of education in the reorganized district is vested with the authority to provide transportation for pupils under Section 165.700, RSMo 1949. It has the government and control of the district, with no statutory limitation as to its authority over the personal property of the district or the manner in which it shall provide the transportation.

Since it may reasonably be necessary to buy and sell buses in order to provide transportation and since the authority to do so must be vested somewhere, in the absence of any statute specifically limiting this authority to the voters of the district it is our opinion that the board of education of a reorganized district has the authority to sell district-owned school buses if in the exercise of its discretion it would be advisable to do so.

The proposition is thus stated in 78 C.J.S., Schools and School Districts, Section 267, page 1247:

"A school board may sell personal property belonging to the district, such as school busses, when it believes that such action is necessary for the best interests of the district, * * *"

In view of the broad authority thus granted to the board of education of a reorganized district, the board may also exercise its discretion as to the number of buses which it deems advisable to sell and as to the procedure of selling them. The procedure followed should be that which, in the opinion of the board, will realize the most net proceeds from the sale for the benefit of the district.

Above we have been dealing with the power of a board of education of a reorganized district, having first established the fact that the district itself has been given statutory authority to provide free transportation for its pupils under certain circumstances and conditions. However, it must be borne in mind that before any action can be taken on behalf of a school district in any specific case by anyone, the authority for the action of

the district must be either expressly conferred by statute or necessarily implied from some other power conferred.

The courts of this state have so held on numerous occasions. For example, see State v. Kessler, 136 Mo. App. 236, 240, 117 S.W. 85; Consolidated School Dist. No. 6 of Jackson County v. Shawhan, Mo. App., 273 S.W. 182, 184; Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S.W. 43.

The law generally in this regard is stated in 78 C.J.S., Schools and School Districts, Section 244(b), page 1202:

" * * * Public policy forbids the bartering of public school property or its sale for anything other than money, and authority to sell does not of itself imply authority to sell on credit, * * *"

Since a sale on part payments would, in effect, be a lending of money to the purchaser, and we find no statute authorizing a school district to engage in the business of lending money or to sell on credit, we believe that the sale of buses contemplated by your request would have to be for cash.

This office, under somewhat similar reasoning, so held, with regard to the sale of real estate, in an opinion directed to Honorable Charles B. Butler, Prosecuting Attorney of Ripley County, under date of September 2, 1942, a copy of which we enclose.

We have pointed out above the broad authority given to boards of education in a reorganized district to provide transportation for its pupils without restriction as to the manner in which this transportation is to be provided. Therefore, we believe it is beyond question that a board of education in a reorganized district does have authority to contract with private bus owners for the free transportation of children to the public schools.

Although that specific question was not raised, such a contract received implicit approval in Cardwell v. Howard, Mo. App., 137 S.W. (2d) 652.

In the Cardwell case the primary issue involved was the right of a board of education in a consolidated district to contract with a private bus owner for the transportation of children for a period of three years. It was contended by defendant that the contract in question was void because it was not to be performed in one year. The court summarily dismissed this contention by saying, 1.c. 654:

"The first assignment insisted on here is that the court erred in not sustaining the demurrer to the petition, because it shows that the contract entered into was not to be performed within one year. We deem it unnecessary to discuss this assignment at length. We hold against this contention. We base this conclusion upon the reasoning of our Supreme Court in the case of Tate v. School District No. 11 of Gentry County, 324 Mo. 477, 23 S.W. 2d 1013, 70 A.L.R. 771."

In the Tate case, cited in the above quotation, the Supreme Court held that a school board is a continuous body and that it may bind succeeding boards, provided that the contract is entered into in good faith, without fraud or collusion and for a reasonable length of time.

Therefore, we feel it is clear that the board of education in a reorganized school district may contract with a private bus owner for a period in excess of one year, provided that it is done in good faith, without fraud or collusion and for a reasonable length of time.

CONCLUSION

It is the opinion of this office that the board of education in a reorganized school district may sell the district-owned buses if in the exercise of its discretion it is deemed advisable to do so. The board may also exercise its discretion as to the number of buses to be sold and the procedure to be followed in making the sale.

It is the further opinion of this office that such a sale must be for cash and that the board may contract with private bus owners for the transportation of children to public schools for a period in excess of one year, if desired, provided the contract is entered into in good faith, without fraud or collusion and for a reasonable length of time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Very truly yours,

JOHN M. DALTON Attorney General

JWI:ml Enc.

INHERITANCE TAXES: TO EXEMPTIONS AND RATE OF NATURAL BROTHER.

: "A's" adoption in Mr ine prior to 1917 to OSTER BROTHER NOT ENTITIED : be given the same e fect, insofar as "A:s" : rights under Missouri statutes are con-: cerned as if "A" had been adopted in : Missouri. "A" is child of adopting parents : as fully as if born to them in lawful wed-: lock; can inherit from them, but not their "A" is not brother of "B", a : child of adopting parents; upon "B's" death intestate in Missouri, "A" can-January 29, 1953 not inherit from "B", and "A" is not entitled to exemptions

and rate allowable to brother



under inheritance tax statutes. 1.29-53

Honorable C. L. Gillilan Assistant Supervisor Inheritance Tax Unit Department of Revenue Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department as to whether a foster brother is, under the inheritance tax statutes of this state, entitled to the tax rates and exemptions allowable to a natural brother in those instances when the deceased died intestate.

Reference is made to correspondence attached to the opinion request, and it is from this source that the facts in the case are given.

From such correspondence it appears that one "A" was taken into the home of a couple and raised as their child, and that "A" has used their surname all his life. It is believed that an adoption of "A" was intended by his foster parents, and that the adoption probably did take place, although formal adoption proceedings provided by the statutes of the state of Maine, where the facts are alleged to have taken place, have probably not been complied with. The date of the alleged adoption is not given, but it appears that "A" is now approximately sixty years of age, and it is believed that he must have been adopted prior to the year of 1917.

While the legality or illegality of the adoption of "A" under the Maine laws does not appear; for the purpose of our present discussion it is assumed that the adoption was legal, and it is necessary for us to determine what effect, if any, is to be given such adoption under the Missouri statutes.

Section 453.170, RSMo 1949, states what effect shall be given in Missouri to adoptions under the laws of other states, and reads as follows:

"Any person adopted pursuant to the laws of other states of the union, whenever the adopted person's rights are affected or determined by the laws of this state, shall, from the date of said adoption, be deemed and held to be for every purpose the lawful child of its parent or parents by adoption as fully as though born to them in lawful wedlock and such adoption shall have the same force and effect as adoption under the provisions of this chapter, including all inheritance rights."

Section 453.090, RSMo 1949, provides what the effect of adoption shall be, and reads as follows:

- "1. When a child is adopted in accordance with the provisions of this chapter, all legal relationships and all rights and duties between such child and his natural parents (other than a natural parent who joins in the petition for adoption as provided in section 453.010) shall cease and determine. Said child shall thereafter be deemed and held to be for every purpose the child of his parent or parents by adoption, as fully as though born to him or them in lawful wedlock.
- "2. Said child shall be capable of inheriting from, and as the child of, said parent
 or parents by adoption as fully as though
 born to him or them in lawful wedlock and,
 if a minor, shall be entitled to proper support, nurture and care from said parent or
 parents by adoption.
- "3. Said parent or parents by adoption shall be capable of inheriting from and as the parent or parents of, said adopted child as fully as though said child had been born to him or them in lawful wedlock, and, if said child is a minor, shall be entitled to the services, wages, control and custody of said adopted child.

"4. Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption.

"5. The word 'child' as used in this section, shall, unless the context hereof otherwise requires, be construed to mean either a person under or over the age of twenty-one years."

Assuming that "A" was legally adopted under the Maine law, such adoption is then to be given the same effect in this state and if he had been adopted under Missouri laws, insofar as the rights of "A" are concerned under Missouri statutes.

From the provisions of the preceding section it is noted that the adopted child shall be deemed and held to be for every purpose, the child of the adopting parents as fully as though said child were born in lawful wedlock to the adopting parents. It is also noted that the adopted child shall be capable of inheriting from his foster parents, and they from him as fully as if the adopted child were born to said foster parents in lawful wedlock.

It appears that the present Missouri adoption statutes are based upon the Adoption Act of 1917, and that there is very little change in such laws to date.

No question has been asked regarding the adopted child's relationship to the adopting parents, and the legal rights of the former to inherit from the latter under the statutes of descent and distribution, but rather the inquiry raises the question impliedly, if not expressly, what effect, if any, the adoption proceedings will have upon the relationship between the adopted child and other members of the family of the foster parents. In the present case, will "A", the adopted son, be legally considered as a brother of "B", the natural born son of the adopting parents, and upon the death of "B", intestate in Missouri, is "A" the heir of "B", under the laws of descent and distribution?

In the event "A" was adopted under the laws of Maine prior to the Missouri Adoption Act of 1917, it appears that he could inherit only from the adopting parents, and not from their kinsmen.

We here call attention to the case of Hockaday vs. Lynn, et al., 200 Mo. 456, which appears to be the leading case in point, at 1.c. 468-472, the court said:

(Underscoring ours.)

It would appear from the quoted portions of above case that "A" would not be the brother of "B", but we shall consider this matter further before reaching a conclusion.

The present adoption statutes do not, nor does any other statute, insofar as we have been able to ascertain, define the word, "brother," consequently, we find it necessary to look to other sources for a suitable definition of the term. However, it is one of the cardinal rules of statutory construction that words used in a statute shall be given their plain or ordinary meaning unless it was the intention of the law-making power to give them some other meaning.

A general definition of the word, "brother," and one in which the word has been given its ordinary meaning is found in Volume 12 C.J.S., p. 373, as follows:

"BROTHER. The correlative of 'sister'. The word has been variously defined by lexicographers as a male person, in his relation to another person or persons of either sex born of the same pa rents; a male relative in the first degree of descent or mutual kinship; a male person in his relationship to any other person of the same blood

or anscestry; a male person who has the same father and mother with another person, or who has one of them; he who is born from the same father and mother with another, or from one of them only. In particular connections, it has been held that the term, when used without any qualifying words, may include a brother of the half blood, but does not include a legitimate child of an adopted child's foster parents."

(Underscoring ours.)

As to whether "A", the foster brother of "B", the deceased is a "brother", within the meaning of the word as defined above, and if "A" is entitled to the exemptions and tax rate allowed a brother of the deceased, within the meaning of state inheritance tax statutes requires a consideration of the inheritance tax statutes involved.

Paragraph 2, Section 145.090, RSMo 1949, provides what exemptions shall be allowed the taxpayer under certain circumstances, and reads as follows:

"2. All transfers of property or any beneficial interest therein of the clear market value of twenty thousand dollars to the surviving husband or wife, said exemption to be in addition to the marital rights of the widow or widower who shall renounce the will of a deceased husband or wife, or whose spouse died intestate; provided, however, that if a widow or widower accepts the benefits provided by the will of a deceased spouse said twenty thousand dollar exemption shall be in addition to an amount equal to the aggregate value of such marital rights to which such widow or widower would have been entitled if such widow or widower had renounced said will or if said spouse had died intestate, and five thousand dollars to each of the other persons described in subdivision (1), subsection 1 of section 145.060; provided, however, that in all cases where any of the lineal descendants of the decedent are idiotic, insane, blind, deformed, or otherwise

mentally or physically incapacitated from performing labor whereby such descendant may not be able to earn a living, there shall be exempted from the provisions of this chapter an amount up to the sum of fifteen thousand dollars."

Paragraph 2, Section 145.060, RSMe 1949, provides the applicable tax rate to be used in computing the inheritance tax due from a taxpayer related to the deceased within certain degrees, and reads as follows:

"(2) Three per cent: Where the person or persons to whom such property or any beneficial interest therein passes shall be the brother or sister, or the descendant of a brother or sister of the decedent, the wife or widow of a son, or the husband of a daughter of the decedent, at the rate of three per cent of the clear market value of such property or interest therein; "

It is noted that the word "brother", has not been defined in any of the above quoted sections of the inheritance tax laws, but from the context, the word appears to be used in its ordinary sense, and in the absence of any expressed or implied intention of the Legislature that it should have any other or different meaning, it will be given its ordinary meaning.

In view of the foregoing, it is our thought that "A's" adoption in the State of Maine is to be given the same effect as if he had been adopted under the laws of Missouri, insofar as "A's" rights under Missouri law are concerned, and that for all intents and purposes (except as will be presently noticed) "A" shall be considered the child of the adopting parents as fully as if he had been born to them in lawful wedlock. However, "A's" adoption being prior to the Missouri Adoption Act of 1917, his rights of inheritance were limited by the statutes and court decisions in effect prior to the Act. Under said laws, he was allowed to inherit only from his foster parents and not from the kinsmen of such parents, since he did not become a relative of the kinsmen by virtue of his adoption. Therefore, "A" is not a "brother" of "B", a son of the adopting parents, and under the statutes of descent and distribution cannot inherit from "B" as "B's" heir. "A" cannot claim the exemptions and the tax rate applicable to those instances when the taxpayer and the deceased were related to each other in the first degree as brothers, since "A" is not a brother of "B", within the commonly accepted meaning of the word "brother", and as used in the above mentioned statutes.

CONCLUSION

It is, therefore, the opinion of this department that the adoption of "A" in the State of Maine prior to 1917, is to be given the same legal effect as if "A" had been adopted in Missouri, insofar as the rights of "A" are affected under Missouri statutes. That, under Missouri statutes and court decisions in effect at the time of the adoption, "A" became the child of the adopting parents for all intents and purposes as fully as though he had been born to them in lawful wedlock, except that "A" could inherit only from his foster parents, and not from their kinsmen. By virtue of his adoption, "A" did not legally become the brother of "B", a son born to the adopting parents, and upon the death of "B" in the State of Missouri, "A" did not become the heir of "B". "A" is not entitled to the exemptions and tax rate allowable to a brother of deceased under inheritance tax statutes.

The foregoing opinion, which I approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General BOND:
ARREST:

One who is arrested under a misdemeanor warrant in a county other than the one in which the offense was committed and the warrant issued, is entitled to make bond before a Judge or a Magistrate of a court having original jurisdiction to try criminal offenses of the county where such arrest is made.

JOHN W. DALTON



March 19, 1953

J.C. Johnsen

Honorable R. M. Gifford Prosecuting Attorney Sullivan County Green City, Missouri

Dear Mr. Gifford:

We render herewith our opinion on your request of March 9, 1953, which request is as follows:

"A misdemeanor warrant is issued from the office of Magistrate of T county for a violation of the Wild Life Code for a resident of J County and the warrant is executed and the violator is placed in the county jail of J county and the sheriff of T county is notified that the prisoner is in custody. Immediately upon being placed in custody the individual charged demands a bond. The question that arises is whether the defendant is entitled to make recognizance in J county or must he forego the privilege of attempting to make bond until he is returned to the Magistrate of the county from where the warrant issued."

We believe that Supreme Court Rule 21.13, which took effect January 1, 1953, now covers the situation. Following is the text of the rule:

"21.13--Bail--Arrest in Another County. If the offense charged is bailable and the arrest occurs in a county other than that in which the alleged offense was committed, and the warrant issued,

Honorable R. M. Gifford

"the officer making the arrest shall, when requested by the person arrested, take him before a judge or magistrate of a court in such county having original jurisdiction to try criminal offenses, who shall admit him to bail in such sum as may seem to be sufficient and proper with sufficient security for his appearance before the judge or magistrate out of whose court the warrant issued, (or if he is absent or his office be vacant, then before the nearest judge or magistrate of the court of such county having original jurisdiction to try criminal offenses) at a time to be stated in the bond. Such bond shall be transmitted to and filed with the judge or magistrate before whom the same is returnable."

Any misdemeanor, of course, is a "bailable offense".
Article I, Section 20, Missouri Constitution, 1945, provides:

"Sec. 20. Bail guaranteed-exceptions.-That all persons shall be bailable by
sufficient sureties, except for capital
offenses, when the proof is evident or
the presumption great."

A capital offense is one which is punishable - that is to say, liable to punishment - with death, Ex parte Dusenberry 97 Mo. 504, 11 S. W. (2d) 17.

CONCLUSION

It is the opinion of this office that one who is arrested under a misdemeanor warrant in a county other than the one in which the offense was committed and the warrant issued, is entitled to make bond before a Judge or a Magistrate of a court having original jurisdiction to try criminal offenses of the county where such arrest is made.

This, opinion, which I hereby approve, was prepared by

Honorable R. M. Gifford

my assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General

WDK:mm

SANITY HEARINGS: PROSECUTING ATTORNEY MAYMBE GUARDIAN'S ATTORNEY: WHEN: When probate court adjudges one insane and appoints guardian who was informant in inquiry. Prosecuting attorney who appeared for state or county at hearing cannot be retained as attorney for guardian subsequent to adjudication.

JOHN M. DALTON



April 29, 1953

XXXXXXX

J. C. Johnsen

Honorable R. M. Gifford Prosecuting Attorney Sullivan County Milan, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:

"Your opinion is sough with reference to a situation where the prosecuting attorney is retained subsequent to the adjudication of insanity by the duly appointed guardian who was an informant at the time of the inquisition."

"Is such action on the part of a prosecuting attorney in conflict with any official duty?"

Reference is made in your letter to an opinion of this department furnished to the Honorable Roy W. McGhee, Jr., Prosecuting Attorney of Wayne County, Missouri. In this opinion it was held that it was improper for a prosecuting attorney to represent at a sanity hearing held in his own county, the person who is the subject of the hearing, or for a prosecuting attorney to represent, in his private capacity, an informant in the sanity hearing, but that it is the duty of the prosecuting attorney to represent the state or county at all sanity hearings held within his county. However, it is believed that said opinion is not broad enough to cover the situation mentioned in your letter, the facts of which are alleged to have occurred subsequently to the adjudication of insanity.

The statement of facts given in the opinion request fail to indicate whether or not the rights of the person (adjudged insane)

Hon. R. M. Gifford

to file a motion to set the judgment aside (as provided by Section 458.100 RSMo. 1949), or to take an appeal from such judgment to the circuit court (as provided by Section 468.020, RSMo. 1949) of the county have expired. However, for the purposes of our discussion herein, it will be assumed that such rights have expired; that such judgment has become final and that no motion to set it aside has been filed or appeal has been taken therefrom.

The only proceeding in which the same parties, interests and issues of the sanity hearing might become involved in a proceeding subsequent to the inquiry would be that of a restoration of sanity proceeding. This proceeding might be instituted by the insane person, or by some other person in his behalf.

Section 458.530, RSMo. 1949, provides for restoration of sanity proceedings, and reads as follows:

"For and on behalf of any person previously adjudged to be of unsound mind by any court in the state of Missouri, there may be filed in the probate court of the county wherein he was adjudged insane, a petition in writing, verified by oath or affirmation, alleging that subsequent to his adjudication of insanity he has fully recovered his mental health and been restored to his right mind and is now capable of managing his affairs, and the probate court wherein any such petition is filed shall hold an inquiry as to the sanity of the person in whose behalf the petition is filed; provided, that if said court, upon such inquiry, shall find that such person is not restored to his right mind, and such person, or anyone for him, shall within ten days after such finding, file with the court an allegation in writing, verified by oath or affirmation that such person is of sound mind and is aggrieved by the action and finding of the court, the court shall then cause the facts to be inquired into by a jury."

In the case of Harrelson v. Flournoy, 229 Mo. App. 582, it was held that the same issues are involved in a restoration proceeding regarding the sanity or insanity of the person adjudged insane as were involved in the sanity inquiry, except that the burden of proof

Hon. R. M. Gifford

is upon the petitioner. At l.c. 593, the court said:

"It necessarily follows that, upon this inquiry under Section 493, upon alleged restoration to rightness of mind or discharge from guardianship, the same issues as to sanity or insanity at the time of the later inquiry and as to the capacity of the subject to manage his affairs are in question as were in question upon the previous inquiry under Section 448upon the original inquiry under which he was adjudicated to be a person of unsound mind and incapable of managing his affairs. The only difference in such inquiries is as to the burden of proof. In the original inquiry, the burden was upon the petitioner or informant seeking the adjudication of appellant's unsoundness of mind. In the later inquiry, the burden was upon the appellant, the petitioner who seeks his discharge, to show his restoration to his right mind. Upon the previous inquiry, the informant charged, and it was adjudicated, the appellant was a person of unsound mind and incapable of managing his affairs. Clearly, inasmuch as the later inquiry is for the purpose of avoiding the adjudication upon the previous one-where the proof warrants -- it is necessary, in order so to warrant, that it be made to appear that the situation upon which the former adjudication rests no longer exists. It is therefore necessary that appellant show upon the inquiry for his discharge that he had not only been restored to his right mind and was same but that he was capable of managing his affairs. The instruction was not erroneous in so requiring. Indeed, it is alleged in appellant's allegation for his discharge that he was, at the time of his filing, a person of sound mind, same and capable of managing his affairs, and had been restored to his right mind. Such contention, for such further reason, is not open to appellant."

While no reference is found in the opinion request to a restoration yet, because such proceedings are to be expected in every instance subsequent to a sanity hearing in which one is found to be insane, we believe it is necessary and proper to consider such proceedings and its effect, if any, upon the subject matter of the opinion request.

Proceedings of this nature are very similar to sanity inquiries and in view of the fact that the parties interested in the hearing are the same, as well as the issues, it is our thought that it is the duty of the prosecuting attorney to appear at all such proceedings held in his county and to represent only the state or county.

It does not appear that a guardian of an insane person would be directly interested in the issues involved in a restoration proceeding, or that he would be a necessary party thereto, yet he would be primarily interested in such proceeding if he had filed the petition authorized by Section 458.530, supra, and his interest in the matter would be identified with that of his ward. In such instances it would be improper for the prosecuting attorney to represent the guardian or any interests other than those of the state or county, since the state or county would be as much interested in the restoration proceeding as it was in the sanity inquiry.

In such event the prosecuting attorney would find himself in the position of attempting to represent the guardian and ward, and the state or county in the same proceeding. Of course the prosecuing attorney is prohibited from engaging in such actions which are highly improper and conduct unbecoming to a member of the Bar. While we are merely stating a hypothetical case not founded upon any known facts, yet it serves to illustrate the unenviable position in which the prosecuting attorney may find himself unless he scrupulously refuses to accept any employment or to engage in any activity which might interfere with the performance of his official duties relating to sanity inquisitions or restoration of sanity proceedings.

The guardian in the instant case was the informant in the sanity inquiry and, for reasons given in above mentioned opinion the prosecuting attorney could not represent the informant in that hearing. Although it does not appear from the facts given in the opinion request that the guardian-informant is primarily interested in the restoration proceedings, it is entirely possible, or even probable, that he might be, and in the event the prosecuting attorney should represent said guardian-informant, he might find that he had represented a person or interest in conflict with his official duties, which require him to represent only the state or county in either the sanity inquisition or restoration proceedings.

In view of the foregoing, it is our thought that a prosecuting attorney would be guilty of improper actions and conduct in the event he represented a guardian of one adjudged to be insane subsequent to the adjudication of insanity under the circumstances referred to in the opinion request.

CONCLUSION

It is the opinion of this department that when a probate court in a sanity inquiry adjudges one insane and appoints a guardian who was informant of the alleged insane person, the prosecuting attorney, who represented the state or county at the inquiry, cannot be retained as attorney for the guardian, subsequent to the adjudication.

The foregoing opinion, which I hereby approve, was written by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General



July 7, 1953

Honorable R. M. Gifford Prosecuting Attorney Sullivan County Milan, Mis souri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"A question has been proposed to this office with reference to the relative positions of the County Court and the County Highway Commission of Sullivan County, Missouri and the State Highway Commission of Missouri with reference to the powers and authority conferred by statute thereupon regarding the location and establishment of proposed county highways. Section 230.030. RSMo 1949, with reference to the power and duties of the County Highway Commission says, 'that said commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the State Highway Commission, a system of county highways . . . '

"The particular question submitted is a determination of the validity of the setting up of a proposed road in this county by the State Highway Commission under circumstances that would indicate objection and disapproval by the County Highway Commission and the County Court. If the power to so designate such roads is within the County Highway Commission but subject to the approval of the State Highway Commission does it not necessarily

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follow that the setting up of a particular road presupposes an agreement between the two Commissions.

"Assuming the necessity of the consent and agreement of the County Commission to set up a particular road and further assuming the designation of such road arbitrarily by the State Commission and over the objection of the county body what remedy, if any, has the County Highway Commission?"

The Missouri State Highway Commission is a constitutional body existing by virtue of the provisions of Sections 29 to 34, inclusive, Article IV of the Constitution of 1945, and prior constitutional provisions. Section 29 reads as follows:

"The department of highways shall be in charge of a highway commission. The number, qualifications, compensation and terms of the members of the commission shall be fixed by law, and not more than one-half of its members shall be of the same political party. The selection and removal of all employees shall be without regard to political affiliation. It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations and conditions imposed by law as to the manner and means of exercising such authority; and authority to limit access to, from and across state highways where the public interest and safety may require, subject to such limitations and conditions as may be imposed by law."

Also, the following portion of subsection (3) (a) of Section 30:

"(3) In the discretion of the commission to locate, re-locate, establish, acquire, construct and maintain the following:

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"(a) supplementary state highways and bridges in each county of the state as hereinafter provided; * * *"

Section 32 relates to the apportionment of funds for supplementary highways, and after setting up the formula by which such allocation is to be made, contains the following provision:

"* * * Supplementary state highways shall be selected by mutual agreement of the commission and the local officials having charge of or jurisdiction over roads in the territory through which such supplementary state highways are to be constructed."

From the foregoing it appears that the constitutional provisions, together with statutory enactments related thereto, which are found in Chapter 226, RSMo 1949, evidence an intent on the part of the people of Missouri that jurisdiction over "state highways" be delegated to the Missouri State Highway Commission. The delegation of power has been accompanied by the qualification with respect to "supplementary state highways" appearing as part of Section 32, Article IV, Constitution of 1945, quoted supra.

We next direct your attention to the provisions of Chapter 230, RSMo 1949, which relate to "county highways." With respect to such highways, it appears that it is the intention of the people of Missouri that jurisdiction thereof be retained at the local level and exercised by a body known as the "County Highway Commission." The powers and duties of such body have been declared in Section 230.030, RSMo 1949, which reads as follows:

"230.030. It shall be the duty of the county highway commission and said commission shall have the power to locate, lay out, designate, construct and maintain, subject to approval of the state highway commission, a system of county highways not exceeding in the aggregate at any given time one hundred miles in any county, by connecting by the most practical route the several centers of population in the county, in such manner as to afford

a connection with such of said centers of population as are not now located on any state highway with such state highway, and so as to afford, as nearly as may be done, a connection with county highways connecting the centers of population of adjoining counties, to the end that all parts of the county shall be connected with the state highway system as now laid out and designated, and that the inhabitants of the county generally shall have and enjoy a system of highly improved farm-to-market roads. If any part of this county one hundred mile highway system has been, or shall hereafter be taken over by the state highway commission and become a state highway, then an equal amount of new mileage, to take the place thereof, may be placed in the county one hundred mile system."

A further limitation other than the approval of the State Highway Commission, which is expressed in the section quoted, appears in Section 230.040, RSMo 1949, which imposes the duty upon the County Highway Commission to obtain the further approval of the State Highway Commission of the proposed location of any "county highway." After such county highways have been approved and constructed, the County Highway Commission exercises complete jurisdiction thereover, as appears from the provisions of Section 230.070, RSMo 1949, which reads as follows:

"230.070. The county highway commission shall have absolute jurisdiction and control over all highways constituting a part of the county highway system, and shall hold title in fee to the right of way thereof, and no other officer, board or commission, except as in this chapter specifically provided, shall have or exercise any authority or jurisdiction over any of such highways. The roads constituting the county highway system shall be known and designated as 'county highways.'"

The integration of "county highways" into the "state highway system" is provided for by Section 230.110, RSMo 1949, which reads as follows:

"230.110. If, and when, the state highway commission is authorized by law so to do, and may so desire it may take over all or any part of the highways of the county highway system and make refund therefor in such manner as may now or hereafter be provided by law for making refund to the several counties of this state, and road districts thereof, for highways heretofore designated and taken over by said state highway department. whereupon it shall be the duty of the county highway commission, by proper deed of conveyance, to transfer to state highway department that part of county highway system so taken over."

Applying the foregoing constitutional and statutory provisions to the problem which you have submitted, it appears that if the proposed road is a "county highway", as you have referred to it in your letter of inquiry, then the power to locate, designate, construct and maintain such road as a part of the "county highway system" has been, and is, vested in the County Highway Commission, subject, however, to the approval of the State Highway Commission. Of course, such power to approve or disapprove may not be exercised in an arbitrary or capricious manner, and inasmuch as this phase proposes a factual matter, we do not undertake to render any opinion thereon.

If, on the contrary, the proposed new road is in fact a "state highway" within the statutory meaning of that term, and not a "supplementary state highway," then the complete power with respect to its location, construction and maintenance is vested in the State Highway Commission, independent of any approval or disapproval on the part of local officials.

However, a third possibility suggests itself. If the proposed new road is in fact a "supplementary state highway" which upon completion will become a part of the "state highway system," then its selection must be based upon a mutual agreement of the State Highway Commission and the local officials having jurisdiction over roads in the territory to which such supplementary state highway is to be constructed. This is the plain meaning of the quoted portion of Section 32, Article IV, Constitution of 1945, quoted supra.

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It does not appear that any statutory remedy has been afforded the body designated as the "County Highway Commission" with respect to enforcing by legal action any failure on the part of the State Highway Commission to obtain the agreement of such "County Highway Commission" before the construction of a "supplementary state highway." In such an instance, it seems that the remedy, if any, would inure to the benefit of owners of land through which such proposed new road might be located. However, it is our opinion that the County Highway Commission could through legal action obtain approval of the State Highway Commission to a proposed "county highway" in the event such approval be withheld arbitrarily or capriciously.

CONCLUSION.

In the premises, we are of the opinion:

- l. That if a proposed new road located within a county is a "county highway," then the exclusive jurisdiction over the location, construction and maintenance of such road is vested in the "County Highway Commission" subject to the approval of the State Highway Commission;
- 2. That if such proposed new road is a "state highway", of the primary type, then the exclusive jurisdiction with respect to its location, construction and maintenance is vested in the State Highway Commission; and
- 3. That if such proposed new road is in fact a "supplementary state highway" which upon completion will form a part of the "state highway system" its selection must be by mutual agreement of the State Highway Commission and the local officials having jurisdiction over roads in the territory through which such proposed new road is to be located.

We are further of the opinion that statutory authority has not been granted to the County Highway Commission to restrain or enjoin the State Highway Commission from the construction of a "supplementary state highway" in such county, even absent the approval of such County Highway Commission, and that the remedy, if any, must of necessity be taken advantage of by the owners of land through which such proposed road is located.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

DIVISION OF WORKMEN'S COMPENSATION: STATUTORY CONSTRUCTION: Under House Bill No. 286, passed by the 67th General Assembly, employees who, heretofore, filed a rejection of the provisions of Chapter 287, RSMo 1949, that has not been withdrawn, need only file a new rejection upon obtaining new employment.

XXXXXXXXX

John M. Dalton

FILED 33

August 19, 1953

XXXXXXXX John C. Johnsen

Mr. Spencer H. Givens, Director Division of Workmen's Compensation Department of Labor and Industrial Relations, Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads:

"An amendment to the Missouri Workmen's Compensation Law, changing Subsection 3 of Section 287.060, will become effective August 29, 1953, under the provisions of House Bill No. 286, signed by the Governor on June 8, 1953. For your convenience I enclose a printed copy of the bill.

"Subsection 3 formerly provided that an employee's rejection of law was effective for any and all employments then or thereafter engaged in, until withdrawn. The amendment makes an employee's rejection effective only on the employment at time of rejection or until withdrawn.

"In connection with this amendment, we would appreciate your opinion on the following:

- "1. Absent a newly filed rejection of the law by an employee on August 29, 1953, or thereafter, would a rejection now on file and continuing on file August 29, 1953, and thereafter be effective on any and all employments?
- "2. If an employee now has on file and continues to have on file August 29, 1953,

and thereafter a rejection of law, would the filing of a rejection August 29, 1953, or thereafter affect his status under the law? In other words, would not the filing previous to August 29, 1953, continue to be effective for any and all employments until withdrawn - irrespective of and in spite of a filing under the new provision of the law August 29, 1953, and thereafter?"

The provisions of said House Bill No. 286, passed by the Sixty-seventh General Assembly, do not specifically indicate whether or not employees shall be subject to the requirement of filing another rejection of provisions of said Chapter 287, RSMo 1949, when they, heretofore, filed such a rejection.

The principal difference in Section 287.060, RSMo 1949, repealed by said House Bill No. 286 and Section 287.060 of said House Bill can be found under Subsection 3 thereof, which formerly provided that notice given by the employee shall take effect upon all employment of which he may then and thereafter be employed until the rejection is withdrawn, while Subsection 3 of the new bill provides that such notice shall be given by the employee to take effect only upon the employment of it which he may then be employed until the rejection is withdrawn.

A well established rule of statutory construction is that acts of the Legislature must be held to operate prospectively only, unless a different legislative intent is clearly to be given from the terms. See Lucas v. Murphy. 156 S. W. (2d) 686, 384 Mo. 1078.

Ordinarily, the general rule that a statute will be construed to be prospective in operation does not apply to statutes affecting procedure or a legal remedy. See Benas v. Maher, 128 Fed. (2d) 247 and Clark v. K. C. St. L. and C. R. Co., 118 S. W. 40, 219 Mo. 524.

There is no impairment of an individual's rights and interest in this instance merely by said House Bill repealing one statute and enacting a new one containing almost the same language with the one exception hereinabove mentioned. Furthermore, the said new bill does not impose any liability on any employee. Actually, it is more in the nature of a procedural and remedial statute, and under the foregoing rules of statutory construction hereinabove announced, such statutes when enacted, apply to all acts whether commenced before or after said enactment. See Wentz v. Price Candy Co., 175 S. W. (2d) 852,

Mr. Spencer H. Givens

352 Mo. 1, transferred 168 S. W. (2d) 462.

In view of the foregoing decisions, we are inclined to believe that no new rejection is required to be filed for the present employment under said House Bill, however, after the effective date of said bill, August 29, 1953, said employees will be required to file rejection of such chapter for any new employment.

CUNCLUSION.

It is the opinion of this department that subsequent to August 29, 1953, the effective date of said House Bill No. 286, passed by the Sixty-seventh General Assembly, that employees that have heretofore filed a rejection of the provisions of Chapter 287, RSMo 1949, will only be required to file rejections of said chapter when obtaining new employment. Of course, if said employees choose to come within the provisions of said chapter, no rejection need be filed.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours truly,

JOHN M. DALTON Attorney General

ARH/mv

SAVINGS AND LOAN ASSOCIATIONS: BOARD OF DIRECTORS' POWER:



A savings and loan association not prohibited under its by-laws or any Missouri statutes, may pay bonuses to employees or affiliates for obtaining new accounts. By-law of an association prohibiting payment of dividends upon accounts with-drawn can be amended to permit payment of dividends upon any portion of withdrawal between lastdividend date and notice of withdrawal. Board of directors lack power under by-laws to create new office of chairman of board. Office cannot be created without amendment authorizing same.

June 24, 1953

Honorable Morris G. Gordon
Supervisor
Savings and Loan Supervision
Department of Business and
Administration
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"The following questions have been submitted to this Division for approval and we would greatly appreciate your opinion before we advise this association.

"Would the Division of Savings and Loan have any objection to the following contemplated changes in the operation of the association?

- "(1) To pay bonuses to employees and affiliates for obtaining new savings accounts.
- "(2) To amend the by-laws to pay dividends on partial withdrawals between dividend dates. --- By proper statutory procedure of course.
- "(3) To create a new office of Chairman of the Board without amending the by-laws."

Honorable Morris G. Gordon

The above inquiries appear to be general in nature and might properly refer to any or all savings and loan associations in the state. However, we do not believe that the writer intended to ask questions of this nature, but rather to ask questions referring to a particular savings and loan association of which he was thinking at the time said inquiries were made.

Our belief in this respect is confirmed by the fact that along with the opinion request, the writer enclosed a copy of the by-laws of a certain savings and loan association, and at least two of above three inquiries relate to the by-laws of this association, which for convenience, we shall refer to as A Savings and Loan Association.

Among the powers and duties conferred upon the board of directors of A Savings and Loan Association, are those to fix the compensation of directors, officers, and employees as provided by sub-section (c) of section 33, of the by-laws, which reads as follows:

"(c) To fix the compensation of directors, officers and employees; and to remove any officer or employee at any time with or without cause."

Above quoted portion appears to be the only provision of the by-laws dealing with the compensation of directors, officers, or employees, although the method of paying such compensation by salary, or in some other manner is not stated. This is not important, except that our remarks to follow will be more or less of a general nature and will be fully applicable to all types or classes of compensation paid employees.

The first inquiry is concerned with whether or not bonuses may be paid to employees and affiliates for obtaining new savings accounts, although no indication is made as to whom the word "affiliates," was meant to refer. From the subsequent clarification of the word by the writer, we understand that "affiliates" was intended to refer to office help, officers, and directors of the association.

In the case of Wellington v. Con. P. Curran Printing Co., 268 S. W. 396, it was held that a bonus contract was unilateral, and was not one based upon the mutual obligations of the employer and employee, and that an employee who had complied with the terms of his employer's offer was entitled to a bonus. At 1. c. 398, the St. Louis Court of Appeals said:

"The compliance with the terms of this offer of defendant created a contract supplementary to the contract of employment. It was an inducement to plaintiff to remain in the employ of defendant, and to perform efficient and faithful service. Plaintiff, who was employed by the week, was not obligated to remain throughout the year 1920, and it could be inferred from the facts in this record that he was induced to do so, in part at least, by the offer of reward made to him by defendant. case does not come within that class of cases which hold that there can be no recovery where defendant gets no more service as the result of such a promise than it would had no such promise been made, because plaintiff here was not under a contract of employment for the entire year 1920, but was employed and paid by the week (according to defendant's own testimony), and for this reason the agreement could not be considered a nudum pactum. We think the great weight of authority supports the view that plaintiff, under such a state of facts as we have in this record, is entitled to recover the amount sued for. * * *

Also, in the case of Building and Loan Association v. Barret et al., 160 Mo. App. 164, in discussing the authority of the officers and directors of a building and loan association, the Springfield Court of Appeals, at l. c. 180, said:

"The officers and directors of building and loan associations possess such powers as are granted by statute, charter and by-laws, and such as are inconsistent therewith which are necessary to the discharge of their several offices, but any substantial departure therefrom is ultra vires. Each of the officer's acts, in a way, as agent for the society and has power to bind it within the scope of the apparent authority which he possesses. (6 Cyc. 139) No citation of authorities is necessary to support these elementary principles."

From the holding in the case of Wellington v. Con. P. Curran Printing Co., supra, bonus contracts between an employer and employee are legally enforceable.

We are unable to find any Missouri statutes or any provisions of the by-laws of a Savings and Loan Association which prohibits it from entering into bonus contracts with its employees and affiliates. Therefore, in view of the foregoing, and in answer to the first inquiry of the opinion request, it is our thought that said association may legally enter into such contracts with its employees and affiliates.

The second inquiry concerns the matter as to whether the by-laws of A savings and Loan Association may be amended so that the payment of dividends on partial withdrawals of accounts of shareholders may be made between (as we assume the regularly established) dividend dates.

Section 369.120, RSMo 1949, provides the procedure that shall be followed when the by-laws of a saving and loan association are to be amended. We are not concerned here with such method of procedure, but rather with the question as to whether or not the by-laws of the savings and loan association referred to in the instant case can be legally amended in the manner, and for the purpose mentioned above.

Section 369.230, RSMo 1949, provides when dividends shall be declared by the board of directors and reads as follows:

"As of June thirtieth and December thirty-first of each year the board of directors shall declare such dividend, if any, from the undivided profits account as the board shall deem advisable, taking into consideration existing conditions; provided, however, that any association which, upon the effective date of this chapter, had been closing its books and declaring dividends upon other semi-annual dates may continue to do so, with the consent of the supervisor."

Section 369.245, RSMo 1949, provides how dividends shall be computed and reads as follows:

"Except as otherwise provided in this chapter, dividends shall be calculated on the participation value of each account

at the beginning of the dividend period, plus payments made thereon during the dividend period, less amounts withdrawn and notice for withdrawal, which for dividend purposes, shall be deducted from the latest previous payment thereon, computed at the dividend rate for the time invested, provided that no association shall be required to compute, credit or pay any dividend on any amount withdrawn during the dividend period."

Section 369.260, RSMo 1949, provides when an application for withdrawal of an account may be filed, and reads as follows:

"Any account holder may, at any time, present a written application for withdrawal of all or a stated amount of his accounts. Such application may be canceled or reduced at any time. An association shall pay or number, date and file in the order of actual receipt, every withdrawal application."

Section 369.270, RSMo 1949, gives the status of applicants for withdrawal of accounts, and reads as follows:

"An account holder who has filed written application for withdrawal shall remain such so long as his application remains on file and shall not become a creditor. Except with the approval of the supervisor, no dividends shall be declared upon that portion of an account which has been noticed for withdrawal, which, for dividend purposes, is to be deducted from the latest previous payment on such account, so long as such application is on file."

Section 21 of the by-laws of A Savings and Loan Association, gives the dates when dividends may be declared by the board of directors, and conforms to the dates provided by Section 369.230, supra.

Section 22 of the by-laws prohibits uncollected interest from being included as earnings from which dividends are to be paid.

Section 23 of the by-laws provides how dividends are to be computed, and reads as follows:

"DIVIDENDS - HOW COMPUTED. Dividends shall be calculated on the participation value of each account at the beginning of the dividend period, plus payments made thereon during the dividend period (less amount withdrawn and noticed for withdrawal, which for dividend purposes shall be deducted from the latest previous payment thereon) computed at the dividend rate for the time invested; provided that no dividends will be computed, credited, or paid on any amount withdrawn during the dividend period."

Sections 21, 22 and 23, are all the by-laws relating to dividends.

Section 24 of said by-laws provides the procedure to be followed by the shareholders in the withdrawal and redemption of accounts, and reads as follows:

"WITHDRAWALS. Any account holder at any time may present a written application for withdrawal of all or a stated amount of his accounts, and may cancel or reduce the amount of such application at any time, if such application is not paid in full when presented, same shall be numbered, dated and filed in the actual order of receipt. Withdrawals shall be paid in the order of receipt, except (1) that the board of directors may pay upon any application not exceeding one hundred dollars to any one account holder, and (2) that payment of withdrawals shall be made on the rotation plan provided by the Savings and Loan Act of 1946 whenever the association does not pay in full each application which has been on file one full calendar month. The association shall not obligate itself to pay withdrawals on any other plan.

"Upon withdrawals the association shall pay from available funds under the Laws of Missouri the value of an account, as determined by the board, but not in excess

of the participation value thereof. No dividends shall be declared upon that portion of an account which has been noticed for withdrawal which, for dividend purposes, is to be deducted from the latest previous payment on such account, so long as such an application is on file."

Section 25, prohibits the association from charging any withdrawal fees, and Sections 24 and 25 are the only by-laws relating to withdrawals. The amendments to the by-laws of A Savings and Loan Association referred to in the opinion request apparently was meant to refer to Section 23, supra. Section 369.230, supra, allows the board of directors of a savings and loan association to declare dividends on shares of stock as of June 30th and December 31st each year, and these are the only dates when dividends may be declared, except when the state supervisor of savings and loan grants permission to an association to declare dividends on some other dates. It appears that A Savings and Loan Association has not been granted special permission and any dividends which may be declared by it must be on the dates provided the above mentioned section of the statutes, and Section 21, supra, of the by-laws.

Section 369.270, supra, prohibits the payment of dividends upon any portion of an account noticed for withdrawals, except with the permission of the superviser. It appears that A Saving and Loan Association has not been granted that permission, and under the provisions of said section, it cannot pay dividends on any part of an account noticed for withdrawal.

Section 369.245, supra, is the only provision of the Savings and Loan Act which appears in any manner to restrict the crediting or payment of dividends upon accounts withdrawn. The pertinent part of that section reads as follows, "* * *that no association shall be required to compute, credit or pay any dividend or any amount withdrawn during the dividend period."

From the foregoing, we reach the conclusion that under the provisions of Sections 369.230, 369.245, 369.270, supra, and Sections 21 to 25 inclusive, of the by-laws of A Savings and Loan Association, said association is empowered to declare dividends as of June 30th and December 31st each year, and that it cannot pay dividends upon any portion of an account noticed for withdrawal. While we construe Section 369.245, supra, as being directory, and does not require an association to declare or pay dividends upon accounts withdrawn during the dividend period, it

does not prohibit the payment of such dividends during said periods. Unless the by laws of an association prohibit the payment of dividends upon withdrawals in whole or in part between dividend dates, it appears that associations might lawfully pay such dividends upon whole or partial withdrawals from the date of the last dividend payment to that of the notice of withdrawal. However, in the instant case, Section 23 of the by-laws of A Savings and Loan Association prohibits it from paying dividends upon any portion of an account withdrawn during the dividend period. Said Association cannot make the dividend payments in the manner suggested in the second inquiry as long as Section 23, supra, of its by-laws is in effect.

In answer to the second inquiry, it is our thought that Section 23 of by-laws of A Savings and Loan Association can be amended to permit the payment of dividends upon partial with-drawals between dividend dates.

Section 369.190, RSMo 1949, gives the qualifications of the directors of a savings and loan association, and reads as follows:

"No member shall be eligible to become or continue as a director unless he shall hold an account with net participation value of at least five hundred dollars.

The number, title functions, and qualifications of officers shall be provided by the bylaws. Each officer shall serve at the pleasure of the board."

(Underscoring ours.)

Section 43 of the by-laws of A Savings and Loan Association provide what officers of the board of directors there shall be, and Section 44, gives the terms of each such officer.

Section 44, reads as follows:

"TERMS OF OFFICE. All officers shall be elected or appointed by the board of directors to serve at the pleasure of the board. Such elections and appointments shall take place at a board meeting to be held immediately after each annual members' meeting."

Sections 45, 46, 47 and 48, of said by-laws set out the duties and powers of president, vice-president, secretary, and

treasurer of the board of directors respectively.

Section 45, reads as follows:

"PRESIDENT'S DUTIES AND POWERS. The President shall preside at all meetings of the members and the board of directors and in the absence of designation from time to time of powers and duties by the board of directors, he shall have such powers and duties as generally pertain to the office of president."

Section 46, reads as follows:

"VICE-PRESIDENT'S DUTIES AND POWERS.
The vice-president shall perform all
the duties of the president during his
absence or disability and shall have
such other powers and duties as shall
from time to time be conferred upon
him, or prescribed by the board of
directors, or the executive committee."

Section 47, reads as follows:

"SECRETARY'S DUTIES AND POWERS. In the absence of designation from time to time of powers and duties by the board of directors, the secretary shall have such powers and duties as generally pertain to the office of secretary or manager."

Section 48, reads as follows:

"TREASURER'S DUTIES AND POWERS. The treasurer, if any, shall perform duties as shall be required of him by the board or the executive committee."

The above quoted sections of the by-laws name every officer of the A Savings and Loan Association, and prescribe the duties of each. Section 43, grants the board power to "elect or appoint such additional officers and employees as it may, from time to time determine," and at first thought this would seem to be sufficient authority for the creation of the new office of chairman, referred to in inquiry number three of the opinion request. The functions and qualifications of the office of chairman have not been given,

and we have no method by which to determine exactly what the writer of the opinion request had in mind from the brief reference made in the third inquiry to the office of chairman of the board. However, it is assumed that the duties of such new office would be those characteristic to a chairman of any other organization.

The word "chairman" is defined by Websters New International Dictionary, as follows: "The occupant of a chair or office or authority; specif., the presiding officer of a committee, meeting, or any organized body."

From this definition, and the few facts given in the opinion request, the apparent reason for creating the office of chairman would be to have that officer preside over the meetings of the members of the board although the necessity for the creation of such office does not appear.

Section 45 of the by-laws specifically provide that it is the duty of the president to preside over all meetings of the members and board of directors, and it seems that the general duties of the proposed new office would be the same as those now performed by the president.

In the event such office was created and one elected or appointed chairman, under authority of Section 43 of the by-laws, then the board of directors would find itself in the embarrassing position of having two presiding officers of its meetings, whose powers, and duties in this respect would be the same. It is believed that the board did not intend for such an absurd situation to ever occur, yet, if it were to be assumed that the board had authority under Section 43, supra, to create the office, and to appoint or elect one of their members as chairman, such an unhappy situation would be the result.

Therefore, it is our thought that the board of directors lacks the power, and has no authority under Section 43 of the by-laws to create the office of chairman, so long as Section 45 of the by-laws defining the office of president and the duties of same, remains in effect, for the board has no power to appoint or elect two different officers to perform the same duties, and particularly those who are to preside over the member or board meetings.

It is our further thought that the only method by which the board may legally create the office of chairman is by a proper amendment of Section 45, of the by-laws, or by repealing

this section and enacting a new section which creates the office of chairman of the board, and prescribes his duties.

CONCLUSION

It is therefore the opinion of this department that:

- (1) A savings and loan association may legally enter into an agreement to pay bonuses to its employees for obtaining new savings accounts.
- (2) A savings and loan association by-laws prohibiting the payment of dividends upon accounts withdrawn during dividend periods can be amended to permit such payments.
- (3) The board of directors of a particular savings and loan association which lacks the power under its existing by-laws to create the office of chairman of the board of directors, cannot create such office without an amendment to said existing by-laws authorizing the creation of said office and defining the duties of same.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON

PNC:hr

SAVINGS AND LOAN
ASSOCIATION: GENERAL
CREDITOR'S PREFERENCE;
WHEN:



General creditors of Savings and Loan Association being liquidated and dissolved entitled to have their claims, together with costs of proceedings, first satisfied before net proceeds are to be distributed to members pro rata according to participation value of each member's account.

September 11, 1953

Honorable Morris G. Gordon Supervisor Division of Savings and Loan Administration Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads in part as follows:

"'In regard to Savings and Loan Associations, please advise if lenders to a savings and loan association would have a preferred claim on the assets of an association in liquidation.'"

The opinion request fails to state whether it has reference to creditors who are, or those who are not shareholders of the association, but it is assumed that the reference was intended to refer to creditors who were not shareholders. Therefore, our discussion will be limited to the proposition as to what right or preference, if any, such general creditors have to the assets of a defunct association over those who are shareholders of such association.

When the methods of liquidation and dissolution of an association are mentioned herein, we have reference to those methods provided by statute, and not to insolvency proceedings. We are not concerned with the methods provided by statute for liquidation and dissolution of an association as such matters are only incidental and of secondary importance to our remarks

herein, but we mention them for the reason that it is believed to be both necessary and proper to a discussion of the present inquiry. However, it is obvious that the rights of creditors to preferred claims against the assets of an association are the same regardless of which statutory method is followed.

Such methods might be described as: (1) voluntary and, (2) involuntary.

- (1) The liquidation and dissolution may voluntarily be entered into when by a two-thirds vote of the members of the association, they adopt such a resolution. When their action has been approved by the State Supervisor of Savings and Loan, then the association may proceed to wind up its affairs. In that event, the directors shall be the trustees for purposes of liquidation and the procedure to be followed in such instance is provided by Sections 369.465 to 369.480, inclusive, RSMo 1949.
- (2) By an involuntary liquidation and dissolution is meant that procedure provided by Sections 369.525 to 369.545, RSMo 1949, under the provisions of which the affairs of an association are wound up by the direction of the Supervisor of Savings and Loan Supervision when it appears to him that it is for the best interests of the shareholders that such action be taken.

Paragraph 4, Section 369.530 provides the duties of the supervisor in those instances and reads as follows:

"4. If a reorganization plan, when submitted to the members as herein provided, is not approved by the required majority, the supervisor shall liquidate and dissolve such association and, after payment of all indebtedness, including expenses of liquidation and dissolution, shall make distribution to the members of the net proceeds prorata to the participation value of their accounts."

This brings us to the point in our discussion as to what preference, if any, claims of creditors of such an association have against the assets of same when liquidation proceedings are in progress. In this connection we wish to repeat that regardless of which statutory method is followed that the procedure is not to be construed as a proceeding in insolvency.

The general rule prevailing in most jurisdictions regarding the liquidation and payment of claims of creditors of an association is stated in 12 C. J. S., page 538, and reads as follows:

"* * *ordinarily, interested
parties occupying the position
of general creditors are entitled
to be paid in preference to those
whose claims are founded on the
relation which they sustain to the
association as members thereof. The
receiver must consider not only the
rights of claimants, as between such
claimants and the association, but
the respective rights of creditors
as between themselves, and as among
the creditors those holding security
for their claims are entitled to
priority out of the proceeds thereof."

The same general rule is also stated in the opinion of the case of Sanft v. Fair & Square Building & Loan Ass'n., 170 A. 697, at l. c. 698 the court said:

> "Moreover, the creditors of the association are first entitled to be paid before the stockholders. The testimony of the secretary discloses that there is not sufficient money on hand to pay the creditors. In Weinroth v. Homer B. & L. Ass'n, 310 Pa. 265, 165 A. 28, 29, it is stated: 'The fundamental principle is that a withdrawing shareholder is entitled only to his proportionate share of the profits of the association after the payment of creditors. He may not gain any preference by prosecuting his claim to judgment, but still retains his status as a shareholder, and execution upon the judgment will be restrained until there is sufficient surplus to pay it. U. S. B. & L. Ass'n v. Silverman, 85 Pa. 394; or until this proportionate share be determined. Christian's Appeal, 102 Pa. 184; Stone v. B. & L. Ass'n (302 Pa 544, 153 A. 758), supra; Sperling v. B. & L. Ass'n, 308 Pa.

143, 162 A. 201; Brown v. Victor B. Ass'n. 302 Pa. 254, 258, 153 A. 349."

In the case of Woerheide v. Johnston, reported in 81 Mo. App. 193, in which the right of an association to become indebted to anyone other than its own stockholders was involved, (before the enactment of statutes allowing associations to borrow money from persons other than shareholders) and the status of lenders to a borrowing association was discussed. In its opinion the court quoted with approval from the case of Towle v. American Building Loan & Inv. Society, 61 Fed. Rep. 446, at 1.c. 198 the court said:

"The Towle v. American Building, Loan & Inv. Society, 61 Fed. Rep. 446, Grosscup, Judge, said, "the insolvency of such an institution is sui generis. There can be strictly speaking no insolvency for the only creditors are the stockholders by virtue of their stock." On the other hand the solution of this troublesome question came before the supreme court of Pennsylvania in Christian's Appeal in 102 Penn. 184, and that court while holding that a court of equity through its receiver was a proper tribunal to administer and adjust the affairs of an insolvent building association adjudged that an assignment for the benefit of creditors was a more direct course to pursue and that the equitable result could be as well attained in such an assignment as by a suit in equity, and further held that in such proceeding the claims of general creditors should first be paid in full, and the remainder distributed pro rata among those whose claims were based upon stock of the association. "

Section 369.330, RSMo 1949, grants an association the power to borrow money under the restrictions imposed by that section, and it appears that the lender referred to is not a member of the association. From the import of the holding in the case last cited, a lender to the association would be a creditor of such borrowing association and would have preference to his claims against the association over those of shareholders.

In view of the foregoing and particularly in view of paragraph 4 of Section 369.530, RSMo 1949, it is our thought that the general creditors of a savings and loan association in process of liquidation and dissolution are to be given preference in the payment of their claims from the assets over those of shareholders of such association. To us it is clear that the general creditors must be first satisfied, including the costs of liquidation and dissolution before the net proceeds are to be distributed to the members pro rata up to the participation value of each member's account.

CONCLUSION

It is therefore the opinion of this department that when a savings and loan association is in process of liquidation and dissolution the general creditors of same are entitled to have their claims, together with the costs of such liquidation, first satisfied from the assets before the net proceeds are to be distributed to the members pro rata according to the participation value of each member's account.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General PUBLIC WAREHOUSES: LICENSES: The Douglas-Guardian Warehouse Corporation, a corporation, is conducting and operating a public warehouse in the City of Springfield, Greene County, Missouri, as defined in Section 415.010, RSMo 1949, and is required to comply with all of the terms of Chapter 415,RSMo 1949, relating to warehouses in this State.

February 20, 1953

Honorable Douglas W. Greene Prosecuting Attorney Greene County Springfield, Missouri



Dear Mr. Greene:

This will be the opinion requested by Honorable Milton B. Kirby, your predecessor in office, for our construction of the public warehousing statutes of this State to determine whether the Douglas-Guardian Warehouse Corporation, a Louisiana corporation, and other warehouse corporations of like status, which are doing a public warehouse business in this State, are required to procure the license prescribed by our statutes. The letter requesting an opinion reads as follows:

"Enclosed find copy of a letter addressed to me by Mr. Warren Turner of the firm of Turner, Davidson and Potter, a copy of an opinion written by a former Assistant Attorney General, and a warehousing contract of the Douglas-Guardian Warehouse Corporation.

"Mr. Turner is anxious to find out whether or not the same ruling that covers the opinion of your department on March 19, 1940 in regard to the Lawrence Warehouse Company should apply to Douglas-Guardian Warehouse Corporation. It is my opinion that the earlier opinion might bear inspection, and if perhaps under the existing law that both Douglas-Guardian Warehouse Corporation and Lawrence Warehouse Company might not both be subject to the license fee."

With said letter there were transmitted copies of the "Sub-Lease-Lease" and "Warehousing Contract" used by the Douglas-Guardian Warehouse Corporation in leasing buildings and premises wherein its business of warehousing is carried on and the agreed method of procedure provided in such contract whereby such business is conducted in this State, respectively.

Reference is made in the letter requesting this opinion to an opinion on this same subject issued by this office dated March 19, 1940, directed to Honorable Maurice L. Hushlin, Associate Prosecuting Attorney, Municipal Courts Building, St. Louis, Missouri. The said opinion of March 19, 1940, is not sufficiently definite in the entirety of its conclusion as to the necessary compliance with all of the terms of Chapter 415, RSMo 1949, formerly Chapter 137, Article 1, R. S. Mo. 1939, by public warehouses before being permitted to carry on their business in this State. The said opinion of March 19, 1940, is, therefore, hereby withdrawn.

Section 415.010, RSMo 1949, defining public ware-houses, reads as follows:

"All warehouses or storehouses situated in cities or towns now having or which shall hereafter have over twenty-five thousand inhabitants, and wherein other property than grain is stored for a compensation or consideration, are declared to be public warehouses."

Section 415.020 of said Chapter requiring the licensing and the annual renewal of such license by the proprietor, lessee or manager of any public warehouse provided for in said Chapter 415, reads as follows:

"The proprietor, lessee or manager of any public warehouse provided for by this chapter shall be required, before transacting any business in such warehouse, to procure from the circuit court of the county in which said warehouse is situated (or if to procure license for a public warehouse in the city of St. Louis, application shall be made to the circuit court of said city) a

license permitting such proprietor, lessee or manager to transact business as a public warehouseman under the laws of this state, which license shall expire with December thirty-first next following issuance thereof, and which shall be otherwise renewed annually as provided under the laws of this state, which license shall be issued by the clerk of said court upon written application, which shall set forth the location and the name of such warehouse, and the individual name of each person interested as owner or principal in the management of same, or if the warehouse be owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; and the said license shall give authority to carry on and conduct the business of a public warehouse, other than a warehouse for the storage of grain. for any calendar year or portion thereof, and shall be renewed annually thereafter in accordance with the laws of this state, and shall be revocable by said court upon a summary proceeding before the court, upon the complaint of any person, in writing, setting forth the particular violation of the law, to be sustained by the satisfactory proof, to be taken in such manner as may be directed by the court."

Other sections of said Chapter 415, which we deem it unnecessary to quote here, do require full compliance with the provisions of said Chapter and prohibit the transacting of warehousing business in cities in this State now having, or which shall thereafter have, a population of 25,000 inhabitants or more until such compliance shall be accomplished.

We have carefully examined and studied the terms and provisions recited in the copies of both the "Sub-Lease-Lease" and the "Warehousing Contract" submitted to us to determine if the Douglas-Guardian Warehouse Corporation

intends to conduct, and in fact is conducting, under the terms and requirements of such Sub-Lease-Lease and Warehousing Contract, a public warehouse in the State of Missouri as defined in said Section 415.010, supra, and as regulated by the remaining sections of Chapter 415.

We believe the terms and provisions of the Sub-Lease-Lease and the Warehousing Contract, said to be used by the said Douglas-Guardian Warehouse Corporation clearly show that said corporation, if operating a warehouse, or warehouses, in this State, under such lease and contract, would be, and is, conducting a public warehouse, or warehouses, in this State and is subject to all of the provisions of said Chapter 415 respecting the procuring of a license to transact a warehousing business under said Section 415.020, supra. A careful reading of said Sub-Lease-Lease and Warehousing Contract forms reveals numerous provisions and requirements to be observed by the parties to the lease and contract which if carried out would conclusively, we believe, constitute the business carried on under such provisions of such lease and contract public warehousing in this State. Among such provisions we find in paragraph 2 of the first clause on the front page of said lease the following provision:

> " * * said lessee to have the sole dominion and control of the premises so leased as a public warehouseman, and to be entitled as such public warehouseman at all times to receive and store merchandise and goods in or upon said leased property, and issue warehouse receipts therefor. It is expressly understood and agreed between lessor and lessee that the lessor shall not have access to the premises herein demised or any part thereof, except with the permission of the lessee in writing, and that lessor shall not attempt to exercise at any time any control of any sort over any of the goods delivered to lessee for storage during the existence of this lease."

There appear in the first and fourth clauses on the front page of the "Warehousing Contract" the following covenants and agreements:

"That Warehouseman will maintain a branch public warehouse on the premises, as covered in said lease, or leases, and issue

its warehouse receipts on commodities accepted for storage therein;

"* * * Storer shall further reimburse Warehouseman for the cost of all bonds, recording expense, State license fee, cost of constructing and maintaining enclosures, placing signs, etc.; * * *"

The carrying out of such conditions and obligations and other similar obligations, rights and privileges by the "lessee" as are provided in said lease and contract are the elements of and constitute a warehousing business when and if performed by any person, firm, partnership, association or corporation, and any such person or other entities named who carry on such business, including the storing of goods in a building on premises in the exclusive possession and control of the operator of such business, the charging of compensation therefor, and the issuing of warehouse receipts by the operator of such business in the State of Missouri, is subject, as a warehouseman, to the strict observance of all the obligations imposed upon the business of warehousing, including the procurement of the license to do business in this State, as required by the terms of the statutes of this State.

In reaching our conclusion on this question we do not believe it is needful to go farther than to understand the plan adopted and practiced by the said corporation in carrying on its warehousing business as expressed in its said lease and contract to determine that said corporation is doing a public warehousing business in this State and thereby becomes and is subject to our State warehousing statutes.

Considering the terms and conditions of the Sub-Lease-Lease and Warehousing Contract submitted to us for consideration, and used by said corporation and applying there to the provisions of our statutes relating to warehouses, we are convinced that such business is public warehousing, and requires full compliance by the Douglas-Guardian Warehouse Corporation with all of the terms of said Chapter 415, RSMo 1949.

CONCLUSION.

It is, therefore, considering the premises, the opinion of this office that:

- 1) Every person, firm, partnership, association or corporation situated in cities or towns now having, or which shall hereafter have, over 25,000 inhabitants, and wherein property other than grain is stored for a compensation or consideration, is carrying on a warehousing business in this State and is required to comply with all of the provisions of the several sections of Chapter 415, RSMo 1949, relating to warehouses;
- 2) That the Douglas-Guardian Warehouse Corporation, a corporation, is carrying on a warehousing business in the City of Springfield, Greene County, Missouri, as defined in Section 415.010, RSMo 1949, and is required to comply with all of the terms of Chapter 415, RSMo 1949, relating to warehouses.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

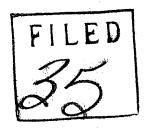
Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

TAXATION.

TAXABLE PROPERTY:



1) The personal property of the Columbia Humane Society at Columbia, Boone County. Mo. is exempt from taxation under Sec. 6. Art. X of the Constitution of Missouri, 1945, and Sec. 137.100, RSMo 1949, because such property is used exclusively for purposes purely charitable and benevolent; 2) Individuals named herein are the owners of certain buildings by the terms of a contract severing said buildings from real estate, conveyed by them to the State Highway Commission and as personalty such property is subject to taxation.

March 24, 1953

Honorable Philip A. Grimes Prosecuting Attorney Boone County Columbia, Missouri

Dear Mr. Grimes:

This will be the opinion you requested by letter from this Department respecting the tax liability of a certain society and individuals of the City of Columbia, Boone County, Missouri. The letter follows:

"I have been requested for an opinion as concerns the tax liability of persons owning the personal property located on real estate belonging to the State of Missouri. I will cite the following as an example:

"The Humane Society here in Columbia owns some real estate with a house and other small buildings located thereon. The real estate was sold to the State of Missouri for highway purposes and the land is now in the name of the State of Missouri. It is my understanding, however, that the road may not be built for a number of years and that the State of Missouri made some sort of provisions whereby the persons owning such property could continue to live on the property and to use the buildings, etc. until notified by the State of Missouri to vacate. It is my further understanding that the buildings, dwellings, etc. are considered personal property under this situation and that they may be moved in this case by the Humane Society. is no real estate assessed against the people, but the Assessor does assess the dwelling and other buildings as

personal property. This is true not only of the Humane Society but of other individual persons. These persons and the Humane Society now claim that it is improper and that the tax should not be assessed to them and that they have no tax liability.

"This poses two questions. One is the question of the status of the Humane Society with reference to whether it is tax exempt or not and secondly, are the private individuals who own valuable buildings liable for personal tax on the buildings, which are or were permanent fixtures located on real estate taken over by the State of Missouri for high-way purposes.

"It is my understanding that the deal made with the state is that the owners have a certain number of years in which to move all of the buildings, etc. Will you please render me your opinion on this set of circumstances."

Your letter submits two questions. One, whether the Columbia Humane Society, as the owner of property located in Columbia, Missouri, is tax exempt as a charitable or benevolent corporation. Two, whether certain individuals, who have sold real estate, upon which were then and are now located certain buildings, to the State of Missouri for highway purposes, with the agreement that such individuals may remove such buildings within a certain period of time after being notified by the State to remove such buildings, are subject to taxation on such buildings.

We are advised in your letter that on July 3, 1944, the Columbia Humane Society was incorporated in the Circuit Court of Boone County, Missouri by pro forma decree as a benevolent corporation for the purpose of preventing cruelty to animals. Contact by correspondence with the Missouri State Highway Commission confirms the statement in your letter that the Columbia Humane Society, by H.J. Waters, President, conveyed by deed on December 9, 1949, certain real estate situated in Boone County, Missouri, to the Missouri State Highway Commission, upon which real estate several buildings are located. In the deed of conveyance it is stipulated and agreed that said Humane

Society shall be permitted to occupy and use such buildings for a period of three years, without any rental charge; that after such free rental period has expired, said Humane Society has the right to remove, and agrees to remove, said buildings at its expense, not later than thirty (30) days after receiving written notice from the Division Engineer of the Missouri State Highway Commission; that in the event the said Humane Society fails or refuses to comply with the agreement within the thirty (30) day time limit to remove such buildings, then said buildings shall become the property of the Missouri State Highway Commission and may be removed or destroyed by the contractor or agents of said Commission.

We are further advised by the Highway Commission that the free rental period inuring to said Humane Society by the terms of said deed of conveyance expired on December 9, 1952, but that the Division Engineer of the Missouri State Highway Commission has not given said Humane Society notice to remove such buildings, as required in said deed. We believe the question of the individual ownership of such buildings, whether they are owned now as personal property by the said Humane Society because of the provision in said deed authorizing the grantor to remove such buildings and thereby convert such buildings into personal property, or whether such buildings may become the property of the State of Missouri upon the abandonment of its right to remove such buildings by the said Humane Society, is not material in the solution of question number one. If such buildings were or may become the property of the Missouri State Highway Commission they would be exempt from taxation by the terms of Section 6, Article X of the present Constitution and Sub-section (1) of Section 137.100, RSMo 1949, because owned by the State. If, on the other hand, the said Humane Society is now the owner thereof, such property is still exempt from taxation under said Section 6 of Article X of the present Constitution of this State and Sub-section (6) of said Section 137.100, if said Humane Society holds such property not for private or corporate profit, and it is used for purposes purely charitable by said Society as a benevolent corporation. It is clear, we believe, that it is so held. Section 6 of Article X of our Constitution reads as follows:

"Exemptions from Taxation. -- All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural

and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Sub-sections (1) and (6) of Section 137.100, RSMo 1949, exempting such property read, respectively, as follow:

"The following subjects shall be exempt from taxation for state, county or local purposes:

"(1) Lands and other property belonging to this state;

"(6) All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school and local purposes; * * *."

Section 352.010, RSMo 1949, provides that any number of persons not less than three, who shall have associated themselves by articles of agreement as a society formed for benevolent purposes may become a corporate society.

Section 352.020, RSMo 1949, provides that any association formed for benevolent purposes, including a purely charitable society, which tends to the public advantage may be created a body corporate and politic by complying with Sections 352.010 and 352.060.

Section 352.060, RSMo 1949, provides that the persons holding the offices, respectively, of president, secretary and treasurer of the association, by whatever name they may be known, shall submit to the Circuit Court having jurisdiction in the city or county where such association is located, the articles of agreement with the petition praying for a pro forma decree, and that the Court upon due proof, if satisfied of the lawfulness and public usefulness thereof, may grant said petition. This, we have observed, has all been consummated in the Circuit Court of Boone County, Missouri, whereby said Humane Society has been granted a pro forma decree of incorporation under the name of the Columbia Humane Society as a benevolent organization. Text-writers and the Courts frequently define "benevolent" as "charitable". 7 C.J. 1140, 1141, states its text on the point as follows:

"Since the context may qualify or restrict the ordinary meaning of the term 'benevolent,' the word is frequently used as synonymous with "charitable!: * * * *."

Our Kansas City Court of Appeals in the case of State ex rel. Hudson vs. Academy of Science, et al., 13 Mo. App. Rep., page 213, l.c. 216, defining a gift for "charity", said:

"A gift designed to promote the public good by the encouragement of learning, science, and the useful arts, without any particular reference to the poor, and any gift for a beneficial public purpose not contrary to any declared policy of the law, is a charity. And, if such a gift is administered according to the intention of the donor, the property is used for charitable purposes. * * *."

The Columbia Humane Society incorporated as a benevolent society for the prevention of cruelty to animals we believe comes clearly within such definition and within the terms of Section 6, Article X of our Constitution as being exempt from taxation as a corporation existing not for corporate profit but for purposes purely charitable.

61 C.J. 506, respecting the status of societies for the prevention of cruelty to animals states the following text:

"Societies for Prevention of Cruelty. Societies for the prevention of cruelty to children or animals may be exempt from tax under laws expressly relating thereto, or as charitable and benevolent institutions."

We find no Missouri case on this specific point but there are cases from other jurisdictions cited in support of the text in the footnotes to the text. One such case is Massachusetts Society for the Prevention of Cruelty to Animals vs. City of Boston, reported in 6 N.E. 840, decided by the Supreme Court of the State of Massachusetts. The facts recited in the decision reveal that the City of Boston assessed taxes against the plaintiff society on its real estate. society paid such taxes under protest, instituted suit and recovered back such payment in the trial court. The society was incorporated under a statute, very similar to our said Section 352.010, permitting literary, benevolent, charitable and scientific institutions to be incorporated within that State. The Court said that the objects and purposes of the society were not more specifically defined than by its title, nor was any mode of accomplishing them pointed out. In the construction and discussion of the statutes involved, the

Court held that the "society" might be properly defined as both benevolent and charitable. The Court in affirming the judgment of the trial court in favor of the society as a benevolent and charitable institution, 1.c. 841, 842, said:

"Without discussing the question whether the word 'benevolent' is used substantially as synonymous with 'charitable,' or disjunctively, we are of opinion that the society also comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members. Its work, in the education of mankind in the proper treatment of domestic animals, is instruction in one of the duties incumbent on us as human beings. Those are charitable societies whose objects are to bring mankind under the influence of humanity, education, and religion. * * *."

It is the belief of this office, answering your first question, that, under the facts existing here and under the authorities herein cited and quoted, including Section 6 of Article X of the present Constitution of this State and Section 137.100, RSMo 1949, the Columbia Humane Society is a society whose property is not held for private or corporate profit but is used exclusively for purposes purely charitable as a benevolent society for the prevention of cruelty to animals, and that its property of whatever description, real or personal, so used, is exempt from taxation by the terms of said Section 6, Article X of the Constitution and said Section 137.100, RSMo 1949.

Your second question is, whether certain individuals, who likewise have sold real estate located in Boone County, Missouri, to the Missouri State Highway Commission, and upon which were then, and are now, located certain buildings, are the owners of such buildings, as personal property, under the terms of a separate contract between such individuals, who are husband and wife, and the Highway Commission, and if such buildings as personalty are subject to taxation. The deed conveying such real estate to the State Highway Commission, dated December 9, 1948, reveals that Mr. Arthur T. Marriott and his wife, Mrs. Estella H. Marriott, are the grantors in the deed. The ownership by the grantors of such buildings separate from the land conveyed we believe is established in a separate contract between the said grantors in said deed and the State Highway Commission of Missouri, dated December 6, 1948, signed and acknowledged by the parties

before a Notary Public of Boone County, Missouri. We shall note and copy only such parts of said contract as in our view bear upon the question of the ownership of said buildings and their liability for taxation.

Clauses 4 and 5 on pages 3 and 4 of said contract refer to and identify said buildings as personal property severed from the land conveyed in said deed and mentioned in said contract and clearly state the intention, understanding and agreement of the parties that such buildings were to become, upon the execution of said deed, and did become, the absolute property of Mr. and Mrs. Marriott, named as grantors in the deed and "owners" in said contract. The said clauses 4 and 5 read, respectively, as follow:

"(4) It is further agreed during the period of occupancy by the owners or their lesses owners shall pay the expense of all maintenance and repairs which said owners deem necessary, said owners further agree to keep said premises free from rubbish, filth, and junk and agree to maintain said premises so that they will have a neat appearance. It is further agreed that when said owners vacate said property they shall be permitted to remove their stock of goods, furniture, signs, and fixtures. And it is specifically agreed that after the expiration of the fiveyear period herein provided for and in the event the premises are not leased to the owners under the provisions of Paragraph (3) above but are leased to others by the Commission, the owners shall retain, have, and be vested with the following property rights in and to the buildings then located upon the premises, viz.: the right and option to reclaim said buildings and remove (at their own expense and without liability to the Commission for waste in so doing) upon sixty (60) day written notice from the Commission that it is necessary to utilize all of the premises for highway purposes and that said buildings must be removed within such sixty (60) days; and the failure, neglect, or refusal of the owners to remove said buildings at their own expense within such sixty (60) day period shall, ipso facto, operate as an abandonment, termination, relinquishment, and forfeiture of any and all of the owners' rights and property interests

in and to said buildings, and the Commission shall then be vested with complete and unrestricted title to and ownership of said buildings and shall have the right to remove or destroy same without further liability to the owners.

"(5) It is specifically understood and agreed by and between the owners and Commission that the owners have a specific and definite property right in and to said buildings which the Commission agrees may be insured by owners and agrees that if owners insure said building or buildings located on said premises against destruction of any kind that the insurance so procured by owners shall be written in the names of the owners, paid by the owners, and in the event of the loss the proceeds of said insurance shall be payable to the owners. In the event of a loss from the destruction as hereinabove contemplated, the owners will not be obligated to rebuild the buildings on said premises but may at their election retain the proceeds from the insurance on said buildings and are further entitled to retain the possession of the real estate for the balance of the five-year period for such use and purposes as the owners may see fit, subject to the exceptions and limitations hereinabove stated and in accordance with the other terms of this contract."

The grantors in said deed having executed said contract with the conditions, privileges, rights and obligations specified therein inuring to them, and being imposed upon them, such as the right to remove such buildings at the end of the five year period, the vesting in them the right, title and interest in said buildings so that they could effect and procure, as the owners thereof, insurance of any kind on said buildings in the names of the said grantors, with the absolute right to collect and receive the proceeds of any loss of such buildings under such insurance, and being relieved of the obligation to replace and rebuild said buildings on said real estate, if destroyed, cast upon and vest in said grantors the ownership of such buildings so that such grantors, the said named husband and wife, would be, and are.

estopped now to deny that they became the owners of such buildings as personal property, severed from such real estate at the time of the execution of said deed, and now are the absolute owners of the title thereto, and are liable as such owners to list such property with the County Assessor for taxation. The reference in clause (4) to the preceding clause (3) of said contract refers to the real estate conveyed in said deed and has no reference or relationship to said buildings whatever.

The authorities in every jurisdiction, so far as we have been able to observe, hold that the character of property may, on occasion, be changed from personalty to realty, or from realty to personalty by the acts, contracts and intentions expressed by the parties interested. 50 C.J., page 769, respecting the severance of buildings from real property, and their conversion into personal property, page 769, states the following text:

"* * * The sale of a house and the materials in it with the understanding that they are to be removed constitutes a severance thereof from the land and converts them into personal property, and where buildings alone are conveyed by the owner of the land, they will, in contemplation of law, be regarded as divided and severed from the soil, and will vest as chattels in the grantee, even before actual severance. * * *."

In the case of Marshall vs. Moore, 146 Mo. App. Rep. 618, our St. Louis Court of Appeals, holding in effect that conditions and circumstances, as to whether a building is personalty or realty, depends upon the agreement and intention of the interested parties as expressed in their agreement, 1.c. 620, said:

"It is argued the judgment should be reversed because the action is to recover a building which was part of the realty. The petition avers it was personal property, and it might have been, for a building is not necessarily part of the realty. The one in question was on the right of way of the railroad company, and it ought to be presumed in support of the judgment and in the absence

of proof to the contrary, it was put there pursuant to some agreement between the owner and the railway company, which left it the personal property of respondent. * * *."

A building erected on land of another with the agreement that it may be removed, remains personal property. Our Supreme Court in the case of Priestley vs. Johnson, 67 Mo. 632, so held where, 1.c. 636, the Court said:

"* * * When a building is erected by one upon the land of another with his consent, upon an agreement that it may be removed at the will of the builder, it does not become a part of the realty, but continues to be a personal chattel and the property of him who builds it. * * *."

The determination of its character as property. whether realty or personalty, when a building is erected on land with permission to remove it or when a building may be sold separately from the real estate, or when the real estate upon which a building is located is sold with the right of the seller to remove the same, all depends, we believe, upon the application of the same principle of law, that is, the purpose and intention of the parties as expressed in their contract or to be implied therefrom. that applies to contracts generally. The Missouri decisions relate to cases where buildings were erected upon land of another by a tenant or other person who had the right under an agreement with the owner of the land that the tenant could remove such buildings, or where buildings were sold separately without selling the real property and by actual severance became personal property, and like cases. The Courts of other States have rendered decisions holding that the conversion of buildings located on real estate into personal property may be effected at once by the mere agreement between the parties interested that upon the sale of the real property the seller or a third person may remove such buildings within a specified period of time, without actual severance. The Supreme Court of New York, in Schuchardt vs. Mayor of New York, et al., 53 N.Y. Rep. 202, made the following comment on the principle which, we believe, is applicable to the agreement between the parties here that, according to their intention, the grantors then remained, and now remain, the owners of the buildings

mentioned, because the contract gives them the right to remove the buildings, and which agreement constituted such buildings, at the time of the execution of the deed conveying the real estate to the State of Missouri, personalty, where the Court, 1.c. 210, said:

"* * * The law has engrafted a qualification upon the rule in case of erections made upon the land by a tenant
for purposes of trade, and gives him
in general a right to remove them during his term. So, also, the owner may
reserve from a conveyance of the land
the trees or buildings thereon, in which
case they will in contemplation of law
be regarded as divided and severed from
the soil, and will vest as chattels in
the grantor, even before actual severance. * * *."

Another New York case, similar both in fact and principle to the situation here, was decided by the Supreme Court of the State of New York in Hood, et al. vs. Whitwell. et al., 120 N.Y.S. 372. The facts recited in the opinion were that the State of New York, under provisions of its Barge Canal Act, acquired title and took possession of a building for canal purposes. The State thereafter entered into a contract with a company for the construction of the barge canal between two points. The construction contract "these buildings will become the property of provided: the contractor, who may dispose of them as he sees fit, except that all parts shall be entirely removed before the completion of the work, together with their foundations and all accessories. * * * *. The buildings were to be removed from the land without cost to the State. The contractor sold the building in controversy in the case to one, Whitwell. After letting the barge canal contract to the contractor, the State changed the site of the canal to exclude therefrom the property upon which the building so sold by the contractor was located. Whereupon, the owner filed the action to prevent the person to whom the contractor had sold the building from removing the same from the land. The Supreme Court of that State in holding that under the contract the contractor became the owner of the building after the contract was let and could lawfully dispose of the building, 1.c. 374, 375, the Court said:

"But it is also argued that the buildings are real property belonging to the state

and do not become the personal property of the contractor until they are actually removed from the site, and that the contractor has no right to dispose of them by sale or to transfer the right to remove them to the purchaser, but only the right to convert them into personalty by actual removal. The state became the owner of the land and buildings after the contract was The buildings 'to be removed' then became the property of the contractor according to the terms of the contract. The title and ownership of permanent erections generally follow the title of the land, but it is perfectly competent for parties by contract so to regulate their respective interests that one may be the owner of the buildings and another of the lands. **张 张 张. ¹¹**

The New York Court of Appeals in the case of Melton, et al., vs. Realty Company, et al., reported 108 N.E., held that the ownership and rights of persons in land is one of contract and when fixed by the contract must be carried out as agreed upon. The Court in the case on this principle, l.c. 850, said:

"* * * While the title and ownership of permanent erections by one person upon the lands of another as a general rule accrue to the holder of the title of the lands, nevertheless it is competent for parties by contract to so regulate their respective interests that one may be the owner of the buildings and another the owner of the lands.

* * *."

Considering the facts and authorities hereinabove recited and submitted, it is clear, answering question two, that the said named grantors in said deed, husband and wife, are the owners of said buildings as personal property, separate from the land conveyed in said deed, and that said buildings are subject to taxation as personal property under the statutes of this State relating to taxation.

CONCLUSION

It is, therefore, considering the foregoing, the opinion of this office:

- l) That the Columbia Humane Society at Columbia, Missouri, is a charitable and benevolent society, incorporated by pro forma decree, and is the owner of certain buildings located on land in Boone County, Missouri, conveyed by deed of said society to the State Highway Commission of Missouri, but in said conveyance created personal property severed from said land; that said buildings are not held by said society for private or corporate profit but are used exclusively for purposes purely charitable and benevolent for the prevention of cruelty to animals, and that its said property is exempt from taxation in this State by the terms of Section 6, Article X of the Constitution of this State, 1945, and Section 137.100, RSMo 1949;
- 2). That on December 9, 1948, Mr. Arthur T. Marriott and his wife, Mrs. Estella H. Marriott, by the terms of a certain contract between said individuals and the Missouri State Highway Commission incident to the conveyance by them of certain real estate by deed, became the owners of certain buildings located on said land conveyed by said individuals by deed to said Missouri State Highway Commission, separate from the land conveyed in said deed as personal property; that said buildings are subject to taxation as personal property in Boone County, Missouri, under the statutes of this State relating to taxation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

STATE PARK BOARD: STATE LANDS: State Park Board may convey land for right-of-way purposes for the use of State Highway Commission.



March 26, 1953

Honorable Abner Gwinn Chief of Parks State Park Board 1206 Jefferson Building Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"Attached to this letter is the original and copy of the deed describing right-of-way which the State Highway Department has requested, This highway skirts near the edge of Mark Twain State Park, and the right-of-way requested by the Highway Department will not be, in any way, injurious to the state park.

"The question which was raised at the Park Board meeting was whether or not the Board should take such action, and I am, therefore, referring this matter to you for your opinion."

From a subsequent conversation with you we understand the question to be whether or not the State Park Board may make such a conveyance.

The State Park Board composed of the governor, attorney general and director of conservation was created by an act now found as Section 253.010, RSMo 1949. Section 253.020, gives to

Honorable Abner Gwinn

said board the power to obtain property for park purposes, promulgate rules and regulations relative to state parks, etc., and provides as follows:

- "1. The state park board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said park board or the exercise of its powers hereunder necessary for the recreation of the people of the state of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission.
- "2. Said park board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all the state parks.
- "3. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the director of state parks and when presented to the state auditor shall be paid out of the funds appropriated for such purposes."

In the case of State v. Anderson, 242 S.W. (2d) 66, 1. c. 70, the court said:

"The State Park Board is the state agency created and authorized to manage and control the state parks. * * *"

Section 227.130, RSMo 1949, provides that a board holding title to or having an interest in real estate, or having administrative jurisdiction and control thereof, may grant and convey for the use of the State Highway Commission, such right-of-ways or

easements for the construction of the state highways and roads and reads as follows:

"The state of Missouri, and all departments, boards, commissions, bureaus institutions, public agencies and political subdivisions thereof, holding title to or having an interest in real estate, or having administrative jurisdiction and control of real estate or other property, are hereby authorized and empowered to give, grant and convey to or for the use of the state highway commission of Missouri such right of ways or other easements and appurtenances in said real estate or property as may be necessary for the proper and economical construction or maintenance of state highways."

Under the above noted section we believe that it is clear that the State Park Board, having charge and control of state park lands, may convey for the use of the State Highway Commission, lands for the construction and maintenance of state highways.

CONCLUSION

Therefore it is the opinion of this office that the State Park Board may convey for the use of the Highway Commission of Missouri, right-of-ways or other easements and appurtenances in real estate as may be necessary for the proper and economical construction or maintenance of state highways.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

STATE PARK BOARD:

State park Board is vested with authority under Section 253.020, RSMo 1949, to purchase property within Roaring River State Park, being sold at auction by the Eagle Rock School Board.



May 28, 1953

Mr. Abner Gwinn Chief of Parks State Park Board Jefferson City, Missouri

Dear Mr. Gwinn:

This will acknowledge receipt of your request for an opinion on whether the State Park Board may bid on and purchase property being sold by the Eagle Rock School Board at public auction on June 3, said property being within Roaring River State Park, and in your opinion said property is needed and necessary for expansion of the picnic and public camp grounds in said park.

Section 253.020, RSMo 1949, vests in the State Park Board authority to acquire all property necessary, useful or convenient for the use of said park board or necessary for the recreation of the people of the State of Missouri, and reads:

- "1. The state park board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said park board or the exercise of its powers hereunder necessary for the recreation of the people of the state of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission.
- "2. Said park board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks.

Mr. Abner Gwinn

"3. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the director of state parks and when presented to the state auditor shall be paid out of the funds appropriated for such purposes."

The primary rule of construction of statutes is to ascertain and give effect to the lawmaker's intent, and this should be done from words used, if possible, considering the language honestly and faithfully. (See City of St. Louis vs. Senter Commission Company, 85 SW (2d) 21, 337 Mo. 238.)

In answering your request we are assuming that there is no question as to said school board having authority to convey said property.

The word "acquire" has been defined to mean to become the owner of property and imports ownership. In Weinberg vs. Baltimore & Annapolis R. Co., 88 A. 2d 575, 1.c. 577, the court in defining the word "acquire" said:

"There does not seem to be any dispute that the word 'acquire' means 'to become the owner of property' or 'to make property one's own'. In the final analysis 'acquire' imports 'ownership'. * * * "

The word "purchase" in the foregoing statute has been defined by nearly all the states. In Byrd v. Allen, 171 S.W. (2d) 691, 1.c. 695, 351 Mo. 99, the court defined "purchase" as follows:

"Plaintiffs do not take as purchasers under the will of Joseph Hunter. 'The words "purchase" and "descent" are employed to designate the only two methods of acquiring title to real property * * *; but they are readily distinguished as each is the opposite of the other, title by descent being acquired by mere operation of law and title by purchase being acquired by act or agreement of the parties, or, as frequently stated, by any means other than descent. * * * "

See also Strudthoff vs. Yates, 162 P. 2d 845, 852, subsequent opinion, 170 P. 2d 873, 28 Cal. 2d 602, in which the court defining the word "purchase" said:

"The word 'purchase', in a technical and broader meaning relative to land generally, means the acquisition of real estate by any means whatever except by descent. Kelly v. Southworth, 38 Wyo. 414, 267 P. 691. In a popular and confined sense, it means acquisition by way of bargain and sale or other valuable consideration, or the transmission of property from one person to another by their voluntary act and agreement founded on a valuable consideration. Cobb v. Webb, 26 Tex. Civ. App. 467, 64 S.W. 792, See also, 35 Words and Phrases, Permanent Edition, p. 473; Robbins v. Pacific Eastern Corporation, 8 Cal. 2d 241, 269, 65 P. 2d 42."

CONCLUSION.

In view of the foregoing statute and definitions, it is the opinion of this department that the State Park Board has authority to bid on said school property in an effort to acquire and purchase said property.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH: SW

SCHOOLS: TAXATION: CONSTITUTIONAL LAW:

Property within school districts added or annexed to city district liable to assessment and subject to taxation on rate fixed and approved by vote of people within city district prior to annexation.



September 22, 1953

Honorable Philip A. Grimes Prosecuting Attorney Boone County Columbia, Missouri

Dear Mr. Crimes:

This is in response to your request for opinion of recent date, which, omitting caption and signature, reads as follows:

"Please furnish my office for the use of the County Clerk of Boone County, Missouri, an opinion on the following question:

"The school boards of two common school districts, respectively known as the Brown and Keene School Districts in Boone County. certified their tax levies as provided by law at \$1.25 and \$1.70, respectively, for the year 1953 on May 15th of that year to the proper authorities, and subsequently after the rate was fixed and certified both School Districts were annexed to the City School District of Columbia, Missouri, as adjoining districts, pursuant to elections had in both common school districts under the provisions of Section 165.300 of R. S. Missouri 1949, and amendments thereto, and the acceptance of the annexing school district had on July 31, 1953. The tax levy of the School District of Columbia for the year 1953 as certified was 2.35. This levy was voted by the School District of Columbia at its election in April, 1953, for a period of three years by more than a two-thirds majority.

"Should the tax levies of the annexed school districts for the year 1953 be that of the levies set before May 15th by certification, or should the tax levies be that of the school district to which they were subsequently annexed?

"I am familiar with the opinions heretofore rendered by your office on this subject, (1) to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, Liberty, Missouri, dated September 7, 1949 and (2) to Honorable John B. Peters, Prosecuting Attorney of Osage County, Linn, Missouri, dated September 10, 1949.

"I feel that neither of these opinions completely cover the instant question in view of the fact that Section 11, Article X of the Constitution was amended since the rendition of the above opinions.

"Therefore, I respectfully request an opinion from your office as to whether or not the annexed districts for the year 1953 should be required to pay the rate for school tax purposes set at their respective April meetings or whether they should be required to pay the rate set by the Board of Education of the School District of Columbia, assuming of course, that the Board of Education would, prior to September 1, withdraw the estimates heretofore filed by the common school districts with the County Clerk and substitute therefor the estimate filed by the School District of Columbia.

"It is obvious from the foregoing that an opinion from your office is necessary at the very earliest date."

This office had the occasion to render an opinion to the Honorable William F. Brown, Prosecuting Attorney of Pettis County, Sedalia, Missouri, under date of April 27, 1950, concerning the question of whether residents and taxpayers of school districts added or annexed to a consolidated district would be liable to

assessment and subject to taxation for the payment of bonded indebtedness previously incurred by the consolidated district. The conclusion of that opinion was that the taxpayers of such annexed districts would be liable for their proportionate share of the bonded indebtedness so incurred by the consolidated district. We enclose copy of that opinion.

In that opinion discussion was made of the constitutional question that might arise with regard to increased taxation to be borne by the districts annexed. In the problem presented by your request, the basic question is whether Section 11 of Article X, Constitution of Missouri, 1945, prevents the assessment of the levy as voted by the Columbia district on the Brown and Keene districts which were annexed to the Columbia district. Section 11(c) of Article X of the Constitution of Missouri, 1945, prior to its amendment provided that school districts might increase their rate of taxation above the maximum allowed in Section 11(b). which in the case of school districts formed of cities and towns is one dollar for a period not to exceed four years, by submitting the rate and purpose of the increase to a vote of the people and obtaining the approval of two-thirds of the qualified electors voting thereon. The amendment to Section 11 of Article X of the Constitution, approved November 7, 1950, provides that the rates of taxation as limited by Section 11(b) may be increased for not to exceed four years when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors vote thereon shall vote therefor. It further provides that the rate of taxation as limited by Section 11(b) may be increased for school purposes so that the total levy shall not exceed three times the limit specified in Section 11(b) and not to exceed one year when submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor. In the case submitted by you, the Columbia district at its election in April, 1953, voted a levy of \$2.35 for a period of three years. which, under Section 11(c), Article X, required a vote of twothirds of the qualified electors voting thereon prior to the amendment, and since it was for a period in excess of one year also required the approval of two-thirds of the qualified electors voting thereon voting the amendment. Therefore, we are unable to see that the constitutional amendment has any effect on the ultimate determination of the problem.

Since the levy as voted in Columbia required the approval of two-thirds of the qualified electors voting thereon, and since the Brown and Keene school districts were not afforded the opportunity to vote on this levy, the question is whether the latter two districts can be required to pay the tax levy as assessed by the Columbia district or whether to do so would be in violation of Section 11(c) of Article X of the Constitution of Missouri, 1945.

An analogous situation was before the Supreme Court of Missouri in the case of Barnes et al. v. Kansas City et al., 359 Mo. 519, 222 S.W. (2d) 756, 10 A.L.R. (2d) 553. The question there was whether a municipal bond issue approved by the voters of Kansas City at an election held November 4, 1947, was valid as to the plaintiffs and all others similarly situated who were not permitted to vote at the bond election because they resided in an area annexed to Kansas City by charter amendment already adopted but not then in effect. Passage of the bond issue required the approval of two-thirds of the qualified electors of the city. Contention was made there that to impose this obligation on those areas annexed to the city subsequent to the passage of the bond issue would be in violation of applicable provisions of the Missouri Constitution. The court ruled against this contention.

In the course of the opinion the court discussed the case of State v. Smith, 343 Mo. 288, 121 S.W. 2d 160, which case is cited in the enclosed opinion. At S.W. 1.c. 759 the court said:

"In State v. Smith, 343 Mo. 288, 121 S.W. 2d 160, supra, we discussed the question of the liability of a consolidated school district for the pre-existing bond indebtedness of its component common school districts. One of the common school districts had no bonded indebtedness at the time of the consolidation. Yet, we held the statute making the consolidated district liable for all the cutstanding bonds was constitutional even though a common school district, formerly free from debt, thus became liable for its proportionate share. We held the constitutional provision requiring a two-thirds vote of the electors of a common school district in order to create an indebtedness did not apply in such a case. Shapleigh v. San Angelo, 167 U.S. 646, 17 S. Ct. 957, 42 L. Ed. 310, supports this conclusion."

In your request you refer to the opinion rendered to Honorable Robert G. Kirkland, Prosecuting Attorney of Clay County, dated September 7, 1949, and the opinion rendered to Honorable John P. Peters, Prosecuting Attorney of Osage County, dated September 10, 1949. In those opinions the conclusion was reached that an annexing district might withdraw the estimate filed by the annexed district and substitute the estimate of the annexing district, provided that the rate of levy of the annexing district was not one which required the approval of the vote of the people and was not in excess of the rate levied by the annexed district.

In those two opinions no mention was made of the cases cited in the enclosed opinion issued to Honorable William F. Brown. Apparently the primary basis for the holding that the rate of the annexing district could not be imposed upon the annexed territory if it exceeded the levy voted by the residents of the annexed territory was the case of Crabb v. Celeste Independent School District, 105 Tex. 194, 146 S.W. 528. No Missouri cases were cited on this point.

We are unable to see any distinction between the imposition of an added tax burden because of bonded indebtedness previously incurred by a district to which another district is annexed and the imposition of an increased levy of taxation under the same circumstances. Insofar as the two opinions referred to in your request conflict with the conclusion reached herein, they are withdrawn.

In view of the decision in the Barnes v. Kansas City case, supra, and upon the reasoning contained in the enclosed opinion issued to Honorable William F. Brown, dated April 27, 1950, it is our conclusion that the districts annexed to the school district of Columbia should be required to pay the rate for school tax purposes set by the board of education of the school district of Columbia and approved by the vote of the people in the Columbia district at its election in April, 1953, assuming that the board of education, prior to September 1, 1953, withdraws the estimates heretofore filed by the annexed districts with the county clerk and substitutes therefor the estimate filed by the school district of Columbia.

CONCLUSION

It is the opinion of this office that property within school districts added or annexed to a city district would be liable to assessment and subject to taxation on the rate fixed and approved by vote of the people within the city district prior to the annexation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

Enc.

JWI: 1w

STATE PARK BOARD: CONTRACT: PURCHASING AGENT: Validity of proposed forms for letting concession contracts. State Furchasing Agent has proper authority to purchase used equipment.



December 14, 1953

State Park Board Jefferson City Missouri

Attention: Mr. Abner Gwinn, Director.

Gentlemen:

This will acknowledge receipt of your recent request and, for sake of brevity, we shall restate the pertinent part thereof.

You first inquire as to whether the seven attached forms which you propose to use in letting concession contracts at the three State Trout Parks conform to the new State Park Law. You also inquire if the State Park Board may negotiate with and buy the equipment now owned by various concessionaires in the State Parks or must all Park Board purchases be made through the State Purchasing Agent.

The forms attached to your request in which you seek an opinion as to their validity are denoted Transmittal of Data, Notice to Qualified Bidders, Concession Proposal, Information and Check Sheet, Form of Performance and Payment Bond and Contract Requirements.

The 67th General Assembly repealed sections 253.010 and 253.020 under Chapter 235 RSMo 1949, which originally created a State Park Board and vested in that board certain authority and enacted in lieu thereof a new State Park Law known as Sections 253.010, 253.020, 253.030, 253.040, 253.050, 253.060, 253.070, 253.080, 253.090, 253.100, 253.110, Vernon's Annotated Missouri Statutes, June, 1953.

The two following statutes recently enacted under the new State Park Law, Sections 253.080 and 253.090, supra, principally relate to the execution of contracts for management of State Parks and concessions therein.

Sections 253.080 and 253.090 read as follows:

- "1. The board may contract for the management of any of the state parks or for the exercise of any concession, privilege, facility or convenience within any such park for a period of not to exceed two years. Any contract for the management of a state park shall provide for the care, maintenance, repair, conservation and improvement of the park property as may be required by the board, and for the rendition of such services to the public as may be required by the board.
- "2. All contracts under this section shall be entered into only upon the basis of competitive sealed bids. A sworn financial statement shall accompany each bid, and all contracts shall be let by the board at a regular meeting. All bids submitted ten days prior to a regular meeting shall be considered. Such advertisements for bids as deemed necessary shall be made by the board.
- "3. The bid most favorable to the state from a responsible person shall be accepted by the board. A good and sufficient bond conditioned upon the faithful performance of the contract and compliance with this law shall be required of all contractors.
- "4. Any person who contracts under this section with the state shall keep true and accurate records of his receipts and disbursements arising out of the performance of such contract and shall permit the board and the state collector of revenue to audit same upon the expiration of his contract. If upon such audit, it shall appear that the net profits of the contractor under any such contract for any one year have exceeded the sum of ten thousand dollars, such excess shall be paid over to the state collector of revenue and may be recovered from the contractor and his sureties. For the purpose of this subsection no contract shall be deemed to extend to operations or management in more than one state park.
- "5. Subsections 2, 3 and 4 shall not apply to contracts or agreements made between the board and any corporation, association, trust or foundation organized and operated solely on a non-profit basis which agrees to operate the park or facility for the purpose of preserving the historic traditions of the area involved."

Section 253.090:

"1. The board may construct, establish and operate suitable public services, privileges, conveniences and facilities on any land, site or object under its jurisdiction and control, and may charge and collect reasonable fees for the use of same. The board may charge reasonable fees for supplying services on park areas.

"2. All revenue derived from privileges, conveniences, contracts or otherwise, and all moneys received by gifts, bequests or contributions, or from
county or municipal sources shall be paid into the
state treasury to the credit of the state park fund,
which is hereby created. In the event any state park
or any park thereof is taken under the power of eminent domain by the federal government the moneys paid
for such taking shall be deposited in said state park
fund. Such fund shall be used solely for the payment
of the expenditures of the board in the administration of this law."

There is little or no similarity between the foregoing statutes under the new state park law and the provisions of the former state park act, so any decision or opinion heretofore rendered construing the provisions of the former act is of no benefit in rendering this opinion. The only suggestion we have to offer as to said forms is that the proposed bond should properly be designated as a surety bond and, in addition to the conditions set forth in said bond, we recommend that it further provide: that the principal shall faithfully comply with all the provisions of Section 253.080, V.A.M.S., and to properly account and pay over to the State of Missouri all sums of money due the state and further provide that said bond may be also sued on by the State of Missouri. We have carefully examined other proposed forms and find nothing therein that might in any manner conflict with any of the provisions of the new state park act.

You next inquire as to whether or not the board may negotiate with and purchase equipment owned by various concessionaires or must such purchases be made through the state purchasing agent?

Section 34.030 RSMo 1949 provides that the state purchasing agent shall purchase all supplies for all departments of the state except as otherwise provided by law. Section 34.010, Subsection 1 RSMo 1949, further defines the word supplies as used in the chapter creating a state purchasing agent and prescribing his duties to mean materials, equipment, contractural services and

any and all articles or things except as in said chapter other-wise provided.

Section 34.100 RSMo 1949 vests in the state purchasing agent power to authorize any department to purchase directly supplies of a technical nature and also emergency purchases. The articles which you propose to negotiate for and purchase from the present concessionaires cannot by any stretch of the imagination come within the purview of articles of a technical nature, neither could such purchases be considered as emergency purchases.

Section 34.040, V.A.M.S. further provides how purchases shall be made by the purchasing agent and reads:

"All purchases shall be based on competitive bids. On any purchase where the estimated expenditure shall be two thousand dollars or over. the purchasing agent shall advertise for bids in at least two daily newspapers of general circulation in such places as are most likely to reach prospective bidders at least five days before bids for such purchases are to be opened. On purchases where the estimated expenditure is less than two thousand dollars, bids shall be secured without advertising. In all cases, the purchasing agent shall post a notice of the proposed purchase on a bulletin board in his office. He shall also, on all purchases estimated to exceed two thousand dollars, solicit bids by mail from prospective suppliers. All bids for such supplies shall be mailed or delivered to the office of the purchasing agent so as to reach such office before the time set for opening bids. The contract shall be let to the lowest and best bidder. The purchasing agent shall have the right to reject any or all bids and advertise for new bids, or with the approval of the governor, purchase the required supplies on the open market if they can be so purchased at a better price. All bids shall be based on standard specifications wherever such specifications have been prepared by the purchasing agent as provided in section 34.050. The purchasing agent shall make rules governing the delivery, inspection, storage and distribution of all supplies so purchased and governing the manner in which all claims for supplies delivered shall be submitted, examined, approved and paid. He shall determine the amount of bond or deposit and the character thereof which shall accompany bids.

State Park Board

It will be noticed under the foregoing provisions that if the purchasing agent can purchase such supplies on the open market at a better price he may do so with the approval of the Governor.

Therefore, we are of the opinion that purchases of such used equipment must be purchased by the State Purchasing Agent under the provisions of Section 34.040, supra. However, if such supplies may be purchased at a better price on the open market he may do so with the approval of the Governor.

CONCLUSION.

Therefore, it is the opinion of this department that the enclosed proposed forms for letting concession contracts in the State Trout Parks are in proper form and conform with the new State Park Act when the foregoing additional suggestions are included in said proposed form of a surety bond.

It is the further opinion of this department that purchases of such used equipment must be purchased by the State Purchasing Agent as provided in Section 34.040, supra, However, if such supplies may be purchased at a better price on the open market he may do so with the approval of the Governor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

ARHjr/lw

JOHN M. DALTON Attorney General ADMINISTRATION: SURVIVAL
OF PERSONAL INJURY CLAIM:
APPOINTMENT OF ADMINISTRATOR,
AND SPECIAL ADMINISTRATOR FOR
NON-RESIDENT:



"Personal representative" as used in Par. 2, Sec. 537.020, RSMo 1949, means executor or administrator of deceased person's estate. "Representative" as used in Par. 3, of said section means special administrator for deceased non-resident, whose powers are limited to those provided in said paragraph. Ancillary administrator of non-resident's estate, under administration statutes may also be appointed. But only when proper amplication and proof of facts involved are made, and court is convinced of sufficiency of same, is it mandatory to appoint administrator for deceased resident, or ancillary administrator, and or special administrator for deceased non-resident.

June 23, 1953

Honorable Max E. Hall Judge of the Probate Court Mt. Vernon, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"Under provisions of Par. 2 Sec. 537.020, what is meant by Personal Representative? Does this mean Administrator with general powers as such and usual Letter issue? Par. 3 limits the appointment for purpose of being sued and defending suit on non-resident decedents. In this paragraph does personal representative mean a special office or Administrator in usual sense? If non-resident dies in auto accident in county and the car is within county at the time of appointment, then would fact that this personal property is within county enlarge power of court to appoint a general Administrator because property may need care etc.? Note Par. 2 does not limit appointment for being sued and defending action as does Par. 3. Par. 2 says court is required to make appointment. Par. 3 says court shall have power. Which, if either is mandatory?"

Section 537.020, RSMo 1949, to which attention is called in the opinion request, reads as follows:

"l. Causes of action for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties. such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representatives, and the liability and the measure of damages shall be the same as if such death or deaths had not occurred. Causes of action for death shall not abate by reason of the death of any party to any such cause of action, but shall survive to the personal representative of such party bringing such cause of action and against the person, receiver or corporation liable for such death and his or its legal representatives.

"2. The right of action for death or the right of action for personal injury that does not result in the death, shall be sufficient to authorize and to require the appointment of a personal representative by the probate court upon the written application therefor by one or more of the beneficiaries of the deceased. The existence of the right of action for death or personal injury that does not result in death shall be sufficient to authorize and to require the appointment of a personal representative for the person liable for such death or injury by the probate court upon his death upon the written application of any person interested in such right of action for death or injury.

"3. Where a non-resident of the state negligently causes such injury or death

in this state, and such nonresident is killed or dies, the probate court of the county where the casualty occurred shall have power to appoint a representative of such deceased for the purpose of being sued and defending any such foregoing action herein."

The inquiries are concerned with the meaning of the terms "personal representatives," and "representative" as used in paragraphs 2 and 3 of above quoted section. Ordinarily, these terms refer to an executor or administrator, and it was so held in the case of Tompkins v. Smith, 103 F. (2d) 936. At 938 the court said:

"The statute is not lacking in clarity.
The phrase 'legal representatives' has
an accepted meaning which includes 'executor.' See Briggs v. Walker, 1898,
171 U.S. 466, 19 S. Ct. 1, 43 L. Ed.
243. In that case the Supreme Court
said at page 471, 19 S. Ct. at page 3:
'The primary and ordinary meaning of
the words "representatives," or "legal
representatives," or "personal representatives," when there is nothing in
the context to control their meaning,
is "executors or administrators," they
being the representatives constituted
by the proper court (citing authorities)'
* * *."

Again, in the case of Nudelman v. Thimbles, 40 S.W. (2d) 475, the term "personal representative," was held to have a broader meaning than executor or administrator. At 1. c. 477, the St. Louis Court of Appeals said:

"We concede that, in legal usage, the term 'legal representatives' ordinarily refers to executors and administrators, but that is not the only sense in which it may be employed. To the contrary, the meaning to be attached to the term in a particular instance will be determined from the context, and the intent with which the expression is used, and, if those considerations are such as to indicate a meaning different from the ordinary one, the courts will not hesitate so to construe it. 36 C.J. 978."

Under the provisions of paragraph 2, Section 537.020, supra, when a proper application is made to the probate court of the county in which one died, and a showing is made that the right of action for personal injuries not resulting in death, or the right of action for personal injuries resulting in death were possessed by such person at the time of his death, said rights of the deceased survive, and such application and showing of facts are sufficient to authorize and require the probate court to appoint a personal representative of the deceased, to prosecute and enforce the rights of the deceased in whatever legal manner the facts of the case may justify.

From the context in which the term "personal representative" is used in paragraph 2 of Section 537.020, supra, it is believed that such term was intended to be given its ordinary or usual meaning by the legislature, and that it refers to executors and administrators, since there is no indication that the legislature intended to give said term some other or different meaning.

Therefore, in answer to the first inquiry, it is our thought that the term "personal representative," as used in paragraph 2, Section 537.020, supra, means an executor or administrator of the estate of a deceased person and who is granted letters testamentary or of administrator under the provisions of Section 461.010, RSMo 1949, for the purpose of administering the estate of said deceased person.

From the definitions of "representative," "personal representative," and "legal representative," are given in above cited cases, it is believed that the term "representative" as used in paragraph 3, Section 537.020, supra, means an administrator of the deceased non-resident. However, from the context in which the term is used, it appears that an administrator thus appointed was not intended to have the powers and duties granted to executors and administrators generally under Missouri administration statutes, but that said administrators are special officers whose power and duties are limited to those specifically provided by said paragraph. We find it unnecessary to repeat the whole of paragraph 3, supra, but we do wish to repeat and emphasize the only statutory power and duty of administrators appointed under authority of said paragraph, as follows:

"* * *to appoint a representative of such deceased, for the purpose of being sued and defending any such foregoing action herein."

(Underscoring ours.)

Hereafter, for the sake of brevity, and to avoid confusion, we will refer to the representative to be appointed under the above quoted authority as "special administrator."

The next inquiry of the opinion request reads as follows:

"If non-resident dies in auto accident in county and the car is within county at the time of appointment, then would fact that this personal property is within county enlarge power of court to appoint a General Administrator because property may need care?"

For the purpose of this request it is assumed that by the words "general administrator" is meant the administrator as provided for in Chapter 461, RSMo 1949. That administrator will hereafter be referred to as "general administrator" for the purpose of this opinion.

The inquiry does not indicate if the writer meant to inquire whether the special administrator appointed under the circumstances and for the purposes provided by paragraph 3, Section 537.020, supra, might be granted letters to administer the estate of the non-resident located within the county under the provisions of Section 461.010, RSMo 1949, supra, or whether the writer meant to inquire if the court had power to appoint a special administrator under paragraph 3, supra, and then to appoint another person as general administrator to administer said non-resident's estate.

Regardless of the exact nature of the inquiry, it is obvious that the personal representative referred to in paragraph 3, supra, is a special officer whose powers and duties are limited by this portion of the tort actions statutes, and that for reasons given above, such special administrator lacks the power to administer the non-resident's estate. If the non-resident's estate is to be administered then this can only be done in accordance with the provisions of the administration statutes. That is the direct sense of the statutes.

Section 1.090, RSMo 1949, in regard to laws in force and construction of statutes is as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." When a proper application and proof is presented to the probate court requesting that an administrator for the non-resident be appointed, in accordance with the applicable statutes, and the court is satisfied that the necessity exists for the appointment of such administrator then, and then only, can the court appoint such an administrator. It is believed that the court cannot appoint an administrator for a deceased non-resident until proper application and proof is presented, and that the court cannot of its own motion appoint such administrator in the absence of the application and proof being made.

In the event administration was begun within the state or country of the non-resident's domicile, then the administration proceedings in the probate court of the county of this state in which the non-resident died owing real or personal property will be auxilliary or ancillary to that of the domiciliary administration.

Should there be no domiciliary administration, then the probate court of the county in which the non-resident died, may upon proper application and proof appoint an administrator to take over the assets and to generally administer the estate of said non-resident in said county. Such was held to be the proper procedure in the case of Wood v. Matthews, 73 Mo. 477. At l. c. 483, the court said:

"The defendant's counsel contends that the administration on the estate of Jane Simpson in this State, before there was any administration in the state of Kansas. where she resided at the time of her death, was premature, and conferred no right upon the administrator in this State to sue, and cites Spraddling v. Pipkin, 15 Mo. 118, in which Judge Gamble, delivering the opinion to the court, says: 'Judge Jackson, on delivering the opinion of the court in Stevens v. Gaylord, 11 Mass. 263, properly declares the law in this language: "It is true that such auxilliary administration is not usually granted until an administrator is appointed in the place of the deceased's domicile. But this cannot be a necessary prerequisite, for if so, and it should happen that administration is never granted in the foreign state, and the debts due here, under such circumstances, to a deceased person, could never be collected; and the debts due

from him to citizens of the state might remain unpaid." We have discovered no error in this record that would justify a reversal of the judgment, which is, therefore, affirmed."

When administration is had in Missouri upon the estate of a non-resident, Section 466.080, RSMo 1949, provides how distribution shall be made, and reads as follows:

"When administration shall be taken in this state on the estate of any person, who at the time of his decease was an inhabitant of any other state or country, his real estate found here, after the payment of his debts, shall be disposed of according to his last will, if he left any, duly executed according to the laws of this state, and his personal estate according to his last will, if he left any, duly executed according to the laws of his domicile; and if there should be no such will, his real estate shall descend according to the laws of this state, and his personal estate shall be distributed and disposed of according to the laws of the state or country of which he was an inhabitant."

If the court should appoint an ancillary administrator of the estate of the deceased non-resident in accordance with the administration statutes, then such administrator would have power and authority to administer the estate of such non-resident within the county.

It is further believed that in the event the court should appoint an ancillary administrator under the above mentioned circumstances, that court will not be precluded, upon proper application and proof being subsequently made from appointing a special administrator of said non-resident, since the statutes do not prohibit such action.

When an application for the appointment of an administrator of the estate of a deceased person, is made to the probate court, and the evidence shows that the only assets of the estate is a right of action for personal injuries of the deceased which resulted in death, or did not result in death, and which survives to the beneficiaries of the deceased person under the provisions of paragraph 2, Section 537.020, supra, and the court is satisfied as to the sufficiency of the application and proof of the facts involved, then it shall be the mandatory duty of the court to appoint said administrator.

When an application for appointment of a special administrator of a deceased non-resident who dies in the county as provided by paragraph 3, Section 537.020, supra, and the court is satisfied as to the sufficiency of the application and facts involved, and particularly of the necessity for the appointment of such administrator, then it shall be the mandatory duty of the court to appoint said administrator.

In answer to the second inquiry of the opinion request, it is our thought that the "personal representative" mentioned in paragraph 2, Section 537.020, supra, refers to the administrator appointed to administer the estate of the deceased in accordance with the administration statutes, Chapter 461, et seq.

CONCLUSION

It is therefore the opinion of this department that the term "personal representative," as used in paragraph 2, Section 537.020, RSMo 1949, is construed to mean an executor or administrator of the estate of the deceased person, and that the term "representative" as used in paragraph 3, of said section is construed to mean a special administrator for a deceased non-resident of the state, appointed only for the purposes, and whose powers are limited to those specifically provided by said paragraph. That the provisions of said paragraph do not prohibit the appointment of one to generally administer the estate of such deceased non-resident within the county. as provided by the applicable administration statutes. That only when an application for appointment of an administrator of a deceased resident under the provisions of said administration statutes, and under the circumstances provided by paragraph 2, or the application for the appointment of a special administrator of a deceased nonresident under the provisions of paragraph 3, of Section 537.020, supra, is made, and the court is convinced of the sufficiency of the application and proof of the facts involved is it the mandatory duty of the court to appoint the general administrator or special administrator in accordance with the request made in the application.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General PROBATE COURT:

MAY APPOINT GUARDIAN

OF ADULT PERSON NOT

ADJUDGED INSANE: WHEN:



Probate court lacks power under Missour; statute to appoint guardian of adult whose sole assessing consist of benefit payments other than old age assistance authorized by Chapter 208, RSMo 1949, when recipient was never adjudged insane. But when person is adjudged insane, habitual drunkard, or narcotics addict and incapable of managing his affairs, guardian of person or estate of recipient may be appointed. Cost of proceeding to be paid from person's estate if sufficient, if insufficient, by county.

May 4, 1953

Honorable Jessie B. Harrison Probate Judge of Dunklin County Kennett, Missouri

Dear Madam:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

"An opinion is requested of your office on the following matter relative to the administration of the Probate Court of Dunklin County, Missouri.

- "1. Has the Probate Judge any authority to appoint a guardian for a person who is not insane but who is incompetent to manage his affairs?
- "2. Is there any statutory authority or compulsion for the appointment of a guardian for a person whom his sole property consists of allotments from the Missouri State Welfare Office other than Old Age Assistance?
- "3. Is the Probate Court required to pay the costs of the proceeds to appoint a guardian and the expenses of the annual settlements in cases in which the sole property consists of allotments from the Welfare Department?

"I would appreciate your opinion on these matters since there are several cases now awaiting for action on our docket of this type."

None of the above inquiry makes any direct reference to a sanity inquiry in probate court as provided by Section 458.020, RSMo 1949, but since such inquiry is involved in the subject matter of the opinion request we find it necessary to refer to such proceeding in the course of our discussion herein.

The primary purpose of an inquiry into one's sanity is to determine whether or not he is insane, to provide for his welfare, and to preserve his property, and such was held to be the primary purpose of said proceedings in the case of State ex rel. Terry vs. Holtcamp, 330 Mo. 608.

The petition in the proceedings must allege that the person named therein is an idiot, lunatic, or person of unsound mind and is incapable of managing his affairs. Either allegation is insufficient and unless both are made the court cannot acquire jurisdiction over the person or subject matter involved. Unless such allegations appear in said petition, and the court finds them to be sufficiently supported by the evidence adduced at the hearing the adjudication of insanity and the appointment of a guardian of one alleged to be insane is illegal.

Assuming that the allegations of the petition in such instance are sufficient, the court is satisfied that the allegations are true and supported by the testimony then the adjudication of insanity and the appointment of a guardian of such person or of his person and estate as provided by Section 458.070, RSMo 1949, will be valid. Said section reads as follows:

"If it be found by the jury or the court sitting as a jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such insane person, or if the court shall be satisfied that it will be for the advantage of such insane person to appoint a curator of the estate, different from the guardian of a person, it shall be lawful to make such separate appointment; and if the person so found to be of unsound mind, is at the time of the finding, a duly qualified public officer of this state, or of any county in this state, or of any municipality in this state such office shall be deemed vacant, and it shall be the duty of the judge of the probate court holding such inquiry to certify the fact of such finding to the officer or tribunal having power to fill such vacancy; and the vacancy shall be filled during the insanity of such officer; provided, that if the insane person be the judge of probate in any county, then the inquiry herein provided for shall be had before the circuit court of said county."

The first inquiry of the opinion request is whether the probate court is authorized to appoint a guardian for a person who is not insane but who is incompetent to manage his affairs. We assume that the writer has reference to the court's power to appoint a guardian for the person or estate (or both) of an adult person who has never been adjudged to be of unsound mind and incapable of managing his affairs. After careful research we are unable to find any statutory authority for the appointment of a guardian for an adult person who has not been adjudged of unsound mind and incapable of managing his affairs except in those instances when one is alleged to be an habitual drunkard or a narcotic addict and is incapable of managing his affairs as provided by Section 458.030, RSMo 1949; said section reads as follows:

"If information, in writing, verified by the informant on his best information and belief, be given to the probate court of any county that any person in its county is so addicted to habitual drunkenness or to the habitual use of cocaine, chloral, opium or morphine as to be incapable of managing his affairs and praying that an inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind, and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in section 458.070, and shall publish the same notice mentioned in section 458.210; also, shall file an inventory and appraisement, made under the provisions mentioned in sections 458.220 to 458.290."

It is noted that the same general procedure is to be followed under Section 45%.030, supra, as in sanity hearings but that in the former proceedings the person may be adjudged of unsound mind and incapable of managing his affairs and that both such facts must be alleged and finally adjudicated.

In the latter proceeding one is alleged to be an habitual drunkard or narcotics addict and incapable of managing his affairs but does not require the further allegation as to the unsoundness of mind of the subject. A judgment in the latter case finding one to be an habitual drunkard and narcotics addict and incapable of managing his affairs and appointing a guardian for such person would be sufficient under the provisions of this statute and it is believed that that portion of the opinion of the Kansas City Court of Appeals in the case of Harrelson v. Flourney, 229 Mo. App. 582, sufficiently substantiates our contention in this respect. At 1. c. 591, the court said:

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"Our statute, Section 448, Revised Statutes
1929, providing for the adjudication of one as
an insane person and incapable of managing his
affairs, requires that such person be a lunatic,
an idiot, or a person of unsound mind and incapable of managing his affairs and that he must be
so found in order to be placed under guardianship.
It is provided by Section 505 of our statutes
(Revision of 1929) that whenever the words 'person
of unsound mind or insane person' occur in Article
18 (Revision of 1929), relating to guardianships
and curators of insane persons, they shall be
construed to mean an idiot, or a lunatic or a
person of unsound mind and incapable of managing
his own affairs, as the case may be upon proof.

"In order that a person may be placed under guardianship in connection with his incapacity to manage his own affairs under the statute relating to guardians and curators of insane persons, his unsoundness of mind must also be made to appear. Otherwise, there is no basis in our statute for the appointment of a guardian for one incapable of managing his affairs (Burke v. McClure et al., 211 Mo. App. 446, 245 S. W. 62), unless under Section 508, Revised Statutes 1929, one be charged as an habitual drunkard or user of cocaine or other drugs therein mentioned. There must be an adjudication of incapability. The two are not to be separated.

"In Burke v. McClure et al., supra, l.c. 451, the court quoted approvingly from State v. Montgomery, 160 Mo. App. 724-733, the following:

'"--the affidavit on which the insanity inquiry is based is required to state two things, viz, that the party is an idiot, lunatic, or person of unsound mind and that he is incapable of managing his affairs. The allegation that he is incapable of managing his affairs is as essential as the allegation that he is of unsound mind."

Again in the case of Darby v. Cabanne, 1 Mo. App. 126, the St. Louis Court of Appeals held that one not alleged to be an idiot, lunatic or person of unsound mind but who was alleged to be an habitual drunkard and incapable of managing his affairs that such allegations in the petition were good and that when the probate court adjudged the person to be an

habitual drunkard and appointed a guardian the action of the court was proper, at 1. c. 129, the court said:

"The petition nowhere alleges that Francis Cabanne is, or was at the time of the alleged contract, or at any time, an idiot, or lunatic, or person of unsound mind, but merely that he was so addicted to habitual drunkenness as to be incapable of managing his own affairs. Our law provides for appointing a guardian for such persons, though they be not of unsound mind, or idiots, or lunatics. * * *"

In the case of State v. Brown, 227 S. W. (2d) 1. c. 644, the court cited the case of Darby v. Cabanne, supra, along with other cases approved by it.

In the Brown case objection was made when a witness was offered for the reason that the witness had been previously adjudged to be an habitual drunkard and incapable of managing his affairs and had been committed to a state hospital by the probate court. The trial court permitted the witness to testify and in reviewing the action of said trial court the Supreme Court said at 1. c. 649:

"* * * The Court did not err in permitting him to testify, because prima facie he was a competent witness. He had not been adjudged to be insane, or a person of unsound mind, nor had he been confined in any institution as such. Sec. 1895, R. S. 1939, Mo. R.S.A., and cases based thereon are not controlling. The facts shown were insufficient to establish mental incompetency as a witness. * * *

Therefore, in answer to your first inquiry it is our thought that the only instances when the probate court has power to appoint a guardian for an adult person who is not insane are in those proceedings authorized by Section 458.030, supra, in which one is alleged to be an habitual drunkard or narcotics addict as stated above.

The first inquiry specifically asks about the probate court's power to appoint a guardian of a person who is not insane, but the second inquiry fails to state whether it was meant to apply to those instances when the person for whom the guardian was sought to be appointed is alleged to be sane or insane.

The second inquiry is not of such nature that it can be answered affirmatively or negatively but requires some discussion.

No statutory provision requires the probate court to appoint a guardian for an adult person whose sole property consists in some form of allotment other than Old Age Assistance authorized by Chapter 208, RSMo 1949, and received from the Missouri State Welfare Department when the recipient has not been adjudged to be insane or when he has not been adjudged to be an habitual drunkard or narcotics addict. However, in the event such recipient has been adjudged of unsound mind and incapable of managing his affairs or hasbeen adjudged to be an habitual drunkard or narcotics addict and incapable of managing his affairs, then his allotments from the Welfare Department shall be paid to his legally appointed guardian as provided by Section 208.180, and which reads in part as follows:

"Benefits hereunder shall be delivered to the applicant in person, or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. * * *"

If no guardian of the incompetent person has been appointed then upon proper application being made to the court by any person in behalf of said person praying that a guardian of the person of such incompetent one and of his estate be appointed and the court is satisfied that good cause exists for the appointment of the guardian then the court shall appoint the guardian and allotments or benefit payments of the incapacitated person shall be paid to his guardian as provided by Section 200180. supra.

It is believed that Sections 458.070 and 458.030, supra, authorize the appointment of a guardian of such persons under the circumstances mentioned above.

The inquiry in the probate court to determine whether one is an habitual drunkard or narcotics addict is provided by Section 458.030, supra, and among other things provides how the court shall proceed and reads as follows:

"* * * the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind, and if a guardian is appointed on such proceedings, * * *."

The third inquiry fails to state whether it was meant to refer to proceedings for the appointment of a guardian of the person and estate of one whom the court had adjudged to be insane, or whether the inquiry was meant to refer to proceedings for the appointment of the

guardian of a person and estate of one not alleged or adjudged to be an insane person.

Regardless of the exact meaning of the third inquiry, it appears that there can be no appointment of a guardian of an adult person who has not been adjudged to be of unsound mind unless such person is found to be an habitual drunkard or narcotics addict within the meaning of Section 458.030, supra.

Section 458.080, RSMo 1949, provides that the costs of a sanity hearing shall be paid from the estate of the person adjudged to be insane, and by the county if such estate is insufficient. Said section reads as follows:

"When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county,"

It is believed that this section is sufficient authority for holding that the expense of the appointment of a guardian of one adjudged to
be insane are a part of the costs incidental to the sanity hearing and
that such costs shall be paid from the estate of such person, if sufficient, or by the county if the assets of the estate are insufficient.

Section 458.090, RSMo 1949, provides that when the person alleged to be insane in the sanity hearing is discharged, the costs of the proceeding shall be paid by the informant. Said section reads as follows:

"If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the costs shall be paid by the county."

In answer to your third inquiry, it is our thought that the probate court is never required under any statute, to pay the costs of a sanity proceeding in which one was adjudged incompetent and a guardian of the person and estate of such person is appointed by said court. That the court lacks the power and cannot appoint a guardian of the person and estate of an adult person without a finding that such person is of unsound mind and incapable of managing his affairs, or a finding that the person is an habitual drunkard or narcotics addict, and this is also true when the entire assets of such person's estate consist of allotments of some form received from the State Welfare Department, other than Old Age Assistance.

When an adult person is adjudged to be insane, an habitual drunkard, or a narcotics addict, and a guardian of the person or estate is appointed and such person is receiving some form of benefit payments other than Old Age Assistance from the State Welfare Department, authorized by Chapter 208, RSMo 1949, supra, then the costs of the particular proceeding, including that incidental to the appointment of a guardian shall be paid from the person's estate if sufficient, if insufficient, by the county.

CONCLUSION

It is the opinion of this department that a probate court lacks the power under Missouri statutes to appoint a guardian of the person and estate of an adult person whose sole property consists of some form of benefit payments other than old age assistance authorized by Chapter 208, RSMo 1949, when such person was never adjudged insane, unless he has been adjudged to be an habitual drunkard or narcotics addict and incapable of managing his affairs. In such instance the court may within its discretion appoint a guardian of such person and the costs of the proceedings shall be paid from said person's estate if sufficient, and if insufficient, by the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PNC:hr:sw

AUTOPSY: CORONERS: PHYSICIANS:

:Section 194.115 (Senate Bill No. 237), enacted by the 67th General Assembly, does not repeal :Section 58.560, RSMo 1949, and does not require :consent when an autopsy is authorized by the :persons, and in the manner, provided by law.



June 26, 1953

Honorable Lane Harlan Prosecuting Attorney Cooper County Boonville, Missouri

Dear Mr. Harlan:

In your letter of June 16, 1953, you request an official opinion as follows:

"I would appreciate it very much if your office can send to me an opinion interpreting Section 194.115 as it may affect Section 58.560. Under the case of Patrick vs. Employers Mutual Liability Insurance Company, 118 S.W. 2nd 116, and the case of Crenshaw vs. 0 Connell, 150 S.W. 2nd 489, it is strongly indicated that the coroner has authority to order an autopsy only in connection with an inquest, and Section 58.560 apparently gives the coroner or Magistrate acting as coroner the authority to order an autopsy in such instances.

"In the event that Section 194.115 would supersede Section 58.560 and the Crenshaw and Patrick cases we would have a situation which I am sure no law enforcement officer would appreciate as there might be a good many instances where the performance of an autopsy would be of definite assistance in determining the cause of death and the surrounding circumstances."

You inquire whether Section 194.115, enacted by the 67th General Assembly, absolutely prohibits autopsies unless the consent required by that section is obtained, and whether such consent is necessary before an autopsy can be performed when ordered by Coroners and Magistrates in cases wherein Coroners and Magistrates are empowered to order an autopsy.

Section 194.115, Senate Bill No. 237, reads as follows:

- "194.115. Autopsy--consent required-penalty for violation
- "1. It shall be unlawful for any licensed physician and surgeon to perform an autopsy or post-mortem examination upon the remains of any person without the consent of one of the following:
- "(1) The deceased, if in writing, and duly signed and acknowledged prior to his death; or
- "(2) The surviving spouse; or
- "(3) If the surviving spouse through injury, illness or mental incapacity is incapable of giving his or her consent, or if the surviving spouse is unknown, or his or her address unknown or beyond the boundaries of the United States, or if he or she has been separated and living apart from the deceased, or if there is no surviving spouse, then any surviving child, parent, brother or sister, in the order named; or
- "(4) If no surviving child, parent, brother or sister can be contacted by telephone or telegraph, then any other relative, by blood or marriage; or
- "(5) If there are no relatives who assume the right to control the disposition of the remains, then any person, friend or friends who assume such responsibility.
- "2. If the surviving spouse, child, parent, brother or sister hereinabove mentioned is under the age of twenty-one years, but over the age of sixteen years, such minor shall be deemed of age for the purpose of granting the consent hereinabove required.
- "3. Any licensed physician and surgeon performing an autopsy or post-mortem examination

with the consent of any of the persons enumerated in subsection 1 of this section shall use his judgment as to the scope and extent to be performed, and shall be in no way liable for such action.

"4. It shall be unlawful for any licensed physician, unless specifically authorized by law, to hold a post-mortem examination on any unclaimed dead without the consent required by section 194.170, RSMo.

"5. Any person not a licensed physician performing an autopsy or any licensed physician performing an autopsy without the authorization herein required shall upon conviction be adjudged guilty of a misdemeanor, and subject to the penalty provided for in section 194.180, RSMo. Laws 1953, p. ___, S.B. No. 237, \$ 1."

Section 58.560, RSMo 1949, reads as follows:

"58.560. Surgeon's fee for post-mortem examination, how paid.—When a physician, surgeon or pathologist shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a post-mortem examination, the county court of said county shall be authorized to allow such physician, surgeon or pathologist to be paid out of the county treasury, such fees or compensation as shall be deemed by said court to be just and reasonable."

The St. Louis Court of Appeals in Crenshaw vs. 0'Connell, 150 S.W. (2d) 489, makes this statement as to the power of a Coroner under Section 58.560, to order an autopsy, 1.c. 491, 492:

"That case holds squarely that under such circumstances as confronted defendant in the case at bar, the law invests the coroner with no authority to have an autopsy performed except in connection with, and

as an incident to, an inquest to be held before a jury upon the body of a person supposed to have come to his death by violence or casualty, the purpose of the inquest being to inquire, upon a view of the body, how and by whom such person came to his death; that while the coroner acts judicially, and has a discretion, with respect to determining whether an inquest shall be held, neither the inquest itself, nor the calling and holding of an autopsy in connection with it, is a proceeding judicial in character so as to relieve the coroner from civil liability for his acts in relation to it; that it was never intended that the coroner should have the right to order an autopsy performed in any case where, in his mere judgment, an autopsy might be deemed proper for any such reason as the advancement of science or the like; and that while it might or might not be thought desirable that the coroner should have the power to hold an autopsy in order to determine whether an inquest should be held, the law gives him no such authority, so that in the case at least of a person who is merely supposed to have come to his death by violence or casualty, an autopsy performed except in connection with an inquest is unlawful and illegal, regardless of what might be the coroner's good faith in the exercise of a mistaken authority in the matter."

The subject of autopsy is further treated by Chapter 194, Section 120, et seq. Therein, provision is made for the performance of autopsies by educational institutions of the State for the purpose of advancing anatomical knowledge and science.

To aid in determining the intent of the Legislature in enacting the statute in question we are guided by certain fundamental rules of construction. Whenever two or more enactments of the Legislature deal with the same subject and are seemingly conflicting or repugnant, they must be considered in pari materia. The Kansas City Court of Appeals in

In re McArthur's Estate, 207 S.W. (2d) 546, 1.c. 550, stated this doctrine thusly:

"* * * Statutes in pari materia must be read and construed together in order to keep all provisions of the law on the same subject in harmony so as to work out and accomplish the central idea and intent of the lawmaking branch of our state government. * * *."

Another guide is the disfavor of the Courts to construe a new statute as repealing a former statute by implication. The St. Louis Court of Appeals in Templeton et al. vs. Insurance Co. of North America of Pennsylvania, 201 S.W. (2d) 784, discussed repeals by implication as follows. 1.c. 789:

"* * * However, repeals by implication are not favored (State ex rel. St. Louis Police Relief Ass'n v. Igoe, 340 Mo. 1166, 107 S.W. 2d 929); and in the absence of express terms, a later statute will not be held to have repealed a former one unless there is such a manifest and total repugnance between their respective provisions that the two could not possibly stand together. State ex rel. and to use of Geo. B. Peck Co. v. Brown, 340 Mo. 1189, 105 S.W. 2d 909; Graves v. Little Tarkio Drainage Dist. No. 1, 345 Mo. 557, 134 S.W. 2d 70."

Thus, when all of the legislative enactments concerning autopsies are considered together, as they must be, it becomes clear that the legislative intent in enacting Section 194.115 was not to remove from Coroners the power to order autopsies in certain instances. This conclusion is buttressed by the fact that in some deaths under suspicious circumstances, the person from whom consent is required under the new enactment may be suspected of causing the death. It is difficult to believe that the Legislature intended to so hinder the enforcement of law and apprehension of murderers.

The type of wrong which the Legislature intended to remedy may be illustrated by an examination of the facts in the Patrick vs. Employers Mutual Liability Ins. Co. and Crenshaw vs. O'Connell cases which you cite in your letter

of inquiry. In the Patrick case an autopsy was performed on the deceased without a notification to the widow, who was the plaintiff. The autopsy was performed by a Pathologist employed by an insurance company to determine the cause of death; the findings to be used as evidence in compensation proceedings. In the O'Connell case the Coroner made a practice of sending bodies to the Department of Pathology in the Medical School of Washington University. In this particular case the autopsy was performed by a certain doctor of the Medical School in the presence of a group of students. No criminal law prohibited such autopsies.

The nearest of kin of a dead person are entitled to the right of sepulture. The obvious intent of the Legislature was to prohibit autopsies except where lawfully authorized.

CONCLUSION

It is, therefore, the opinion of this office that Section 194.115 (Senate Bill No. 237) enacted by the 67th Session of the General Assembly, does not repeal Section 58.560, RSMo 1949, and does not require consent when an autopsy is authorized by the persons and in the manner provided by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

PMcG:irk

JOHN M. DALTON Attorney General STATE: CONVEYANCE:

DEPARTMENT OF CORRECTIONS: Director of Department of Corrections unauthorized to execute easement to United States of America.



November 12, 1953

Department of Corrections Division of Penal Institutions Jefferson City, Missouri

Attention: Mr. C. R. Hardy, Auditor

Gentlemen:

This will acknowledge receipt of your opinion request which reads in part:

> "On July 17, 1952, the Director of the Department of Corrections, B. M. Casteel, signed an option for an easement with the Federal Government covering 8.58 acres of land known as Stanley Bend Project, Tract A-101-E, for which there was to be paid 1643.00 to the Division of Fenal Institutions or the State of Missouri, and since it is not clear to this office as to the validity of an option signed in this manner on state-owned land, it is respectfully requested that you give a legal opinion on the following: 1. Is an easement option signed by the Director of the Department of Corrections a valid instrument: 2. If payment is made according to the present option what distribution should be made of the funds received?"

You first inquire if the easement option for purchase. a copy of which is attached hereto, is valid. This is merely an option executed by the then Director of the Department of Corrections, State of Missouri, to the United States of America to purchase for a certain consideration a perpetual easement and right of way over a portion of land belonging to the State of Missouri located in Cole County, Missouri and under management of the Department of Corrections. State of Missouri. The purpose for which this easement is sought is for the improvement of the Missouri River at Stanley Bend in the interest of navigation and under said option the Federal Government may purchase the land described therein. may overflow, corrode, remove, cut away and do most anything to said described land for such purposes.

An easement creates an interest in land and automatically is permanent; Wood v. Gregory, 155 S.W. 2d 168, 171, 138 A.L.R. 142; First Trust Company v. Downes, 230 S.W. 2d 770 local cite 775.

It is well established that public officials who are creatures of Statute have only such power as may be granted by the General Assembly and necessary implied authority to carry out that expressed and all persons dealing with such officials do so at their own risk. See Aetna Insurance Company v. Omally124 S.W. 2d 1064, local cite 1066, wherein the court said:

"Did the superintendent of insurance have the authority to employ the respondents in these restitution proceedings? Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. State v. Bank of the State of Missouri, 45 Mo. 528; State to the Use of Public Schools, etc., v. Crumb, 157 Mo. 545, 57 S.W. 1030; State ex rel. Blakeman v. Hays, 52 Mo. 578; State v. Ferlstein, Tex. Civ. App., 79 S.W. 2d 143; 59 C.J., section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. An agreement not legally binding on the state may, however, impose a moral obligation. The doctrine of estoppel, when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers; nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one. "

In volume 81, Corpus Juris C.J.S., section 107, page 1079, we find the following well established principle of law:

"State property cannot be sold or disposed of except by authority of law, but, in the absence of constitutional limitations, the state, like any individual owner of property, may convey its property in any way it sees fit, and its grant may be express or by necessary implication. The power to dispose of state property is vested in the legislature which may make provision therefor by statute, and may regulate or change at any time the method of disposition; and the statutory provisions must be complied with or the sale will be void."

See State ex rel. Equity Farms v. Hubbard, 280, N.W.9, 203 Minnesota and Bjerke v. Arens, 281 N.W. 865, 203 Minnesota, 501.

In view of the foregoing decisions and fundamental principals of law, we are forced to the conclusion that the Director of the Department of Corrections could only legally execute such an option under a specific statute authorizing him to execute such an easement or conveyance and that the General Assembly of the state is the only body vested with such authority in the absence of legislation granting such authority to some official of the state.

Under section 216.130, R.S.Mo, 1949, the Director of the Department of Corrections is vested with authority to acquire lands by lease or purchase in behalf of the State of Missouri for farming, rock quaries, grazing or other purposes deemed necessary by him to be used for employment at useful work of prisoners at the Penitentary and for training them so they may earn a livelihood, and further provides if he cannot so acquire necessary land then it authorizes him to direct the Attorney General to condem said land in the name of the State of Missouri.

We can locate no statute authorizing the director to execute such an option or convey land to the United States of America.

Apparently the officials of the United States of America have questioned the validity of such an instrument and have held up the payment provided therein. Under paragraph 6, page 3 of said option, it provides that the parties therein have agreed that the vendor, notwithstanding said option to purchase, may at its election acquire such interest therein, by condemnation, or other judicial proceedings and further agree that the consideration vested in said option shall be the full amount of award or just consideration for taking of said land. Which, of course, is not binding upon the state in this instance any more than the option contract.

Therefore, in the absence of such statutory authority, the Director of the Department of Corrections exceeded his authority in executing such option, and, therefore such option is of no validity.

In view of the foregoing, we consider it unnecessary at this time to answer your second inquiry.

CONCLUSION

It is the opinion of this department that the then Director of the Department of Corrections had no legal authority to execute such an option and bind the State of Missouri, and therefore same is invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARE:lw

THERITANCE TAXES: ORPORATE STOCK: PROCEDURE:

Surviving owner of estate by entirety desires to sell or otherwise transfer certain corporate stocks. If certifi-ESTATE BY ENTIRETY: cates of stock are in surviving owner's possession or TRANSFER BY SURVIVOR: control, before delivery or transfer, he must give written notice to director of revenue and attorney genera and comply with other requirements of sec. 145.210 RSMo

1949, unless he first secures written consent, or waiver, of director of revenu and attorney general authorized by sec. If such stock certificates are include in inventory and appraisement of estate of deceased joint owner during adminis tration proceedings, and court orders that no inheritance taxes are due on the estate as provided by subsec. 2, sec. 145.150 RSMo 1949, then sec. 145.210 RSMo 1949, shall be inoperative as to surviving owner and no further tax proceedings shall be had. If certificates in possession or control of a corporation, then before delivery or transfer of same to surviving owner, or to another at said owner's direction, corporation must comply with requirements of sec. 145.210 RSMo 1949, particularly as to notice to director of revenue and attorney general, unless said corporation, as transfer agent, first secures consent or waiver authorized by said section.

Honorable Lane Harlan Prosecuting Attorney Cooper County Boonville, Missouri

December 16, 1953

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:



"The first question is as follows, and concerns Chapter 145. R.S.Mo., 1949: In the event that a husband and wife owned certain stock certificates as tenants by the entirety, with the right of survivorship, and either the husband or the wife died, must the survivor obtain a waiver of inheritance tax from the Department of Revenue before selling the stock and transferring the certificates?

"And, as a corollary to the previous question, is the transfer a ent for a Missouri Corporation justified in demanding an inheritance tax waiver from the Department of Revenue as a condition precedent to the transfer of such a stock certificate in such Missouri corporation when the transfer agent has ample proof of the death of one of the tenants by the entirety: (Subparagraph (3) of paragraph 1 of section 145.020 not being in question.)"

The above quoted inquiry refers to a situation where a husband and wife had created a tenancy by the entirety in certain shares of corporate stock.

It will be recalled that a tenancy by the entirety is a tenancy in common in real or personal property by husband and wife for their joint life with remainder to the survivor in fee simple.

Consequently, upon the death of one of the joint owners, the surviving owner succeeds to the complete title of such shares of stock, to the exclusion of the personal representative of the deceased joint owner.

The question presented in the opinion request is whether or not the surviving owner must secure a waiver of State inheritance taxes from the Director of Revenue before selling or transferring the certificates of stock, and also if the transfer agent must secure such waiver.

In this connection we desire to call your attention to the word "transfer", as used in connection with the inheritance tax laws and as defined by subsection 4, section 145.010 RSMo 1949. Said subsection reads as follows:

"The word 'transfer' as used in this chapter shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein described."

Section 145.210 RSMo 1949 provides that before any of the companies, corporations, institutions, person or persons, having possession or control of securities or other assets standing in the name of a decedent, or in the name of a decedent and one or more persons, shall be delivered to the personal representative of the decedent, or to the surviving owner, that the custodian of such securities or other assets, as transfer agent, shall meet certain requirements. Said section reads as follows:

"If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligation in this state standing in the name of the decedent or in trust for a decedent liable for any such tax, the tax shall be paid to the director of revenue on the transfer thereof.

"No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or nonresident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares of capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent or the survivor or survivors when in the joint name of a decedent and one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the director of revenue and attorney general at least ten days prior to said delivery or transfer; nor

shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing in the name of decedent or belonging to or standing in the joint names of decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this chapter unless the director of revenue and the attorney general consent thereto in writing.

"And it shall be lawful for the director of revenue together with the attorney general, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer.

"Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax or interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits, or other assets, including the charges of capital stock of, or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto a penalty of one thousand dollars; and the payment of such tax and interest thereon or the penalty above prescribed or both may be enforced in an action brought by the attorney general at the relation of the director of revenue, in any court of competent jurisdiction."

The statement of facts of the opinion request does not indicate what company, corporation, institution, person or persons has possession or control of the certificates of stock referred to, and, not being fully advised as to all of the facts upon which the inquiry is based, it is necessary for us to frame our discussion and conclusion in the alternative, taking into consideration two sets of facts regarding the possession or control of the stock certificates, that is:

1. If the stock certificates are in the possession or under the control of a company, corporation, institution, person or persons, which shall make the necessary transfer and delivery of the certificates to the surviving owner, or to any other person, corporation or institution as directed by such surviving owner.

- 2. If the stock certificates are in the possession or under the control of the surviving owner, who shall make delivery and transfer of them to the purchaser or other transferee.
- 1. In the event the certificates were in the possession or under the control of a corporation, as it seems to be intimated from the latter portion of the question presented, then before the corporation as custodian and transfer agent makes delivery to the surviving owner or to another person, corporation, or institution, as directed by such surviving owner, said transfer agent has the mandatory duty of complying with the provisions of Section 145.210 supra, as to the giving of notice of time and place of delivery of the stock certificates, to the director of revenue and attorney general, in the manner provided by the section and also to with-hold a sufficient portion or amount of said stock with which to pay any inheritance tax or interest which may subsequently be found due on account of said delivery or transfer.

The assumption by the transfer agent that no taxes can be legally assessed upon the transfer, in view of the existence of the above mentioned facts, will not excuse said transfer agent from complying with the terms of the section nor release it from the possibility of being subject to the penalties provided by the latter portion of the section, for failure to comply with the provisions of said section. However, in event the custodian and transfer agent does secure the written consent or waiver of the state's right to demand the immediate payment of any inheritance taxes or interest which may be found due, then the stock certificates may be lawfully delivered or transferred to the surviving owner or others, without violating the provisions of section 145.210, supra.

2. If the stock certificates are in the possession, or under the control of the surviving owner, it is our thought that such owner must, before delivering or transfering his ownership of said stock certificates to another, give the required notice, or secure the necessary waiver and consent of the director of revenue and attorney general. By a "transfer" of such certificates to another, we have reference to the passing of said certificates to such other in the manner referred to in the definition given of the term "transfer" by subsection 4, section 145.010 supra.

The terms "transfer agent," are also used in the opinion request, although no explanation of the intended meaning is given. We understand the terms as referring to the corporation which issued its stock certificates to the husband and wife as tenants by the entirety, and came into possession or control of such certificates by permission of the surviving owner for the purpose of reissuing said certificates in the name of the survivor, or in that of another person to whom the survivor desires to sell or otherwise transfer the certificates.

The mere supposition that the surviving owner cannot be legally required to pay any inheritance tax by reason of his intended delivery of the stock to another person, does not exempt him from complying with the provisions of section 145.210 supra, discussed above. Said Statute,

as well as others, imposes the duty upon the director of revenue to determine in every case of this kind whether or not taxes or interest are due, hence the liability for taxes or interest cannot be ascertained until after the director of revenue has had an opportunity to make the necessary examination and determination of the facts.

In event the surviving owner secures the necessary written consent or waiver of the state's right to demand immediate payment of inheritance taxes or interest, from the director of revenue and attorney general, before the contemplated delivery or transfer, then said owner is exempted from the requirements of section 145.210, supra.

Again, under the provisions of section 145.150 RSMo 1949, the surviving owner may be exempted from the provisions of section 145.210, supra, as will be presently noticed. Subsection 2, section 145.150 RSMo 1949 reads as follows:

"Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 145.210 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown."

Applying the provisions of the section last quoted to the facts before us, in the event administration proceedings of the estate of the deceased joint owner of the corporate stocks is had in that Probate Court having proper jurisdiction, where an inventory and appraisement of the estate property is filed and the corporate stocks referred to in the opinion request are listed therein, the Court makes a finding, which finding and an order are entered of record, that no inheritance taxes are due upon the stock certificates; the Court's action in the matter would preclude any further proceedings relative to inheritance taxes, and would render the provisions of section 145.210, supra, inoperative as to the surviving owner of said corporate stock.

Therefore, in answer to the inquiry of the opinion request, it is our thought that the surviving owner of the stock certificates must strictly comply with section 145.210 supra, with reference to the notice to the director of revenue and attorney general of such owner's intention to sell or otherwise transfer such stock certificates, unless he secures written consent or waiver of the state's right to demand payment of inheritance taxes or interest on account of such delivery or transfer of said stock certificates in the manner provided by section 145.210 supra.

It is our further thought with reference to the inquiry of the opinion request that the transfer agent, in possession or control of the stock certificates, in demanding a waiver of inheritance taxes prior to the date of the intended delivery or transfer of the corporate stock certificates to the surviving owner of same, or to another as may be directed by said owner, is fully justified under the provisions of section 145.210, supra, in making such demand for inheritance tax waiver by the director of revenue and attorney general.

CONCLUSION

It is the opinion of this department that when certain shares of Corporate stock are held by husband and wife by an estate in entirety and said certificates of stock are in the possession or control of the surviving owner who desires to sell or otherwise transfer them to another, that before the delivery or transfer, said survivor shall give the written notice of the time and place of same to the director of revenue and attorney general, and also comply with the other requirements of section 145.210 RSMo 1949, unless such surviving owner first secures the written consent or waiver of the state's right to demand immediate payment of any inheritance taxes or interest found due by reason of the sale or transfer, which consent or waiver must be given by the director of revenue and attorney general. That in the event administration is had upon the estate of the deceased joint owner of the stock certificates, and such shares of Corporate stock are included in the assets of the estate, and the Probate Court finds, and enters an order of record that no inheritance taxes are due on the estate, as provided by subsection 2, section 145.150 RSMo 1949, Section 145.210, RSMo 1949, shall be inoperative as to the surviving owner and no further proceedings shall be had regarding inheritance taxes.

It is the further opinion of this department that in the event the certificates of stock referred to above are in the possession or under the control of a corporation, that before delivery or transfer of said certificates to the surviving owner, or to another at such owner's direction, said corporation, as transfer agent, shall strictly comply with the provisions of section 145.210 RSMo 1949, as to the required notice to the director of revenue and attorney general and also as to the other provisions of said section, unless the transfer agent first secures the written consent or waiver to demand immediate payment of such taxes or interest found due as provided by said section.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours.

JOHN M. DALTON Attorney General

PNC: 1w

P.S.

Encs. - As per our letter to you of October 17, 1953.

(1) April 26, 1946 - Hon. David E. Impey.

(2) January 19, 1950 - Hon. Robert G. Kirkland.

CRIMINAL PROCEDURE:
BAIL: SUPREME COURT
RULE 21.14:

Under Rule 21.14, Supreme Court Rules of Criminal Procedure for all Missouri courts, one arrested without warrant for criminal offense of careless and reckless driving of a motor vehicle, a bailable offense under Sec. 20, Art. I, Cost. of Mo. 1945; while in custody said person may request and be granted bail by magistrate court of county having jurisdiction to try case if charge filed

in such court. Condition of bond being that person will appear on specified date, or from time to time to which cause may be continued, to answer information that may be preferred against him, charging said offense. One arrested without warrant for alleged criminal offense and while in custody applies to the magistrate court of the county having jurisdiction if criminal charge filed, and court orders sheriff to bring the prisoner before court and be present during consideration of application for bail; order properly and legally made, and duty of sheriff to obey same.

July 30, 1953

Honorable Ellsworth Haymes Prosecuting Attorney of Webster County Marshfield, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon the procedure for admitting persons to bail under Rule 21.14, Rules of Criminal Procedure for all courts, adopted by the Supreme Court of Missouri. The opinion request reads as follows:

> "This is a request for an opinion on the application of Rule 21.14, Rules of Criminal Procedure. The facts are as follows: A trooper of the highway patrol apprehended a driver of a motor vehicle who was driving carelessly and recklessly and had been drinking. This was late in the afternoon, after office hours, and the subject was lodged in the county jail. At about 6:00 p.m. the attorney for the driver contacted the magistrate of the county to admit the driver to bail. The magistrate tried to contact the sheriff at that time, but he was out of town. He did contact him about 7:15 p.m. and the magistrate came to his office and ordered the sheriff to bring the driver before him (the magistrate) for the purpose of making bail. This the sheriff refused to do, and the



next day the magistrate issued a citation to the sheriff for contempt for refusing to obey the order to bring the driver before him. The morning after the arrest the prosecuting attorney filed an information against the driver charging him with careless and reckless driving.

"All parties concerned, including this writer, would like your opinion as the proper procedure under this rule in admitting a person to bail, and also as to the legality of the order of the magistrate ordering the sheriff to bring the driver before him."

Rule 21.14 of the Supreme Court Rules reads as follows:

"All persons arrested and held in custody by any peace officer, without warrant, for the alleged commission of a criminal offense. or on suspicion thereof, shall be discharged from such custody within twenty hours from the time of arrest, unless they be held upon a warrant issued subsequent to such arrest. While so held in custody, every such person shall be permitted to consult with counsel or other persons in his behalf. If the offense for which such person is held in custody is bailable and the person held so requests, he may be admitted to bail in an amount deemed sufficient by a judge or magistrate of a court of such county or of the City of St. Louis having original jurisdiction to try criminal offenses. Such admission to bail shall be governed by all applicable provisions of these rules. The condition of the bail bond shall be that the person so admitted to bail will appear at a time and place stipulated therein (which shall be a court having appropriate jurisdiction) and from time to time as required by the court in which such bond is returnable, to answer to a complaint, indictment or information charging such offense as may be preferred against him."

This rule, while very similar to Section 544.170, RSMo 1949, is believed to be for the purpose of implementing and giving effect to said statutes, and to provide the necessary procedure for admitting

persons to bail who have been arrested and taken into custody by any peace officer without a warrant for alleged commission of a criminal offense, or on suspicion thereof.

It is noted that Section 544.170, supra, makes no provision for admitting persons to bail who have been arrested without warrant under authority of this section. Said section reads as follows:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every person shall, while so confined, be permitted to all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

Rule 21.14, supra, specifically provides that when one is arrested without warrant and held in custody for an alleged criminal offense or on suspicion thereof, and such offense is bailable, and he so requests, he may be admitted to bail in an amount deemed to be sufficient by a judge or magistrate of the proper court of the county, or of the City of St. Louis having original jurisdiction to try the case, should the criminal charge be filed in said court. The condition of the bail bond shall be that the person admitted to bail will appear at the time specified in the court to which bond is returnable, or from time to time to which the cause may be continued, to answer a complaint, indictment or information for such offense as may be preferred against him.

It is noted that the rule does not provide that one arrested and held in custody under the circumstances referred to shall be required to wait until after a criminal charge has first been filed against him before he can request and be granted bail for his appearance on whatever day the case is set for trial, but that he may apply for, and, if the offense is bailable, be granted bail by the proper court even though no charge is filed against him.

Section 20, Article I, Constitution of Missouri 1945, provides the classes of criminal offenses which are bailable and reads as follows:

"Bail guaranteed-exceptions.--That all persons shall be bailable by sufficient sureties, except for capital offense, when the proof is evident or the presumption great."

From the statement of facts given in the opinion request, it appears that a member of the Missouri Highway Patrol arrested a person without a warrant for the careless and reckless driving of a motor vehicle, and that the person was lodged in the county jail. About 6 p.m. of the same day, the attorney for the prisoner requested the magistrate court of the county to permit said prisoner to make bail. It appears that no formal charge had been filed at the time of the request, and that an information was not filed until the next day, charging said prisoner with careless and reckless driving of a motor vehicle. It does not appear that bail was fixed by the court, that the prisoner furnished a bail bond, or that he was released upon such bond.

The offense for which the person was arrested, held in custody, and later charged, is a violation of Section 304.020, RSMo 1949, and is a misdemeanor, the punishment for which is prescribed by Section 304.570, RSMo 1949.

Said offense was bailable within the meaning of above quoted constitutional provision, and when so requested, the magistrate court of the county might legally have set the bail of the prisoner in a sum deemed sufficient to guarantee his appearance on a specified date or from time to time to which the cause might be continued in said court where said prisoner would be required to answer an information charging him with the careless and reckless driving of a motor vehicle in the event such charge should be preferred against him. This we believe to be the proper construction

of Rule 21.14, supra, and the procedure for making bail, and the proper application of such procedure to the facts given in the opinion request.

The second inquiry of the opinion request is in regard to the legality of the order of the magistrate requiring the sheriff to bring the prisoner before said magistrate.

The statement of facts given above does not appear to be clear or complete, therefore, insofar as the discussion of the second inquiry is concerned we find it necessary to assume certain facts to be true.

It is assumed that the prisoner was in the custody of the sheriff at 6:00 p.m. on the day of the arrest, when the attorney for the prisoner requested the magistrate court of the county to admit said prisoner to bail, even though no formal charge had been made against such prisoner. The magistrate then attempted to contact the sheriff, presumably for the purpose of getting him to bring the prisoner before the magistrate court for a hearing on the application for bail. The sheriff was out of town at that time, but the magistrate was successful in contacting the sheriff about 7:15 p.m. the same evening. After that time the magistrate went to his office and ordered the sheriff to bring the prisoner before him (the magistrate), which the sheriff refused to do.

It is not clear whether the sheriff was still out of town or whether he was in the presence of the magistrate when ordered to bring the prisoner to court, nor are any reasons given for his failure to comply with the order.

Again, for the purposes of our discussion, it is assumed that the sheriff had returned to town and was in the magistrate's presence when the order was made, and that the prisoner was still in custody of the sheriff where he is assumed to have been placed earlier in the evening.

We make this assumption since it is the only reasonable conclusion we are able to draw from the facts given. We do not believe that the magistrate would, or that he did order the sheriff to bring the prisoner before him when he knew that the sheriff was out of town and that under such circumstances it would be physically impossible for the sheriff to comply with the order. We are rather of the opinion that the magistrate believed the sheriff to be in a position in which he could easily carry out the court's order by bringing the prisoner before said court within a short period of time.

When the prisoner's application for bail was made it was the duty of the magistrate to follow the procedure applicable

in such cases and as authorized by Supreme Court Rule 21.14, supra. The circumstances required the magistrate to give the application due and proper consideration, and if satisfied that the offense was bailable, to set the amount of bail, and if furnished in the proper amount, then it would be the further duty of the magistrate to release the prisoner.

It appears that such a procedure necessitated a hearing upon the application before the court, and that it was to such a hearing the magistrate ordered the sheriff to bring the prisoner, and to remain until the hearing was adjourned. The court properly and legally made the order, and it was the official duty of the sheriff to bring the prisoner before the court, as ordered, and to remain and attend the court throughout said hearing. In the event the sheriff could not be personally present, then he should have had one of his deputies perform that duty for him, as it is the duty of the sheriff and deputy to attend court and to act in accordance with the court's direction. The general rule in this respect now prevailing in most jurisdictions is stated in 21 C. J. S., under the title of "Courts" Section 142, page 22, as follows:

"As a general rule * * * court * * * attendants and assistants must act in accordance with the judge's directions. * * *"

Section 482.140, RSMo 1949, provides that when requested by a magistrate, it shall be the duty of the sheriff to be present in person, or by deputy and to attend the court. Said section reads as follows:

"Every magistrate may hold court for the trial of all causes of which he has jurisdiction as often as may be necessary to meet the needs of justice, and may hold such court on any day, except Sunday, on which any cause may be set for trial, or any cause adjourned; and, when so required, the sheriff shall be present in person or by deputy and attend on said court."

Therefore, in answer to the second inquiry, it is our thought that the order of the magistrate was properly and legally made, and that it was the official duty of the sheriff to obey same.

CONCLUSION

It is therefore, the opinion of this department that under the procedure provided by Rule 21.14, Rules of Criminal Procedure for all courts of Missouri, as adopted by the Missouri Supreme

Court, one arrested without a warrant for the alleged criminal offense of careless and reckless driving of a motor vehicle, a bailable offense, under Section 20, Article I, Constitution of Missouri 1945, and while in custody, said person may request and be granted bail by the magistrate court of the county having jurisdiction to try the case in the event a formal charge of such offense were filed in said court. The condition of the bond being that the person admitted to bail shall appear in said court on a specified date, or from time to time to which the cause may be continued, there to answer any information which may be preferred against him, charging the offense of careless and reckless driving of a motor vehicle.

It is the further opinion of this department that when one is arrested for an alleged criminal offense without warrant, and while in custody, makes application for bail to the magistrate court of the county having jurisdiction to try the case in the event a criminal charge were filed in said court, and said magistrate court orders the sheriff to bring the prisoner before the court and to be present during the consideration of the application for bail, such order is properly and legally made and it is the duty of the sheriff to obey same.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General RECORDENC DEEDS - 3RD
CLASS COUNTIES - SEPARATE
CIRCUIT CLERK AND RECORDER.)
SALARY AND NUMBER OF
DEPUTIES:



Recorders in 3rd class counties where there is a separate Circuit Clerk and Recorder determines the amount of salary for deputy hire which must be reasonable. The Recorder in said counties shall also determine the number of deputies necessary to perform the duties of the office promptly, carefully and well. Such reasonable payment to necessary deputy or deputies may be deducted from Recorder's fees, balance paid County Treasurer.

January 6, 1953 1-7-53

Honorable Albert L. Hencke Prosecuting Attorney Franklin County Union, Missouri

Dear Sir:

This is in reply to your request for an opinion of this office, which request is as follows:

"The Recorder of Deeds of Franklin County has asked that I request an opinion from the Attorney General's Office regarding the following:

"Does the Recorder of Deeds or the County Court determine the salary of the Deputy Recorder in third class counties?

"Is the Recorder of Deeds of third class counties allowed more help than just one deputy, and if so, how much and how shall that extra help be paid?"

Franklin County has a separate Circuit Clerk and Recorder.

Section 11 of Article VI, Constitution of Missouri, deals with compensation of county officers, fees collected, and salary paid to their necessary deputies or assistants and is as follows:

"Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall be prescribed by law uniform in operation in each class of Honorable Albert L. Hencke

counties. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law."

The above constitutional provision and Section 59.250, RSMo 1949, control the salary of the Recorder and pay of his "deputies and assistants" in third class counties wherein there is a separate Circuit Clerk and Recorder. Said Section 59.250 is as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder. shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of four thousand dollars except those set out in Section 59.490. for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

We shall deal with the questions in the order in which they appear in your request. Your first question is as follows:

"Does the Recorder of Deeds or the County Court determine the salary of the Deputy Recorder in third class counties?"

Under the provisions of said Section 59.250 the Recorder of Deeds shall fix a reasonable amount to be paid deputies and assistants which are necessary "to secure the proper and expeditious performance of the duties of office." After deducting Four Thousand (\$4,000) Dollars for the Recorder's salary and a reasonable amount for necessary deputy or deputies to perform the duties of the office "promptly, carefully and well," the Recorder shall pay the balance into the county treasury.

In State ex rel. Vernon County v. King, 136 Mo. 309, 318-320, Macfarlane, J., speaking for the Supreme Court of Missouri, said:

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a power given to public officers, and which concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner. Such an interpretation is demanded 'for the sake of justice and the public good. Steines v. Franklin Co., 48 Mo. 178, quoting from Newburgh Turnpike Co. v. Miller, 5 Johns. Chy. 113.

"There can be no doubt that the public interest demands that the work required of a recorder should be done promptly, carefully, and well. A public officer is, by right, entitled to compensation for the labor performed, and it should also be measured to some extent by the responsibilities assumed. The statute regulates the amount of the fees the recorder is entitled to collect, and the presumption is that he fairly earns what he is allowed to charge. Four thousand dollars was fixed

Honorable Albert L. Hencke

as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceed that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid.

"In construing a statute which provided that when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, 'the county court may make a reasonable allowance to the deputy,' the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. Bradley v. Jefferson Co., 4 G. Greene, 300. See, also, Washington Co. v. Jones, 45 Iowa, 261.

"We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county."

(Underscoring ours.)

Under the above authority we are of the opinion that it is the duty of the Recorder to fix the amount to be paid to his deputy or deputies—such amount, of course, to be reasonable for necessary services rendered, and it is the duty of the county court to allow the Recorder to deduct such amount for necessary deputy hire.

Your second question is as follows:

"Is the Recorder of Deeds of third class counties allowed more help than just one deputy, and if so, how much and how shall that extra help be paid?"

This query has been practically answered by the abovequoted Section 59.250 and that part of State ex rel. v. King, supra, which is hereinabove set out.

The statute provides that the remainder of the fees after the Four Thousand (\$4,000) Dollars salary is deducted and "after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary shall be paid into the county treasury."

If the Recorder finds it necessary to employ more than one deputy "to secure the proper and expeditious performance of the duties of the office," then the Constitution and the Statute authorize him to employ additional deputies and assistants, and it is made the duty of the county court to "pay a reasonable compensation for the necessary services rendered and that payment was not discretionary with the county court."

CONCLUSION

It is the opinion of this office that the Recorder of Deeds in counties of the third class wherein there is a separate Circuit Clerk and Recorder shall fix a reasonable allowance for deputy hire. The Constitution and the Statute authorize the Recorder to employ sufficient help to perform the duties of the office "promptly, carefully and well." It is the duty of the county court to permit such reasonable and necessary amount for deputy hire to be deducted from the fees of the Recorder's office.

Respectfully submitted,

GROVER C. HUSTON Assistant Attorney General

APPROVED:

Attorney General

GCH:fh

COUNTY CLERK:



A county clerk of a third class county with a population of more than twenty-four thousand and less than thirty thousand shall be allowed as compensation for deputy and assistants an amount equal to 100% of his salary as determined in Section 51.300, exclusive of Section 51.415 and in addition thereto the amount specified in Section 51.415, RSMo 1949.

January 29, 1953

1-29-53

Honorable George Henry Prosecuting Attorney of Newton County Neosho, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"I would like to have the opinion of your office on the following proposition:

"Newton County is a third class county and the salary of the County Clerk is set by Section 51.300 of the Revised Statutes of Missouri, 1949. Then Section 51.450(5) provides that the County Clerk shall be allowed an amount equal to 100% of his salary for the employment of deputies and assistants. In 1951 H. B. 459 was enacted as Section 51.415, Revised Statutes of Missouri, 1949, and provides additional compensation for the County Clerk and deputies for administration of Social Security Act. Newton County has elected to come under the provisions of the Social Security Act and since the amount allowed as clerk hire under Section 51.415 is not as great as the amount allowed under Section 51.450(5), there appears to be a conflict in the two sections providing for compensation of deputies and assistants.

"Our question is, shall the County Clerk be allowed as compensation of deputies and assistants, an amount equal to 100% of his salary received both under the provisions of Section 51.300 and 51.415 or shall he be allowed as compensation for duties and assistants, an amount equal to 100% of his salary received under provisions of Section 51.300 plus the amount allowed for clerk hire under the provision of 51.415(3)."

We note, for the purpose of this opinion, that Newton County is a county of the third class having a population of at least twenty-four thousand and less than thirty thousand as indicated by the 1950 census of population count.

Section 51.300, RSMo 1949, prescribes the salary of a county clerk of a county of the third class. Section 51.450, RSMo 1949, provides for the appointment and compensation of deputies in counties of the third class and reads in part, so far as we are here concerned, as follows:

"The clerk of the county court in each county of the third class shall be entitled to employ deputies and assistants, and for such deputies and assistants shall be allowed the following sums:

* * * * * * * * * * * * * * * * * *

"(5) In counties having a population of twenty-four thousand, and less than thirty thousand, the sum of one hundred per cent of the salary of the county clerk; * * * provided, that the total allowance for deputies and assistants shall in no case exceed the sum of four thousand dollars annually. The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed five hundred dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county; provided, that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration."

Section 51.415, RSMo, Cumulative Supplement 1951, enacted by the Sixty-sixth General Assembly, to which you refer, provides as follows:

- "1. In all counties of class three and four which shall enter into an agreement with the state agency to place county employees under the Federal Social Security Act in accordance with the provisions of sections 105.300 to 105. 450 RSMo 1949, it shall be the duty of the county clerk to keep necessary records, collect contributions of county employees and remit the same to the state agency, and do all other administrative acts required by the agreement or by ruling of the federal or state agency in order to carry out the purposes of the aforesaid law.
- "2. In addition to the compensation now provided by law for said county clerks, and in consideration of the additional duties imposed upon them by this section, they shall receive compensation payable in twelve equal monthly installments out of the county treasury in the following amounts:
 - "(1) In counties of class three, eight hundred dollars per annum;
 - "(2) In counties of class four, six hundred dollars per annum.
 - "(3) In counties of class three the salary of the deputy clerk shall be increased three hundred dollars per year to be paid in twelve equal monthly installments.
 - "(4) In counties of class four the salary of the deputy county clerk shall be increased two hundred forty dollars per year to be paid in twelve equal monthly installments."

You inquire as to what is the amount allowed a county clerk in counties of the third class for deputies' and assistants' salaries under the foregoing cited provisions. It is a fundamental rule of statutory construction that statutes dealing with the same subject matter shall be read and construed together to give effect to each, consistent with the other if at all possible. This rule is stated in the case of State v. Mitchell, 181 S. W. (2d) 496, as follows:

"* * *Statutes are in 'pari materia'
when they are upon the same matter or
subject. 31 C.J., p. 358; and the rule
of construction in such instances proceeds upon the supposition that the
several statutes relating to one subject
were governed by one spirit and policy
and were intended to be consistent and
harmonious in their several parts and
provisions. Dupont v. Mills, 9 W.W. Harr.
42, 39 Del. 42, 62; 196 A. 168, 119 A.L.R.
174, 185."

Under the above stated rule, it is presumed that the General Assembly was cognizant of laws relating to the same subject matter when Section 51.415 was enacted and that it was intended to be consistent therewith, unless a contrary intention is indicated or unless a repugnancy exists rendering the provisions inconsistent. Following this rule, we are of the opinion that the amount provided in Section 51.415 is in addition to the amount allowable under Section 51.450. Section 51.415 takes into consideration the fact that additional duties will be imposed upon the county clerk of a county which has elected to participate in the Social Security program and will place upon him additional duties, and that he should be compensated therefor. It further provides that for the additional duties imposed on the office by participation in the Social Security program, the county clerk shall be allowed an additional amount for deputy hire. We are of the opinion that this additional amount for deputy hire as provided, was intended to be full compensation for such additional work.

It is noted in paragraph 2 of Section 51.415, that the amount therein specified is to be "in addition to the compensation now provided by law, * * " thereby precluding an interpretation which would allow the county clerk for deputy hire an amount equal to one hundred per cent of his salary provided in Sections 51.300 and 51.415, RSMo 1949.

Such an interpretation renders each provision effective and consistent with the other.

CONCLUSION

Therefore, it is the opinion of this office that the compensation provided in Section 51.415, Cumulative Supplement 1951, payable to the county clerk for deputy hire for additional duties imposed upon the office by the county's participation in the Social Security pregram, is in addition to the amount allowed a county clerk of a county of the third class for the employment of deputies and assistants provided in Section 51.450, RSMo 1949, and that in computing the amount provided in Section 51.450, the increase in the county clerk's salary provided in Section 51.415, is not taken into consideration since the latter section specifically provides that the amount is in addition to that already provided by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Yours very truly,

JOHN M. DALTON Attorney General COUNTY COURT: COUNTY CLERK: COMPENSATION: County clerk not entitled to additional

compensation for preparing payroll for

FEES AND SALARIES: county highway department employees.



May 1, 1953

Honorable Rex A. Henson Prosecuting Attorney Butler County Poplar Bluff, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I have been requested by the Presiding Judge of the County Court of this County to procure your opinion of a problem now facing the Court.

"This county is a third class county and for several years now the County Court has operated without a County Highway Engineer. During the time since the county has been without a Highway Engineer we have had one County Clerk in office, and he has charged the county a monthly salary. in addition to the compensation provided by statute, for preparing the payroll for the County Highway Department employees. This payroll was formerly prepared by the County Highway Engineer. The County Clerk's compensation for this job has varied from \$50.00 to \$75.00 per month during the last three or four years, and only recently the Presiding Judge of the County Court learned indirectly that the State Auditor had advised the County Clerk that he would have to refund all the money he had drawn

from the County Treasury since he started preparing the Highway Department payroll.

"I would appreciate your written opinion as to whether or not the County Court is authorized to pay the Clerk additional compensation for this work, and if they are not authorized to do so, if it is the duty of the County Clerk to prepare the County Highway Department payroll without additional compensation."

Subsection (2), Section 51.150, RSMo 1949, provides as follows:

"It shall be the duty of the clerk of the county court:

* * * *

"(2) To keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom;"

It is our view that under the provisions of this statute it is the duty of the county clerk to prepare the county highway department payroll. It is axiomatic that a public officer is entitled only to such compensation as is provided by statute for the performance of his official duties.

In the case of Nodaway County v. Kidder, 344 Mo. 795, 1.c. 801, the Supreme Court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing

same. Such statutes, too must be strictly construed as against the officer. (State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.)

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. (State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645.)"

CONCLUSION

It is the opinion of this department that a county clerk of a county of the third class is not entitled to additional compensation for preparing the payroll for employees of the county highway department, and the county court has no authority to pay him additional compensation for such work.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

SCHOOLS: County treasurer having in his possession funds derived in part or wholly from allocation from state COUNTY TREASURER: aid to a reorganized school district should, upon application of district treasurer, transfer such funds to district treasurer or, absent such application, retain funds credited to district until ordered to refund them in whole or in part to public school fund by some legally constituted body authorized to make such an order. Funds derived from local taxation should be credited to district and transferred to treasurer of district upon application of such treasurer.

September 21, 1953

Honorable Albert L. Hencke Prosecuting Attorney Franklin County Union, Missouri

Dear Sir:

This is in response to your request for an opinion, which request reads as follows:

> "I hereby request an opinion from your office regard the following: 'What distribution for funds of a reorganized school district shall be made by the County Treasurer when said funds is involved in an injunction action regarding the question of aid to a private school?'

"I refer you to a case recently decided by the Supreme Court, to-wit: Henry Berghorn, Mona Berghorn, Arthur Vit, William Winters, Lucile Winters, Edith Young and George Eilers, Plaintiffs, vs. Reorganized School District Number 8, Franklin County, Missouri: Herman A. Toben, Charles Busch, Edward A. Fischer, George J. Brinkmann, Joseph H. Jasper and Frank A. Miesner, members of the Board of Directors of said school district; Florenz C. Nieder, Secretary of the Board of Directors of said school district; Edward R. Fisher, Treasurer of said district; Rock Hill School District Number 23, Franklin County, Missouri: Edward Weber, Adolph Holtmeier and Edward Koop, members of the Board of Directors of said school district, Frank M. Noelker, Clerk of said school district, and Otto Schomberg, Treasurer of Franklin County, Missouri, Defendants.

"It is my understanding that the Treasurer of Franklin County holds an apportionment for Reorganized District R-8. Also he holds the utilities tax received from the County. Said treasurer desires your opinion as to whether he can legally pay this money to said Reorganized School District."

The case referred to in your request, hereafter referred to as the Berghorn case, held that two of the schools in Recorganized District No. 8, Franklin County, Missouri, i.e., Gildehaus and Krakow schools, were not free public schools and hence were not entitled to be supported by public school money or public funds. The court did not detail the findings of fact, the provisions of the declaratory judgment or the injunctive decree of the lower court in its decision. Early in the decision the court said: "The judgment as entered, including the specific findings of fact, the declaratory judgment and the injunction decree covers some thirty seven pages of the transcript. Space permits only a very brief review of the facts." Later on in the opinion the court said:

"In view of the issues raised on this appeal, it will not be necessary at this point to review the detailed provisions of the declaratory judgment entered on count one. Under count two, the court enjoined and restrained defendants from continuing the arrangement for the joint operation of motor buses and from using any public monies for the joint operation of motor buses under an arrangement with the Roman Catholic Church, enjoined and restrained defendants from using or paying any public monies for the maintenance and support of either of the Gildehaus schools or the Krakow school. as presently conducted and maintained, enjoined and restrained defendants from employing as teachers any nun or nuns of the order of the Sisters of the Adoration of the Most Precious Blood of O'Fallon or any nun or nuns of the Order of the Poor

School Sisters of Notre Dame and from employing as a teacher in any public school within said district 8 'a person wearing a uniform garb prescribed by a religious order of the Roman Catholic Church, and enjoined defendants from conducting any school in said district upon property and in any building belonging to the Roman Catholic Church unless said property be removed and separated from premises on which is located any nuns' home, church buildings, or priest's home and unless the premises be validly leased for a specific term under an agreement removing said property from the control of the church by the terms of the lease. The Rock Hill district and its officers were enjoined and restrained from paying public funds belonging to said district for tuition to District 8 for resident pupils of the Rock Hill District attending either the Gildehaus or Krakow schools in District 8. We need not review further the detailed provisions of the injunction decree."

The court made a brief review of the facts and the ruling of the lower court and closed by affirming the judgment. Although it could have done so, the upper court did not amend, modify or supplement the judgment of the lower court.

With respect to the effect of an affirmance of a judgment of a lower court, it was said in Gary Realty Co. v. Swinney, 17 S.W. (2d) 505, l.c. 509:

" * * * This judgment was affirmed by this court. After such affirmance, the judgment was still the judgment of the circuit court. The judgment of affirmance was not an independent judgment of recovery, but a pronouncement by this court that the judgment of the circuit court was right and should remain in force. Meyer v. Campbell, 12 Mo. 397, 401. * * * "

Therefore, since the upper court did not purport to detail the injunctive relief granted by the lower court or to enter a decree of its own, we must look to the provisions of the decree of the lower court as being the only decree in force. It should be mentioned at this point that the lower court made a specific finding that the Ziegemeyer school operated by Reorganized District No. 8 was a free public school and entitled to support from public funds. This finding was not disturbed or questioned by the upper court. The injunctive relief granted was only with respect to the operation of the schools known as Krakow and Gildehaus in Reorganized District No. 8, Franklin County, Missouri, and Rock Hill District No. 23, Franklin County, Missouri.

Specific injunctive relief was granted against the officers and directors of Reorganized District No. 8, Franklin County, Missouri, with regard to the expenditure of public monies, the operation of these schools and joint operation of motor buses. The only injunctive relief granted against defendant Otto Schomberg, Treasurer of Franklin County, Missouri, was that he, along with the officers and directors of Rock Hill School District No. 23, Franklin County, Missouri, was restrained from paying public funds belonging to said Rockhill School District under their control for the uses and purposes of said district for tuition to Reorganized School District No. 8, Franklin County, Missouri, for resident pupils of Rock Hill School District No. 23 attending either of the Gildehaus schools or the Krakow school. He was not restrained from paying over to Reorganized School District No. 8, Franklin County, Missouri, any funds in his hands.

The treasurer of Franklin County has funds in his possession raised from local taxation and money allocated from the public school fund of the state. Upon the ultimate distribution of these funds they may be separated and disposed of according to the source from which derived, but for the purpose of determining what disposition should be made of them by the county treasurer they may be treated substantially the same.

The procedure whereby a school district receives its allocation of state aid is set forth in Section 161.030, RSMo 1949. Summarizing the applicable portion of that section, the district clerk makes a report to the county superintendent showing the number of days attendance of all pupils, the length of the school term, the average attendance, the number of days taught by each teacher, the salary of each teacher, and any other information required by the state board of education. He swears to that report before a notary and is made criminally liable for knowingly furnishing any false information in that report. The county superintendent then approves the report and turns it over to the county clerk who summarizes it as prescribed by the

statute and forwards it to the State Board of Education. It is on the basis of this report that the State Board of Education makes its apportionment to the district. The State Board of Education then certifies the amount so apportioned to the State Comptroller for his approval and a warrant is issued payable to the county treasurer and forwarded to him. The statute then says that:

" * * * The county treasurer shall immediately upon receipt of such moneys distribute and credit to the various school districts in the several counties the amounts due each district as apportioned and reported to the county treasurer and county clerk by the state board of education; * * *

Further, with regard to money in the hands of the county treasurer apportioned to any town, city or consolidated district, from whatever source derived, Section 165.343, RSMo 1949, provides:

"Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, the same shall, on the application of the treasurer of said town, city or consolidated school district, be paid over to him by said county or township treasurer. and the receipt of any such school district treasurer for said money shall be a lawful voucher for the disposition of said money by said county or township treasurer, and be accepted as such by the county court or other body or person having authority by law to make settlements with said county or township treasurer."

If money credited to the various school districts remains in the hands of the county treasurer and is drawn upon by warrants, he does have the duty of seeing that such warrants are in proper form (School Dist. No. 45 of Pemiscot Co. v. Correll, 286 S.W. 136), that they are paid out of the appropriate fund, and other ministerial duties specified in Section 165.110, RSMo 1949. However, he is not given the discretion of determining whether funds in his hands credited to a school district have been properly apportioned to such district, nor can he withhold payment of funds so allocated to a district, whether derived from

local taxation or state aid, upon any assumption that such money may be illegally expended.

In the case at hand the court found that the Gildehaus and Krakow schools were not free public schools and, hence, not entitled to be supported by public school money or public funds. The Ziegenmeyer school was found to be a free public school and entitled to be supported by public school money and public funds. All are but part of Reorganized School District No. 8, Franklin County, Missouri. It is apparent that said district is entitled to that portion of the public school money apportioned to the district for the Ziegenmeyer school but not that portion allocated on the basis of attendance, etc., at the Gildehaus and Krakow schools. But the county treasurer has no method of determining what portion was legally allocated to Reorganized School District No. 8, nor does he have any authority to do so. The county treasurer does not expend school money belonging to such a district. He is a mere conduit.

An analogous case is that of State ex rel. Randolph County v. Evans, 240 Mo. 95, 145 S.W. 40, where it was held that the State Superintendent of Schools could not collaterally attack the truthfulness or correctness of an enumeration upon which the amount of state aid was based. In quoting with approval from a New Jersey case the court said (Mo. 1.c. 108):

"The whole school money of the State is thus passed down to the township collectors, and they are ordered to pay it over to the town superintendents; and then the town superintendents are ordered, by the statute (Nix. Dig. 735, sec. 17), to apportion the whole money so received among the several school districts, in the ratio of the number of children capable of attending school between the ages of five and eighteen, and to pay it over, on the orders of the trustees, to the teachers; so that it will be perceived that the distribution of all the school funds, both State and township, in every county, township, and district of the State, is based upon this ascertaining of the children by the district trustees. The whole movement depends upon the finality of this ascertainment. If this return be in its nature judicial, the county collectors, the township collectors, the town superintendents, can safely pay over

the funds, respectively, as commanded by the statute. They perform merely ministerial functions, and are liable to indictment for not doing so; and the whole school system moves on harmoniously. * * * "

Therefore, since the county treasurer is given no discretion in the distribution of public school funds in his hands apportioned to a reorganized district, and was not enjoined by the court from distributing such funds to Reorganized School District No. 8, Franklin County, Missouri, he must obey the statutory mandate and either turn such funds over to the treasurer of Reorganized School District No. 8, Franklin County, Missouri, upon the application of the treasurer of such district or, in the absence of such application, retain such funds credited to the district until such time as they may be ordered refunded to the public school fund in whole or in part by some legally constituted body authorized to make such an order.

As for the funds in the hands of the county treasurer raised from local taxation and credited to Reorganized School District No. 8, Franklin County, Missouri, there is no question but that these funds may and must be turned over to the district treasurer upon his application or retained to the credit of such district in the absence of such application. The derivation and source of those funds is entirely different from the state aid above discussed. The basis for their allocation to the district is not that of number of days of attendance of pupils, average attendance, etc., as in the case of state aid, but rather is based upon the amount of property in the district subject to taxation and the rate of taxation previously established for school purposes. The district and its officers are limited in the manner in which these funds may be expended by virtue of recent cases decided by the Missouri Supreme Court, but the duty of the county treasurer with respect to these funds is the same as above discussed in regard to the funds derived from state aid. He has no discretion in the matter and must deliver such funds to the treasurer of the district upon his application or retain them, credited to the district.

This opinion is confined to the question submitted and does not purport to define the rights, duties or liabilities of any other person, officer or legally constituted body.

CONCLUSION

It is the opinion of this office that a county treasurer having in his possession funds derived in part or wholly from

Honorable Albert L. Hencke

allocation of state aid to a reorganized school district should, upon the application of the treasurer of such district, transfer such funds to the district treasurer, or absent such application, should retain such funds in his possession, credited to the district, until ordered to refund them in whole or in part to the public school fund by some legally constituted body authorized to make such an order. The fact that such funds may have been allocated on an improper basis and consequently involved in litigation wherein injunctive relief was granted does not change this, provided that the court decree does not restrain the county treasurer from making such distribution. Those funds derived from local taxation should be credited to the school district and transferred to the treasurer of the district upon the application of such treasurer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml:lrt

DIVISION OF HEALTH: PROSECUTING ATTORNEY: ATTORNEY GENERAL:



The Division of Health may join as relator in an action by the Prosecuting Attorney of a county or the Attorney General of the state in a legal action; that the Prosecuting Attorney of a county may exercise discretion as to whether he institutes a civil action when requested to do so by a state department such as the Division of Health.

September 28, 1953

Honorable Rex A. Henson Prosecuting Attorney Butler County Poplar Bluff, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"In the city of Poplar Bluff, Butler County, Missouri, we have an out-dated and inadequate sewer system, which does not have a disposal plant. Sewage is piped by underground sewer to Black River, which runs through the city.

"A group of land owners in one section of the city, which was recently opened for the construction of new homes, have petitioned the City Council of the city of Poplar Bluff to extend the present sewer system so that the residents of this new area can use the present sewer system. The City Council and the City Engineers presented a plan to the State Board of Health showing the present sewer system and proposed extension, and asked that it be approved. The State Board of Health refused approval, because the present system was inadequate and have advised the city officials that no changes or extensions will be approved in the city of Poplar Bluff until a disposal plant has been built. I have been advised that the city officials are proceeding to make the extension of the present sewer system to include the persons affected and I have also been advised that the State Board of Health is making a request that I file an Injunction Suit in the Circuit Court of Butler County against the city of Poplar Bluff, to stop this proposed extension.

Honorable Rex A. Henson

"If the proposed extension is enjoined the persons residing in this area will be damaged, because they have no method of disposing of their sewage. The proposed extension in my opinion is necessary and is the lessor of the two evils. I am also of the opinion that in the event I file an injunction suit against the city that the court upon a hearing would not grant an injunction and under the circumstances as they exist.

"I would like an opinion as to whether or not the State Board of Health has the right to bring an injunction suit under these circumstances and if it is my duty as Prosecuting Attorney to bring the injunction suit at the request of the State Board of Health, even though I feel that the suit should not be filed and that the injunction should not be granted.

"Since the construction of this new extension is now started, I would appreciate hearing from you as early as possible."

In regard to the power of the Division of Health of the Department of Public Health and Welfare to file such a suit as is the subject of your inquiry, we refer to the case of State ex rel. Shartel, Atty. Gen., et al. v. Humphreys, 93 S.W. 2d 924. This was an action in mandamus by the State of Missouri at the relation of the Attorney General and the State Board of Health to compel the cities of Maplewood and Richmond Heights to do certain things regarding sewers and to abate a public nuisance. At l.c. 927 of its opinion, the Court states:

"The next question is: Did relators have authority to institute and prosecute this cause? The nuisance sought to be abated was a public nuisance and a grievous one, and it also appears, as alleged, that the State Board of Health endeavored, without avail, to get Maplewood and Richmond Heights to agree upon some plan. Despairing of any relief by conference and persuasion, the State Board of Health brought the matter to the attention of the Attorney General and this cause was filed. Section 9015, R.S. 1929, Mo. St. Ann. Sec. 9015, p. 4178, makes it the duty of the State Board of Health 'to safeguard the health of the people in the State, counties, cities, villages and towns, and under the facts here the Attorney General could have properly proceeded with or without joining as relator with the State Board

of Health. Section 12276, R.S. 1929, Mo. St. Ann. Sec. 12276, p. 586; 46 C.J. 740; State ex rel Crow v. Canty, 207 Mo. 439, 105 S.W. 1078, 15 L.R.A. (N.S.) 747, 123 Am. St. Rep. 393, 13 Ann. Cas. 787; State ex rel. Lamm v. City of Sedalia (Mo. App.) 241 S.W. 656; State ex rel. Detienne v. City of Vandalia, 119 Mo. App. 406, 416, 94 S.W. 1009."

In this regard the Court, in the case of State ex rel. Westhues v. Sullivan, 283 Mo. 546 stated, at 1.c. 569:

"The first contention is that Henry J. Westhues, as Prosecuting Attorney of Cole County, was not authorized to bring this suit, in the name of the State. That there are certain suits which the prosecuting attorneys of the counties can bring in the name of the State is made apparent by our more recent holdings. (State ex rel. v. Lamb, 237 Mo. 1.c. 450 and 454; State ex rel. v. Williams, 221 Mo. 1.c. 261.)

"The whole matter is thoroughly discussed by FERRISS, J., in the Lamb case, supra. The rule is, that such prosecuting officer can not proceed in the name of the State, save and except the matters involved are matters arising within and pertaining to the jurisdiction of such prosecuting officer. In other words, they must be matters which concern the State in the limited territory over which such officer has control, or in which he has power to act. His limit is the county for which he was elected. Westhues as Prosecuting Attorney of Cole County can use the name of the State in such matters in which the State is interested within the confines of the said County of Cole. The real question is whether or not the things pleaded are matters localized to Cole County, or whether the State's interest in the proceeding is one of broad expanse, and covering a matter having a state situs rather than a county situs. If the latter, the State must proceed through the Attorney-General; if the former, it may proceed through the local prosecuting officer. Upon this point nothing can be added to the learning of the two recent cases cited, supra. In addition the statutes fix their respective lines of action. That of the Attorney-General is state-wide, whilst that of the prosecuting attorney is local. Whether the one or the other can act must be determined from the nature of the subject-matter of the action. ** 45 45 FF

From the above it appears that while the Division of Health as an agency of the State of Missouri, cannot itself file the type of lawsuit, injunction, which you mention, it can properly request the Attorney General of the State of Missouri or the Prosecuting Attorney of a county to do so, and may join as relator therein.

Your next inquiry is, whether, when so requested, it is your absolute duty as Prosecuting Attorney to file such suit. In this regard we direct attention to a copy of an opinion rendered by this department on June 9, 1950, to Honorable Robert A. Dempster, Prosecuting Attorney of Scott County. This opinion holds that a Prosecuting Attorney may exercise discretionary powers in instituting civil actions in which his county is concerned. We would emphasize that if the Prosecuting Attorney refuses to institute such proceedings his reasons for doing so should not be personal, but based upon sound legal grounds.

CONCLUSION

It is the opinion of this department that the Division of Health may join as relator in an action by the Prosecuting Attorney of a county or the Attorney General of the state in a legal action; that the Prosecuting Attorney of a county may exercise discretion as to whether he institutes a civil action when requested to do so by a state department, such as the Division of Health.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW/ld

HIGHWAY ENGINEERS:)

PUBLIC OFFICERS:

COMPENSATION:

of the third class can claim his per diem wage only for those days in which he actually performs statutory services as county highway engineer.

2. Consultation with "interested persons" other than those with whom it is the statutory duty of the highway engineer to consult, is not the performance of services as county highway engineer from which he is entitled to claim compensation.

3. The county court is vested with a broad discretion in determining whether on any given day the county highway engineer has devoted to his duties enough time to earn his daily wage.

December 22, 1953

Mr. George Henry Prosecuting Attorney Newton County Neosho, Missouri

Dear Sir:

We render herewith our opinion based upon your request of November 19, 1953, which request reads as follows:



"Recently your office rendered an opinion as to the salary which county highway engineers in third and forth class counties are to receive under authority of Section 61.190 Revised Statutes of Missouri, 1949, as amended by laws of 1953. That opinion stated that in counties of class 3, county highway engineers are to receive not in excess of \$10.00 per day, for each day actually served as county highway engineers.

"Our county court has recently appointed a county highway engineer for a period of one year. He will not be engaged in field work or office work every working day of the month, but he will hold the appointment for each working day of the month and we respectfully request the opinion of your office as to whether or not he can be paid on the basis of the number of working days in a month for holding

Mr. George Henry

the position of county highway engineer. As I recall, this bill was passed so that it would enable the various county courts to pay their county highway engineers. In as much as these are skilled men, it is practically impossible to get a man to work for \$10.00 per day and those county highway engineers who were instrumental in getting this bill before the House were of the opinion that the purpose of the bill was to enable the county courts to appoint a county highway engineer and to pay him enough salary to get the work done.

"As with other county officers, the man holding the position of county highway engineer is, of course, contacted at his office by interested persons requesting information on county highway problems. In the event that he is consulted with such problems and does no other work on that particular day as county highway engineer, is he to be considered as actually serving as county highway engineer on that day, so as to receive a day's compensation under the provisions of Section 61.190?

"We will appreciate the opinion of your office on this matter."

The request may be broken down into two separable questions. They are these:

- 1. He will not be engaged in field work or office work every working day of the month, but he will hold the appointment for each working day of the month and we respectfully request the opinion of your office as to whether or not he can be paid on the basis of the number of working days in a month for holding the position of county highway engineer.
- As with other county officers, the man holding the position of county highway engineer is, of course, contacted at his office by interested persons re-

Mr. George Henry

questing information on county highway problems. In the event that he is consulted with such problems and does no other work on that particular day as county highway engineer, is he to be considered as actually serving as county highway engineer on that day, so as to receive a day's compensation under the provisions of Section 61.190?

In answer to your first question, it is the opinion of this office that payment cannot be on the basis of working day during which the highway engineer holds the appointment but must be based on the days which he actually performs services as highway engineer. The statute, Section 61.190, V.A.M.S., August Pamphlet, House Bill 339, 67th General Assembly, reads thus:

"1. In all counties of the second class the county highway engineer shall receive an annual salary, to be fixed by the county court, of not to exceed four thousand dollars, payable monthly out of the county treasury.

"2. In all counties of the third and fourth class the county highway engineer shall receive as compensation an amount fixed by the county court, for each day he shall actually serve as county highway engineer. The amount so fixed shall not exceed ten dollars per day in counties of class three nor eight dollars per day in counties of class four. All such compensation shall be payable monthly out of the county treasury."

This statute contemplates that the office of highway engineer in a third class county is not a full time job, but that the work is intermittent. It states that the highway engineer is to receive pay for "each day he shall actually serve as county highway engineer." (Emphasis ours.)

Had the legislative intent been that he should receive pay for each day he held the appointment the wage would have been on a monthly or annual basis and not on a per diem basis.

As to question No. 2, mere consultation with "interested persons" is not a statutory duty of the highway engineer. (See Chapter 61, RSMo 1949). Consultation with road overseer, being part of the highway engineer's statutory duties, (see Section 61.220 and 61.290, RSMo 1949) would be performance of services

Mr. George Henry

as county highway engineer and for which the highway engineer would be entitled to compensation.

As to the amount of time the highway engineer must serve in a given day in order to earn his per diem stipend, it is difficult to say. Casual consultation for five minutes on a given day probably would not entitle the highway engineer to his daily wage. On the other hand, the statute probably does not require that he serve a full eight-hour day in order to earn the wage. In this matter the county court is vested with a broad discretion.

CONCLUSION

It is the opinion of this office:

- 1. That the county highway engineer in a county of the third class can claim his per diem wage only for those days in which he actually performs statutory services as county highway engineer.
- 2. Consultation with "interested persons" other than those with whom it is the statutory duty of the highway engineer to consult, is not the performance of services as county highway engineer from which he is entitled to claim compensation.
- 3. The county court is vested with a broad discretion in determining whether on any given day the county highway engineer has devoted to his duties enough time to earn his daily wage.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

CONTRACTS:

DIVISION OF PENAL INSTITUTIONS: Provision for "delayed shipment" incorporated in contract for purchase of raw materials by reference is valid.



April 28, 1953

Mr. C. M. Hill Superintendent of Industries Division of Penal Institutions Jefferson City, Missouri

Dear Mr. Hill:

Reference is made to your letter requesting an official opinion of this department. The letter of inquiry is quite lengthy and contains matter not germane to the legal question involved, and we, therefore, have summarized its content as follows:

> On the second day of December, 1952, a contract was entered into between yourself, as Superintendent of Industries, Division of Penal Institutions, Department of Corrections of the State of Missouri, and a firm dealing in raw materials used in the operation of the Missouri State Twine Company manufacturing plant. The particular contract related to the purchase of approximately three hundred tons of sisal. It was and will be hereinafter referred to as the "Short Form Hard Fibres Contract." It provided for shipment to be made in the months of December, 1952, and January, 1953. The contract contained the following provision:

"This is a short form of the current Standard Form of Hard Fibres Contract as amended of the Hard Fibres Association. All the terms and conditions of the current Standard Form * * are

made a part of this contract as if set forth here in full. * * *"

The current "Standard Form" referred to contains the following provision:

"Seller is not liable for delay or failure in shipment due to any laws, regulations, orders, actions, interventions and instructions of the Government or any department thereof (civil or military) of the United States or any foreign government whether made prior or subsequent to the making of this contract or to any contingencies whatsoever beyond Seller's control whether or not similar to the foregoing and whether or not now in contemplation of either of the parties hereto and if Seller shall thereby be unable to ship all or any portion of the goods, (hereinafter referred to as the 'delayed delivery') within the time specified, the time for shipment of such delayed delivery shall automatically be extended for a period of 60 days; * * *"

(Emphasis ours.)

The shipment was not made in either of the months mentioned in the original contract due to factors alleged by the contracting vendor to put into force the last quoted portion of the Standard Form. Shipment was made from the point of origin within the sixty day extension period.

No question is presented as to the form of the contract except as noted below, nor as to the authority of the purported agent or agents of the State of Missouri to execute the same.

Upon the foregoing facts, the sole question presented and the only question which this

opinion is to be construed as passing upon is whether or not the provision for "delayed shipment" became a part of the original contract by reason of reference thereto in such original contract.

The general rule with respect to the incorporation of matters not appearing in a contract, by reference to such extraneous matter in such original contract, is stated thusly in 17 C.J.S., page 716:

"Sec. 299. Writings which are made a part of the contract by annexation or reference will be so construed; but where the reference to another writing is made for a particular and specified purpose such other writing becomes a part of the contract for such specified purpose only.

"Reference is sufficient without actual annexation."

That the holdings of the appellate courts of Missouri in regard to this part of the law of contracts is in accord with the general rule quoted appears from Spitcaufsky v. State Highway Commission of Missouri, 159 S.W. 2d 647, from which we quote, 1.c. 657:

"When the above testimony and the appropriate table were tendered, and again when the Commission made an offer of proof, respondent's counsel objected on the ground that the mere reference to the weighted tables in the contract documents did not make them a part of the contract; that no copy thereof was given to respondent, and there was no proof that he knew of them. We are unable to see any merit in this objection. The table, though a separate document, could be incorporated in the construction contract by reference, 12 Am. Jur., Sec. 245, p. 781; 13 C.J., Sec. 126, p. 304, Sec. 588, p. 530; 17 C.J.S., Contracts, Sec. 58, p. 408; 17 C.J.S., Contracts,

Sec. 299, p. 716. Clause 13 of respondent's proposal or bid agreed 'to complete the work within the specified number of weighted time units; and Clause 14 declared that if changes in the plans for the work required more time for its completion, 'a reasonable extension of time based upon the weighted time units will be allowed. Sec. I-7 of the Specifications stated that if extra or additional work was ordered by the engineer, an extension of contract time would be allowed based upon the weighted time tables. The same section in another place recited that the tables were on file in the offices of the Commission. Undoubtedly the table used was a part of the contract and admissible as such, and also to show respondent had not completed the project in the contract time."

(Emphasis ours.)

To the same effect are the cases of Killman v. City of Carthage, 247 S.W. 992, State ex rel. Central States Life Insurance Company v. McElhinney, 90 S.W. 2d 124, and Swinney v. Insurance Company, 8 S.W. 2d 1090.

We, therefore, reach the view that the provision relating to "delayed shipment" found in the current Hard Fibres Association Standard Form, Hard Fibres Contract, was incorporated in the original contract by reason of having been referred to in such original contract, and that such provision is and was valid under the law of Missouri.

CONCLUSION

In the premises, we are of the opinion that the contract referred to in your letter of inquiry and in the foregoing opinion, contained as a valid part thereof the provision permitting the contracting vendor to delay shipment of the subject matter of the contract for a period of not to exceed sixty days from the shipment date provided in the original contract, for any of the causes enumerated in Section 17 of the Hard Fibres Association Standard Form, Hard Fibres Contract.

We have no knowledge as to the facts claimed by the contracting vendor to authorize "delayed shipment" on its part, and therefore do not assume to pass upon the question as to whether such facts constitute a lawful excuse for failure to ship the subject matter of the contract within the time prescribed in the original contract.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB/lrt/fh

SPECIAL ROAD DISTRICTS:

Commissioners of special road district should continue to carry on business of district pending appeal from county court decision dissolving such district. County treasurer may honor warrants properly issued by commission pending such appeal.

JOHN M. DALTON



August 4, 1953

John C. Johnsen

Honorable Andrew J. Higgins Prosecuting Attorney Platte County Platte City, Missouri

Dear Mr. Higgins:

This is in response to your request for an opinion dated June 18, 1953, which, omitting caption and signature, reads as follows:

"Mr. W. M. Couch, Treasurer of Platte County, requests the opinion of your office in the following situation:

"On June 1, 1953, the Western Benefit Special Road District of Platte County, Missouri, was dissolved under the provisions of Sections 233.290 to 233.315, R.S. Mo. 1949. Thereafter, the objectors to the dissolution filed their Appeal Bond and Notice of Appeal. Said appeal will in all probability not be heard until the September Term of Court, 1953.

"1. Pending the decision on the appeal, is there any authority in either the commissioners of the district or the trustee in dissolution, appointed by the County Court to carry on the business of the Special Road District?

"2. If either of the above have such authority, may the County Treasurer honor the warrants issued by either of the parties for labor, materials, and supplies?"

You mention that the special road district in question was dissolved under the provisions of Sections 233.290 through 233.315, RSMo 1949. We express no opinion herein as to the constitutionality of provisions of those sections with regard to the disincorporation of special road districts.

Assuming the constitutionality of Sections 233.290 and 233.295, with regard to the dissolution of special road districts, we must consider as basic in the questions presented by you the effect of an appeal from the county court to the circuit court. The circuit court is vested with jurisdiction of appeals from the county court by virtue of Section 478.070, RSMo 1949, the applicable portion of which reads as follows:

"The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as follows:

* * * * *

"(4) Appellate jurisdiction from the judgment and orders of county courts, probate courts and magistrates, in all cases not expressly prohibited by law, and shall possess a superintending control over them, and a general control over executors, administrators, guardians, curators, minors, idiots, lunatics and persons of unsound mind."

The fact that an appeal still lies from a finding of a county court to the circuit court by virtue of this section since the adoption of the Constitution of Missouri, 1945, was decided in In re City of Kinloch, 242 S.W. (2d) 59, 1.c. 64, wherein the court said:

"Section 478.070(4), R.S. 1949, formerly Section 2100, R.S. 1939, has been construed as applicable to and providing for appeals from county court judgments and orders in cases which partake in some respect of the characteristics of an action at law or in equity (Section 49.230, R.S. 1949, formerly Section 2490, R.S. 1939), and in which the circuit court can hear the evidence and from that enter up a judgment of its own. State ex rel. Dietrich v. Daues, 315 Mo. 701, 287 S.W. 430; Bradford v. Phelps County, 357 Mo. 830, 210 S.W. (2d)

996; In re City of Uniondale, supra. We see no reason why the Sections should not continue to be available and implement an appeal from the determination of a county court in incorporating or disincorporating proceedings in so far as the determination calls for the exercise of duties judicial in nature."

The exact manner in which such appeals shall be taken from county courts to circuit courts, and the manner in which such cases shall be handled on appeal in the circuit court, is set forth in Section 49.230, RSMo 1949:

"In all cases of appeal from the final determination of any case in a county court, such appeal shall be prosecuted to the appellate court in the same manner as is now provided by law for the regulation of appeals from magistrates to circuit courts, and when any case shall be removed into a court of appellate jurisdiction by appeal from a county court, such appellate court shall thereupon be possessed of such cause, and shall proceed to hear and determine the same anew, and in the same manner as if such cause had originated in such appellate court, without regarding any error, defect or informality in the proceedings of the county court."

Sections 512.180 through 512.320, RSMo 1949, prescribe the manner in which appeals shall be taken from magistrate courts to circuit courts. We assume that the appeal in the case at hand was perfected according to the rules prescribed for appeals from magistrate courts.

In the case of State ex rel. McDermott Realty Co. v. McElhinney, 246 Mo. 44, 151 S.W. 457, the Supreme Court considered the effect of an appeal from the county court to the circuit court. The court said, Mo. 1.c. 54:

" * * * On the other hand, either party is entitled to an appeal in a private road case, from any judgment or order of the county court not expressly prohibited by law (Sec. 3956, R.S. 1909; Colville v. Judy, 73 Mo. 651; State ex rel. v. Wiethaupt, supra), and the effect of such an appeal (Sec. 4091, R.S. 1909) is that the 'appellate court shall thereupon be possessed of such cause, and shall proceed to hear and determine the same anew, and in the same manner as if such cause had originated in such appellate court, without regarding any error, defect or informality in the proceedings of the county court.'

* * * In appeals from inferior courts, where provision for an unrestricted trial de novo is made, it is well-recognized law that the judgment appealed from is vacated, * * * "

The effect of that ruling and numerous other cases on the subject is to hold that, upon an appeal from the county court to the circuit court, the findings and rulings of the county court are nullified unless the appeal be dismissed. The cause is tried anew in the circuit court and the effect is the same as if the case had never been heard in the county court. That being so, it follows that in your case there has not as yet been any final order dissolving the special road district. The commissioners then are the persons still in the position of authority with respect to the special road district and should carry on the business of the district pending appeal as if no order had been issued by the county court.

Since there has been no final order dissolving the special road district, and since the commissioners exercise control and jurisdiction over the affairs of the district, the county treasurer may honor the warrants issued by the commission pending final decision of the case on appeal by virtue of Section 233.185, RSMo 1949, which says that: "All money paid to the county treasurer and placed to the credit of the district shall be paid out only on warrants signed by the president or vice-president and attested by the secretary, except as may be otherwise authorized by law."

CONCLUSION

It is the opinion of this office that, pending appeal from the decision of a county court dissolving a special road district, the commissioners of the special road district should continue Honorable Andrew J. Higgins

to carry on the business of the district. It is the further opinion of this office that, pending appeal, the county treasurer may honor the warrants of the commission executed according to the provisions of Section 233.185, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml

CORONERS: RSMo. 1949:

It is the duty of the county, in a county of the third OFFICE SPACE: class, to furnish the county coroner an office or space COUNTY COURT: to carry on his official duties; to maintain and equip SEC. 49.510: said office; to provide supplies and equipment as are shown to be absolutely necessary; all to be taken care of and paid for out of county treasury, as provided for in Sec. 49.510, RSMo. 1949, as county court may direct.

February 25, 1953

Mr. Robert Hoelscher Prosecuting Attorney Warren County Warrenton, Missouri

XXXXXXX

J. C. Johnsen

Dear Sir:

Your recent letter containing a request for an opinion has been assigned to me to answer. Said request is as follows:

> "May the County Court legally allow the Coroner additional compensation such as office rent, telephone expense etc? At present the office of the Coroner is located in his home and he is receiving no operating expenses from the county.

Warren County is a county of the third class.

The coroner being a county officer we believe the statute applicable in answering your request to be Section 49.510, RSMo. 1949. which states as follows:

> "49.510. County to provide and equip offices .--It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Considering the terms of the statute we are of the opinion that it makes it the duty of the county to provide an office or space where the coroner may properly carry on and perform the duties and functions of his office; that it is the duty of the county to maintain, furnish and equip his office and provide only such necessary

Mr. Robert Hoelscher

supplies, equipment, appliances and furniture as are shown to be needed, all to be taken care of and paid for out of the county treasury at the time and in the manner that the county court may direct.

We feel we are further fortified in our opinion by the case of Ewing v. Vernon Co., 116 S.W. 518, 216 Mo. 681, where in his opinion at pages 689 to 694 and 695 to 696, said:

"However, by parity of reasoning, some aid may be borrowed from our decisions; for instance, in pioneer times so early as 1832 the question was here whether it was the duty of Boone county to furnish its circuit clerk a room to keep his office. (County of Boone v. Todd, 3 Mo., star p. 140) The county refused to supply such room and Mr. Todd, the clerk furnished one. He presented his account for rent to the circuit court. That court allowed it in the sum of \$120. Thereat the county court refused to draw a warrant and Todd sued out a conditional mandamus. A peremptory writ being finally awarded, Boone County brought error. The judgment was affirmed partly on the theory that the statute, as it then read, required clerks to provide and safely keep and preserve suitable books and furniture 'and other necessaries for their respective offices. ! etc. It was held, in this connection, that a room came under the head of 'necessaries' and was as much a necessary as a book to record the judgments of the court. But the decision is also put on larger grounds, viz: that it would be unreasonable to suppose that the Legislature could intend that a clerk should furnish a house to keep the books and papers at his own expenses. It was pointed out that in some instances this might require him to build a house and thus absorb all his official fees. or more. It is said also (Chief Justice McGIRK speaking). that to compel him to take his own private property for public use without compensation would be contrary to the Constitution; and that the law gives him his fees for compensation for official services and. so devoting them, did not intend those fees to be diverted or frittered away in providing a house to work in. What was this but holding that the laborer was worthy of his hire, and that the master, the public, should provide a safe and reasonable place and appliances in which to labor?

"In St. Louis County Court v. Ruland, 5 Mo. 269,

Mr. Robert Hoelscher

the doctrine of the Todd case was approved. In the Ruland case the clerk furnished fuel for the use of his office. * * *

"In Gammon v. Lafayette County, 79 Mo. 223, it was held that under a statute providing that the necessary expenses incurred by the probate court for furniture shall be paid by the county, the judge of such court could compel the county to repay him an outlay for a bookcase purchased for his use. * * *

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"The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'

"The statute relating to recorders ordains that he 'keep' his office, etc., the word keep is one of wide and flexible meaning, one meaning being to maintain, to provide for. It involves the idea of continued effort in that line, i.e., that the office shall be carried on, enjoyed, etc. In this view of the case, the great breadth of the statutory work 'keep' permits of the notion that it was the legislative intent that the recorder of deeds should have the power to maintain and provide for his office in a reasonable way for the benefit of the public, and (by implication) at the public expense, where county courts violate or renounce their duty in that regard."

We commend this case for your attention regarding this section of the statute.

However, we believe that there is a limitation placed upon the foregoing statute regarding the provision of necessary stationery, supplies, equipment, appliances and furniture. Such limitation is

Mr. Robert Hoelscher

that the coroner must budget these items in accordance with the provisions of Section 50.690, RSMo. 1949, and that the county court is under the duty of revising and amending this estimate in accordance with the provisions of Section 50.740, RSMo. 1949, and the showing must be made by the coroner in his budget estimate of the absolute necessity of the things included therein.

The above, we believe, is shown by the case of Rinehart v. Howell County, 348 Mo. 421, 153 S.W. 2d. 381, 1.c. 426:

"The foregoing disposes of the points briefed by the appellant. The result might differ under live issues involving the County Budget Law, lawful action by the General Assembly covering the subject matter in said county, nonarbitrary action by the County Court, or the substantialness of the testimony as to the absolute necessity for the services."

CONCLUSION

It is, therefore, the opinion of this department that it is the duty of the county to furnish the county coroner an office or space wherein he may properly carry on and perform his duties and functions; it is the duty of the county to maintain, furnish and equip his office, provide only such necessary stationery, supplies, equipment, appliances, and furniture as are shown to be needed, all to be taken care of and paid for out of the county treasury at the time and in the manner the county court may direct.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. A. Bertram Elam.

Yours very truly,

JOHN M. DALTON Attorney General

FEES

When term "day" is used in Section 57.290 as to time spent by Sheriffs or other officers in taking prisoners to the Penitentiary "day" is used as a measure of time

and means a natural or calendar day.

March 18, 1953

Honorable W. H. Holmes State Auditor Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

> "We would like to have your official opinion in regard to the interpretation to be placed on that part of Section 57.290 R.S. Missouri 1949, relating to fees to be paid by the State to Sheriffs, Marshals or other officers for taking convicts to the Penitentiary.

"We understand these fees are paid by the State to the Sheriffs as Criminal fees. that is, for serving Criminal process etc., and as the Sheriffs are on a salary basis, in so far as Criminal procedure is concerned, they turn over to the County all such fees paid for their services as Sheriff.

"The point we particularly want to clarify is concerning the per diem fee of the Sheriff and guard or guards authorized for taking prisoners to the Penitentiary. Section 57.290 above referred to provides in part that:

" ** the sheriff, county marshal or other officer shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary. and each guard shall receive the sum of two dollars per day for the same, **!

"And a further provision:

Honorable W. H. Holmes:

" ** which in no case shall exceed three days, **

"Is it contemplated that a "day" is considered on a calendar basis, or is this based on any certain number of hours? As an example, if a Sheriff leaves his home County early in the morning of a certain day and returns home late in the evening of the same day, would or could this constitute more than one day for the purpose of placing the proper construction on this statute?

"Likewise, if a Sheriff left his home County early in the morning of a certain day and returned late in the evening of the following day, would this be considered two days, or could more than two days be implied in properly construing this statute."

We may look first to the statute law for guidance in the interpretation of the above-quoted statute. In Section 1.090, RSMo 1949, it is provided as follows:

"Words and phrases shall be taken in their plain and ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

We take it that the use of the word "day" in the section of the statute quoted in your letter was as a measure of time and that as the word "day" is used in its plain and ordinary meaning as directed by the statute quoted, it could mean only a natural day. In further reference to this point, the Court in the case of Friar vs. Ray, 5 Mo. 510, l.c. 512, said as follows:

"* * * in every instance in our laws, where the word day is mentioned, a natural day is meant. * * *."

It is true that this opinion was given many years ago, but there is no record of it ever having been overruled,

Honorable W. H. Holmes:

criticized or distinguished. This subject of day is again discussed in Williams vs. Williams, 30 S.W. (2d) 69, l.c. 71, where it is said:

"The natural or solar day consists of twenty-four hours, the space of time which elapses while the earth makes a complete revolution on its axis; as ordinarily considered, it is the space of time which elapses between two successive midnights. * * *."

It is further said on the same page:

"But ordinarily the law does not consider fractions of a day. A day is an indivisible point of time; it has neither length nor breadth, but simply position, without magnitude. * * *."

We believe that the provisions of Section 57.290 as quoted in your letter, are plain and definite. That in accord with the above-quoted decisions and the statute quoted the word "day" as used would mean as in the Williams case, supra, a time from a midnight to the next succeeding midnight.

It is, therefore, our answer that this statute means that if the sheriff leaves his home early in the morning and returns late in the evening, but between one midnight and the next succeeding midnight, he can be said to have utilized only one day. And as to the second inquiry, if he leaves his home early in the morning of one day and returns late in the evening of the second day, he will have utilized only two days. The Legislature unquestionably meant to use the term "day" as a measure of time and it was so used as a calendar or natural day.

CONCLUSION.

It is, therefore, the opinion of this office that where in Section 57.290, RSMo 1949, the sum of Three (\$3.00) Dollars per day is allowed sheriffs and others for time actually and necessarily employed in the taking of convicts to

Honorable W. H. Holmes:

the Penitentiary the word "day" is intended to mean a calendar day as a measure of time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General

JWF:irk

COUNTY COURTS: County court is not authorized to subject funds of county to risks incident to trade or commerce.



April 9, 1953

Honorable Haskell Holman State Auditor State of Missouri Jefferson City, Missouri

Dear Mr. Holman:

A request for an official opinion of this office from Mr. W. H. Holmes, former State Auditor, reads as follows:

"Does the County Court in a third class county have statutory authority to enter into a contract with a second party to purchase cattle, whereby the County Court is to pay for one-half of the cost of the cattle from county funds. The cattle are to placed on the county farm and the county to share in the profits."

It appears from the wording of this request that the "second party" referred to is an individual and not a state, municipality or political subdivision, or the United States, as contemplated in the wording of Section 16 of Article VI, Missouri Constitution of 1945, and it is with this assumption in mind that this opinion is written.

The cases of Reardon vs. St. Louis County, 36 Mo. 555, and Alderson vs. St. Charles County, 6 Mo. App. 420, and an unbroken chain of cases since those decisions have held that the powers of the county court are derived from the state government and may appropriate the money of the county to certain objects because it has express power given to it by the state government to do so; conversely, the county court has no authority to enter into a contract and appropriate money as here contemplated unless expressly authorized to do so by the state government.

The several county courts are authorized by statute to purchase or lease land not exceeding 320 acres and cause to be erected thereon a convenient poorhouse or houses, with certain implementing provisions and limitations (Secs. 205.640 and 205.650, RSMo 1949). The county court by Section 205.660, RSMo 1949, is given the following power:

Honorable Haskell Holman

"The county court shall have power to make all necessary and proper orders and rules for the support and government of the poor kept at such poorhouse, and for supplying them with the necessary raw materials to be converted by their labor into articles of use, and for the disposing of the products of such labor and applying the proceeds thereof to the support of the institution."

This section gives the county court broad powers pertaining to the affairs of said poorhouse; however, nothing is said therein about permitting the county court to enter into a business arrangement for the joint ownership of cattle or other property by said county and an individual. The Constitution for Missouri of 1945, Article VI, section 16, specifically authorizes any municipality or political subdivision of this state to contract and cooperate with other governmental units "for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law." No provision exists which would specifically authorize this type of contract and cooperation between a county court in a third class county and an individual.

Section 205.720, RSMo 1949, contemplates that stock shall be owned by the county on said poor farm by requiring that book accounts shall be kept thereon by the superintendent thereof. Section 205.760, RSMo 1949, forsees the renting or leasing of the poor farm to said superintendent and permitting him to stock it and furnish the necessary farm implements and operate it at his own expense. But no specific provision is found authorizing such action by the county court of a third class county as is contemplated by your request.

CONCLUSION.

It is the opinion of this office that the county court in a third class county does not have statutory authority to enter into a contract with a second party to purchase cattle to be placed on the county farm, whereby the county court is to pay for one-half of the cost of the cattle and the county is to share in the profits.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. J. Robert Tull.

Yours very truly,

JOHN M. DALTON Attorney General RECIPROCITY: LICENSES:

Complete reciprocity as regards registration of MOTOR VEHICLES: motor vehicles does not exist between the state's or Missouri and Indiana: then a motor vehicle owned and registered in Indiana and leased to a Missouri resident for a period of more than thirty days must be registered in Missouri.



June 23, 1953

Major E. I. Hockaday Assistant Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

> "Attached is a letterhead on the Contract Steel Carriers, Incorporated, which is a Missouri corporation. This company operates from Chicago to Kansas City, Missouri. They lease tractors on a yearly basis and these vehicles are licensed in the State of Indiana.

"We request an opinion from your department as to whether or not their operation in the State of Missouri is legal, or must they purchase Missouri license plates for these vehicles."

The above letter raises the issue of whether there is reciprocity between the states of Missouri and Indiana as to the registration of motor vehicles. The reciprocity law of Missouri is found in Section 301.270, RSMo 1949, and reads as follows:

> "A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state.

Major E. I. Hockaday

provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

From the above it will be seen that a motor vehicle which is owned by a resident of Indiana, and which has been duly registered for the current year in and by the State of Indiana, may be operated by such owner or operated by his permission, in the State of Missouri, without registering such motor vehicle in Missouri or paying any registration fee in Missouri, provided that a motor vehicle duly registered for the current year in Missouri would have the same privilege in Indiana.

- At this time, we would direct attention to the definition of "owner" of a motor vehicle in Missouri and in Indiana. The Missouri definition is found in paragraph (19) of Section 301.010, Missouri Revised Statutes Cumulative Supplement 1951, and reads as follows:

"'Owner,' the term owner shall include any person, firm, corporation or association, who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this law."

The Indiana definition is found in paragraph (o) of Section 47-2402, Burns Indiana Statutes Annotated, 1952, and reads as follows:

"Owner. -- A person who holds the legal title of a motor vehicle or any person renting or leasing a vehicle and having exclusive use thereof for a period longer than thirty 2307 days, or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof, with the right of purchase upon the performance of the conditions stated in the agreement and with

Major E. I. Hockaday

an immediate right of possession vested in the conditional vendee or lessee, or in the event the mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed to be the owner for the purpose of this act."

It will be noted that by the Indiana definition "any person renting or leasing a vehicle and having exclusive use thereof for a period longer than thirty (30) days" is held to be the owner of such vehicle. It will also be noted that the Missouri definition contains no such provision. As a result of this difference, the following would be true: A Missouri registered motor vehicle leased on an annual basis in Indiana would have to be registered in Indiana, whereas, in view of the Missouri reciprocity statute and the Missouri definition of owner, such a requirement is not now made in Missouri of an Indiana registered motor vehicle leased for a period of more than thirty days in Missouri. The situation thus created represents a disparity which is incompatible with reciprocity, and in view of this fact, we would feel that a motor vehicle registered in Indiana and leased to a Missouri owner for a period of over thirty days should be registered in Missouri, unless there is present some additional element which would alter this situation.

In this regard, we would direct attention to the fact that the State of Indiana has a reciprocity commission (Section 47-202, Burns Indiana Statutes Annotated 1952) which is authorized to enter into reciprocity compacts with other states. That statute reads in part:

"* * Lif such other state, commonwealth or the District of Columbia has no commission or official authorized to enter into such reciprocal agreement, but does have in force a law or statute which contains a reciprocal provision for the benefit of the citizens of this state, then the commission hereby created, if it be of the opinion that it would be beneficial to this state or the citizens thereof is authorized to consent to the provisions of such reciprocal law or statute, and to notify the proper authority of such other state, commonwealth, or District of Columbia thereof."

On December 31, 1943, the Reciprocity Commission of Indiana entered into a reciprocity agreement with the State of Missouri, said agreement to become effective January 1, 1944, to "remain in full force and effect until cancelled by either parties upon

thirty days written notice to the other." No such notice of cancellation has been given by either party. Signing this compact for Indiana were the members of the Reciprocity Commission of Indiana, and signing for Missouri was the Chairman of the Missouri Public Service Commission and the Commissioner of Motor Vehicles of Missouri. The pertinent parts of this agreement are:

- "I. The undersigned do solemnly covenant and agree that the motor vehicles, trailers and semi-trailers, while engaged solely in interstate commerce for hire or in carrying the property of the owner of such vehicle, and owned or operated by a resident of either state shall be exempt in the state of non-domicile from the payment of any and all fees and taxes levied by such state against said owners or operators by reason of the operation of such motor vehicles, trailers and semi-trailers upon the highways of the States involved herein; subject, however, to the limitations and exceptions in the following subparagraphs:
- "A. The fees and taxes from which said owners or operators shall be exempt in the state of non-domicile shall include any and all taxes or fees of whatever name or description which may be levied or imposed by reason of the operation of motor vehicles, trailers or semi-trailers on the highways of the reciprocating state or any political subdivision thereof, including the application filing fee for common, contract or private operating authority payable to said state.
- "B. Provided, however, that whenever an owner or operator shall maintain a vehicle at any terminal upon an interstate route, which vehicle for other legal purposes might ordinarily be regarded as engaged in "interstate commerce" by reason of the character of its operations, but which is engaged in such operations exclusively within the state of non-domicile, such vehicle shall not be exempt under this agreement, but shall be registered in, and subject to taxation by the state of non-domicile.
- "C. For the purposes of this agreement any individual, corporation or other legal entity who had his or its principal place of business in either of said states on or before July 22, 1943, and who has complied with the laws of such

state with respect to registration and payment of all fees and taxes for his or its motor vehicle, trailer or semi-trailer, at said time, shall, in addition to such persons as fall within the common and legal definition of the word 'resident', be deemed a resident of the state in which such principal place of business was so situated on said date, and such state shall likewise be regarded as his or its 'domicile'.

"D. Reciprocity shall not knowlingly be extended by either state to any owner or operator whose authority to operate is not in full force and effect in the state of said owners' or operators' residence.

This agreement shall not affect or impair the power, authority and discretion of the regulatory bodies or other competent authorities of either the state of Missouri or Indiana, acting within the territorial limits of their particular state, to make and enforce laws, rules and regulations governing motor carriers generally, or to grant or deny certificates or permits to motor carriers, and such power, authority and discretion of said bodies and authorities shall not be superseded or suspended in any respect by reason of this agreement. and all motor carriers of either state when operating in either state shall comply with and conform to all the laws, rules, regulations and safety measures as to operation including the filing of proper insurance or other required undertaking for damage to persons or property, imposed by the particular state wherein operations are being conducted, save and excepting that insofar as said laws, rules and regulations deal with or require among other things the payment of fees and taxes, compliance therewith as to such payment only shall be fully waived by the reciprocating state as elsewhere provided in this agreement.

"III. The parties hereto further covenant and agree to extend to each other full cooperation in the exchange of information as to the domicile of owners or operators of vehicles

registered in their respective states as of July 22, 1943, and any and all other information deemed necessary or essential to the establishment of said owners' or operators' rights to the reciperocal privileges afforded by this agreement, or to the denial of such privileges upon ascertainment of his or its lack of qualifications therefor."

The question to which the above compact gives rise is to what extent, if any, it affects the disparate situation existing between Missouri and Indiana in regard to the registration of motor vehicles discussed above.

A study of the compact indicates to us that it does not cover the disparate situation which results from the different definitions of "owner" of motor vehicles in Missouri and Indiana. It is, therefore, the opinion of this department that the disparate situation which we have discussed is not affected by the reciprocity compact. We here note that we are ruling on the specific situation struction which you present in your letter of inquiry, and not upon any other phase of reciprocity between the states of Missouri and Indiana.

CONCLUSION.

It is the opinion of this department that complete reciprocity as regards registration of motor vehicles does not exist between the states of Missouri and Indiana, and that as a result of this fact, a motor vehicle owned and registered in Indiana and leased to a Missouri resident for a period of more than thirty days must be registered in Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm:sw

TAXATION: INSURANCE: LIENS:

County has lien for delinquent taxes on proceeds from insurance policy paid for DELINQUENT TAXES: destruction of insured leased building assessed separately from land.



October 2, 1953

Honorable Haskell Holman State Auditor State of Missouri Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department reading as follows:

> "Please furnish this department with an official opinion on the following question.

"Where a taxpayer owned a building assessed to him that was built on leased ground failed to pay his taxes and a subsequent purchaser of the leased building paid all of his taxes, does the county have a lien on a check (or rather the funds representing the said check) for insurance for the destroyed building (said building having burned down after being purchased from the original delinquent taxpayer); or should the court strike the taxes in question from the tax books by virtue of the provisions of Section 140.120 R.S. Mo., 1949, on the theory that although the county had a lien for taxes on the building, same would be lost when the building was destroyed by fire?"

Section 139.110, RSMo 1949, provides as follows:

"1. In the event of the destruction by fire, windstorm or tornado of any permanent buildings and/or improvements

situate upon any land or lot, and which permanent buildings and/or improvements at the time of destruction were situate upon any land or lot against which taxes were then levied and assessed, and was so situate at the time of such levy and assessment, the lien of such taxes shall attach to and follow any insurance that may be upon said property at the time of its destruction, and the insurer shall pay to the county collector from said insurance money, and limited to the extent thereof, all taxes, interest and cost then due, levied and assessed against the identical land or lot upon which was situate the buildings and/or improvements destroyed, and such payment shall discharge the obligation of the insurer to the amount paid; provided, however, if in the opinion of the county collector the destruction of such building and/or improvement will not prejudice the collection of such taxes, then in such event the county collector shall be authorized, in writing, addressed to the insurance company or companies, to waive and/or release the lien by this section given. The lien given by this section shall be a first and paramount lien upon the money due in event of the contingency herein referred to.

"2. The assured or person making claim for loss on any permanent buildings and/ or improvements from any insurance company, shall file with such company a statement from the collector or collectors in writing, with such claim, that there are no taxes against said buildings and/or improvements and describing said property, or that taxes exist against the same and the amount and description thereof, and whether or not such lien is waived, as the case may be, and no such claim for loss may be maintained until such statement shall have been filed by claimant.

Honorable Haskell Holman

"3. The provisions of this section shall not apply unless the loss exceeds fifty per cent of the face value of the amount specified in the policy and applicable to the property involved."

We believe it to be clear from the provisions in subsection (2) of such section that there is a lien on insurance received because of destruction of a building or buildings, whether the land and the building or buildings were assessed together or assessed separately.

Therefore, the county has a lien which attaches to and follows any insurance upon buildings the subject of a lease which at the time of destruction had delinquent taxes levied and assessed against such buildings and which buildings were assessed separately from the land on which they stood.

Of course, the provisions of subsections (1) and (2) of such section are applicable only in the instance specified in subsection (3). We assume that the building about which you inquire is one that comes within the purview of such subsection (3).

CONCLUSION

It is the opinion of this office that where a building, the subject of a lease, which is assessed separately from the land on which it stands, is destroyed by fire, that the county has a lien on the insurance money collected for such destruction to the amount of any delinquent taxes which have been levied and assessed against such building.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

JOHN M. DALTON Attorney General COUNTY CLERK:
COUNTY COURT: CLERICAL HIRE:



Increase in amount county clerk can expend for clerical hire or additional compensation to regular deputy or assistant, provided for in Senate Bill 290, 67th General Assembly, may be expended during present term of county clerk.

October 22, 1953

Mr. Haskell Holman State Auditor State of Missouri Jefferson City, Missouri

Dear Mr. Holman:

Your request for an official opinion is at hand, which said request reads as follows:

"Sub-section 6 of Section 51.450 of Senate Bill No. 290, passed by the Sixty-seventh General Assembly, provides in part:

'The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed one thousand dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county; * * *

"This section repeals Sub-section 6 of Section 51.450 R.S.Mo. 1949, which provides in part:

'The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed <u>five hundred dollars</u> per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county;* * *'

"The question is -- Would the county court, after the effective date of the bill, be authorized to allow the county clerk, during his present term in office, the

one thousand dollars for clerical hire, provided in Sub-section 6 of Section 51.450 of Senate Bill No. 290, passed by the Sixty-seventh General Assembly?"

Section 13 of Article VII of the Constitution of 1945 of the State of Missouri provides that the compensation of state, county and municipal officers shall not be increased during the term of office. The problem involved in the instant request is whether or not the additional \$500.00 which the county court may allow the county clerk "to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county" does, in fact, increase the compensation of the county clerk during his present term of office.

This precise question has never been presented to the courts of Missouri.

Section 51.450 R.S.Mo. 1949, as amended, divides the counties of the third class into population groups, and provides that the clerk of the county court in each such county shall be entitled to employ deputies and assistants, and for such deputies and assistants shall be allowed the sums as in said section provided. It should be noted here that there is no provision for a fixed or definite term in said section for the deputies or assistants.

The general rule is stated in 37 L.R.A. (N.S.) 389, to-wit:

"The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers who hold only at the pleasure of the appointing power."

Corpus Juris Secundum, Vol. 67 at p. 355, states as follows:

"However, where the statute provides a fixed salary for dthetofficer and salary for deputies, all payable out of the public treasury, an increase in the salary of such deputies, or an extra allowance for clark hire, or a provision for extra deputies, is not within the Constitutional prohibition, since the government has undertaken to pay the officer and the expenses of running the office."

The Board of Commissioners of Muskogee County v. Hart, 29 Okl. 693, 119 Pac. 132, decided by the Supreme Court of Okbahoma,

Mr. Haskell Holman

involved increasing the compensation of certain deputies then in office who did not hold for any specified time or defined term. The Constitution of Oklahoma provided that "in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office.* * *" The court held that the deputy clerk here is without any "term" as the same is used in the quoted section of the Constitution, and therefore does not apply to the deputy clerk. In Sommers v. State, 5 So. Dak. 321, 50 N.W. 804, Id. 5 S.D. 585, 59 N.W. 963, where the Constitution provided that the legislature shall never grant any extra compensation to any public officer, employee, agent or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office, the Court held as follows:

"A deputy, appointed by an officer to hold during the pleasure of such principal, does not hold for a "term" within the meaning of Sec. 3, Art. 12, of the Constitution, prohibiting any change in the compensation of any public officer 'during his term of office'".

The case of Harrold v. Barnum, Auditor, 8 Cal. App. 21, 96 Pac.104, involved a deputy county surveyor who was appointed to serve by the county surveyor who was elected January 7, 1907, for a term of four years. At the time of the county surveyor's election the statute read that the surveyor's salary was to be \$2,000.00 and the deputy's salary was to be \$960.00 per annum. The Legislature of 1907 amended the deputy's salary, making it \$1,200.00 yearly. The county surveyor revoked the deputy county surveyor's appointment after this legislative change and reappointed him. This suit was to compel payment under the increased salary for the deputy county surveyor. The question was whether the act increasing the salary as hereinbefore set out is within the prohibition of the California Constitution which reads:

"'Compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office, nor shall the term of any officer be extended beyond the period for which he is elected or appointed.'"

The court concluded that the expression "term of office" as used in this provision of the Constitution applies only to officers who have a fixed and definite term and that it does not apply to appointive officers who hold at the pleasure of the appointing power.

The Supreme Court of California in the case of Bayley v. Garrison, County Auditor, 190 Cal. 690, 214 Pac. 871, dealt with a mandamus action brought by a deputy in the office of the county clerk. The clerk at the start of his term received a fixed salary and was allowed deputies who also had fixed salaries, all being paid out of the county treasury. During the term of office of the clerk, the pay of the existing deputy was increased, and this action is brought to recover the increased pay of this deputy during the clerk's term of office. The court held that whatever benefit the clerk may derive from an increased salary to his deputy is not a direct benefit; rather, if it is a benefit, it arises from securing more valuable or competent help. The court then determined that this "provision for the deputy is neither an increase of the salary of the officer nor of the deputy during his term of office within the meaning of Article 11, Section 9, of the Constitution, prohibiting an increase of salary."

It would thus seem that by virtue of these authorities and under our statutes and constitutional restriction, if the money is "allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant" that the sum could be allowed by the county court after the effective date of the bill and during the county clerk's present term in office. But what of the provision of the section where the additional sum may "be used solely for clerical hire"?

The Constitution of the State of Illinois, dealing with the subject of Counties, in Article X, Section 10, provides that the county board "shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses," and thereafter in said section is stated: "Provided, that the compensation of no officer shall be increased or diminished during his term of office". The Supreme Court of Illinois has construed this section in several cases. In People v. Foster, 133 Ill. 496, 23 N.E. 615, that court said: "This court is committed to the construction of the statute that the amount fixed by the county board 'for necessary clerk hire, stationery, fuel, lights,' etc. to a county officer, remains under the control of the board, and may be changed at any time when, in their judgment, the necessity therefor exists."

In another Illinois case, Coles County v. Messer. 195 Ill. 540, 63 N.E. 391, the compensation of the sheriff had been fixed by resolution of the county board "including all necessary deputy hire", at the amount of \$2,500.00 per annum, "and that the said sheriff shall be allowed \$1.50 per day for failer". The sheriff asked the county for extra compensation from the fees of his office, claiming he had paid out more in necessary expenses than this amount. The sheriff brought suit when the county board refused to allow and pay such amount. The Supreme Court of Illinois states, at p. 545 of 195 Ill., P. 393 of 63 N. E.:

"If the compensation including the expenses, is fixed at one sum, the officer is entitled to retain that amount if it is paid by the fees of his office. If it is fixed in separate sums - one sum for the compensation of the officer, and another sum for expenses - the officer can only retain out of the fees collected a sufficient sum to reimburse him for moneys actually paid out for reasonable and necessary expenses of his office. * * * If the amounts are fixed separately, the compensation, aside from the expenses, cannot be changed during the official term, but the expenses may be changed from time to time by the county board as the necessities of the office may change. * * * The principle of all the decisions is that the compensation, including the expenses of the office, is to be paid, if at all, out of the fees and emoluments of the office, and that there is no liability, and there can be no recovery, for expenses which have not been fixed in advance by the county board. The plain intent and meaning of the Constitution is that the county board shall have power to control and limit the expenses of county officers, and that the officers shall not be at liberty to create a liability against the county except within some limit already fixed by the county board. The allowance for expenses may be changed from time to time, as varying circumstances may require; but there is no liability unless an allowance has been made."

A California case, Newman v. Lester, County Auditor, 105 P.785, concerned Orange County, a county of the 15th class, which by statute allowed a salary to the assessor's office as follows: \$3,500.00 per annum to the assessor; and seven field deputy assessors appointed by the assessor of the county and holding office for one specified year, each to receive \$100.00 per month. The law was changed during the term of office of the assessor wherein the office was allowed eight field deputy assessors, and one deputy was to keep an account of all transfers of property in said county during the year, and the change was to take effect immediately. A field deputy assessor filed suit for the increased pay, and the Court of Appeals, 2nd District of California, in this case, allowed the petitioner his salary claimed, stating as follows at 11 Cal. App. P. 581:

"* * * Where the statute provides a fixed salary for the officer and a separate allowance for expenses of his office (Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488), or a fixed salary for the officer and a fixed salary for a certain number of deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of deputies or the amount paid to each, is not a violation of the constitutional provision that 'the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office.' (Const., Sec. 9, Art XI.)"

CONCLUSION

It is the opinion of this office that the county court in all counties of the 3rd class may allow the county clerk after the effective date of sub-section 6 of Section 51.450 of Senate Bill No. 290 and during his present term in office the \$1,000.00 per year as in said section provided for the purpose provided for in said subsection.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. J. Robert Tull.

Very truly yours,

JOHN M. DALTON Attorney General

JRT:f:ld

COUNTY CLERKS: Fees r Section 140.100, Sub-FEES: section 2, RSMc.1949, for county

clerks are accountable fees.



November 4, 1953

Honorable Haskell Holman State Auditor Jefferson City, Missouri

Dear Mr. Holman:

The following opinion is given in answer to your letter of August 31, 1953, in which you state as follows:

"Sub-section 2 of Section 140.100, R.S. Mo., 1949, provides as follows:

'For making and recording the delinquent land lists, the collector and the clerk shall receive ten cents per tract or lot and the clerk shall receive five cents per tract or lot for comparing and authenticating such list.'

"The question is, are said fees earned by the clerk accountable or non-accountable?"

The question is whether or not the county clerks' fees for making, recording, comparing and authenticating the delinquent land lists, as provided in Subsection 2 of Section 140.100, RSMo 1949, are accountable. If they are accountable, the duty to make the account is covered by Sections 50.340 through 50.520, 51.120 and 51.150, RSMo 1949. We do not quote these sections at length because they do not answer the determinative question, which is: Did the Legislature, in providing the fees in question, intend for the clerks personally to retain them as remuneration for their services? In other words, when Section 140.100 was enacted (R.S. 1939, #11117, 11124, A.L. 1945, p. 1910, A. 1949, S.B. 1024), did the Legislature intend to increase the compensation of county clerks by the addition of such fees to be by them retained and unaccountable? For the following reasons we believe this question must be answered negatively.

At an earlier date, remuneration to the county clerk was based upon the amount of fees collected by that office, but the present salary statutes indicate a legislative intent to wholly compensate the clerk by a fixed salary only and without regard to fees collected (with certain exceptions clearly expressed and later referred to herein). Attention is invited to the 1937 opinion of the Supreme Court of Missouri in Ward v. Christian County, 111 S.W. (2d) 182, 184, wherein earlier statutes compensating the county clerk are referred to and in which opinion the court indicates that, by Laws 1937, page 440, Mo. St. Ann., #11811, page 7028, the office was put on a salary basis having no regard to the fees collected.

The present basic salary statutes found in RSMo 1949 are 51.280 (counties of class one), 51.290 (counties of the second class), 51.300-51.310 (counties of the third class), and 51.350 (counties of the fourth class). We find no escape from the conclusion of these statutes, that the salaries therein provided were to replace the fee basis of remuneration and that no fee was thereafter to be retained by the clerk as compensation to him for any service except in instances clearly and specifically stated. There are other unambiguous statutes which, in unmistakable terms, allow compensation in addition to the base salary above referred to and in which statutes the Legislature clearly states that the particular monies are to be "retained by the clerk" or to be "received in addition to his salary" or are to be "unaccountable." See Sections 51.290, 51.320, 51.340, 51.360, 51.380 and 51.400. This indicates that the clerk is not to retain fees collected under statutes -- such as the one in question -- which merely prescribe the fee for the particular service without stating what disposition is to be made thereof.

Section 51.410, RSMo 1949, provides as follows:

"The clerks of the county courts, respectively, shall be allowed fees for their services as follows:

This statute is similar to Section 140.100, in question. Both prescribe a fixed fee but neither state the disposition to be made thereof. Yet does any clerk think the fees set out in Section 51.410 are to be retained by him in addition to his salary? We

cannot conceive of such a contention. These fees are certainly accountable, and it seems to us that the Legislature intended to put the fees prescribed by Section 140.100 in the same category. If the Legislature had intended to allow the clerk to retain the fees prescribed by Section 140.100, it presumably would not have remained silent on the point as it did in Section 51.410, but would have expressly so stated as it did in the general statute on unaccountable fees (Section 51.400), which provides as follows:

"The following fees and compensation shall be allowed to and retained by the clerk of the county court, as unaccountable fees, in addition to the salary and other fees now provided by law, for services rendered:

(1) For extending the tax on the assessment book, three cents for each name, to be paid by the state and county in proportion to the number of tax columns used by each;

Should the fees provided for in Section 140.100 be placed on the same basis (concerning accountable) as those provided for in Section 51.410 (accountable) or on the same basis as those provided for in Section 51.400 (unaccountable)? Legislative silence on the matter of accounting, and similarity of language in Sections 51.410 and 140.100, answers the question.

In view of the salary basis of compensation, we believe the court would resolve any doubt against the clerks, concerning the matter of accounting for a given fee, and that the legal presumption of legislative intent is that every fee is to be accounted for and not to be retained by the clerk unless the Legislature clearly states otherwise.

We cannot overlook the familiar principle restated in Ward v. Christian County, supra, l.c. 183:

"'It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute.

and that the statute which is claimed to confer such right must be strictly construed.' State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S.W. 655, 656. * * *"

In State ex rel. Smith v. Holliday, 61 Mo. 524, the clerk performed certain services concerning tax bills but was denied the fee claimed therefor, on ground that the Legislature had made no provision for such compensation.

No one should fail to appreciate the service rendered by county clerks performing their duties in connection with the delinquent land lists, but we cannot say that the Legislature intended to compensate them therefor by allowing them to retain the fees set out in Section 140.100. In absence of an expressed legislative intent to the contrary, we are constrained to rule that said fees earned by the county clerk are accountable.

CONCLUSION

It is the opinion of this office that county clerks' fees for making, recording, comparing and authenticating the delinquent land lists as provided by Section 140.100, RSMo 1949, are accountable fees.

This opinion, which I hereby approve, was written by my Assistant, James A. Vickrey.

Yours very truly,

JOHN M. DALTON Attorney General

JAV:ml

PRISONERS: CRIMINAL LAW: Solvent convicted defendant in county of the third class liable for board bill accruing while committed to jail by lawful authority as part of costs.

February 17, 1953

OPINION NO. 42

Honorable Robert L. Hoy Prosecuting Attorney Saline County Marshall, Missouri FILED 42

Dear Sir:

This opinion is written in response to your request dated January 29, 1953, which request for opinion reads, in part, as follows:

"This letter is being written at the joint request of the Magistrate, the Circuit Clerk and the Prosecuting Attorney of Saline County and respectfully requests a ruling on the questions hereinafter propounded. The questions have to do with the subject of the inclusion of the board bill of prisoners in counties of the third class in taxing the costs against a defendant who is solvent and able to pay the costs.

* * *

"The first question which arises is whether or not in class 3 counties the board bill of a prisoner may ever be taxed as costs against a solvent defendant in view of the specific provision of Section 221.100 authorizing a board bill to be taxed as costs in class 1 and class 2 countes. If such board bill may not be taxed as costs against a prisoner in class 3 counties then the answer to the questions hereinafter propounded is pretty well settled. Assuming that such board bill may be taxed as costs and

collected from the defendant by reason of the general provisions of sections 221.070 and 221.160 several practical questions arise with reference to the computation of the time of ascertainment.

"Now limiting this matter to class 3 counties and solvent defendants, may I propound you three questions:

"First, where defendant is arrested for a misdemeanor committed in the presence of the officer, e.g. careless and reckless driving, on a Saturday night, held over till Monday and pleads guilty or is convicted and fined, is there any way to include Sunday's board bill in the costs paid by the defendant? Apart from the practical matter of determining the amount, is he in jail 'committed by lawful authority' until the charge is filed and the defendant is brought before the court? If so, how is the amount determined?

"Second, where defendant is sentenced to jail by the Magistrate, e.g. thirty days for common assault, and, at the end of his sentence defendant wishes to pay his costs and be released, is his board bill accruing after he is committed for failure to give bond pending trial and/or his board bill accruing after sentence to be taxed as costs and collected from the defendant? If so, how is the amount determined?

"Third, where defendant is sentenced to the penitentiary and has accumulated a board bill pending trial in the Circuit Court, he failing to make bond after preliminary examination, and the defendant is financially able to pay, and execution would collect it, is the board bill, computed as provided for in section 221.090 and certified to the Circuit Clerk by the County Clerk in the same manner as if it were to be paid by the state, a proper charge to be included in the fee bill for which execution should issue? * * *"

Honorable Robert L. Hoy

We shall answer the questions in the order propounded.

The basic question is whether the board bill of a prisoner may ever be taxed as costs against a solvent defendant in a county of the third class.

To answer this we must resort to the specific statutes on the subject of criminal costs because costs were unknown to the common law, hence one's right to costs is wholly dependent on statutory provisions allowing them.

In the case of In re Thomasson, 159 S.W. (2d) 626, l.c. 628, affirming 119 S.W. (2d) 433, the court said:

" * * * In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are strictly construed. 7 R.C.L., Sec. 2, p. 781; Van Trump v. Sannerman, 193 Mo.App. 617 187 S.W. 124; Ex parte Nelson, 253 Mo. 627, 162 S.W. 167. * * *"

As a further rule of construction, it is well established that all statutes on the same subject matter must be construed together so as to give effect to each, if possible.

Section 550.010, RSMo 1949, reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county." (Emphasis ours)

It appears from reading the above statute that the Legislature contemplated that fees for board would be included in the cost bill chargeable against the defendant and that such fees were part of the costs incurred on behalf of the defendant.

Reading this section together with Section 221.070, RSMo 1949, and Section 221.090, RSMo 1949, strengthens our conclusion that the board bill of a prisoner committed to the common jail by lawful authority would be taxed as costs against the defendant.

Honorable Robert L. Hoy

Section 221.070, supra, reads:

"Every person who shall be committed to the common jail within any county in this state, by lawful authority, for any offense or misdemeanor, if he shall be convicted thereof, shall bear the expense of carrying him or her to said jail, and also his or her support while in jail, before he or she shall be discharged; and the property of such person shall be subjected to the payment of such expenses, and shall be bound therefor, from the time of his commitment, and may be levied on and sold, from time to time, under the order of the court having criminal jurisdiction in the county, to satisfy such expenses."

Section 221.090, supra, reads:

- "1. In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost.
- "2. When the final determination of any criminal prosecution in a county of the third or fourth class shall be such as to render the state liable for costs under existing laws, it shall be the duty of the county clerk to certify to the clerk of the circuit court or court of common pleas in which the case was determined, the amount due the county for boarding any prisoner who was a party in such case. It shall then be the duty of the clerk of

the court in which the case was determined to include in the bill or costs against the state, all fees which are properly chargeable to the state for the board of such prisoners." (Emphasis ours)

The state or county is liable for certain criminal costs under certain conditions only in the event that the defendant is unable to pay them.

Section 550.020, RSMo 1949, provides in part:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except, costs incurred on behalf of defendant." (Emphasis ours)

Section 550.030, RSMo 1949, provides as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant." (Emphasis ours)

Under Section 550.010, supra, the only costs incurred on behalf of a convicted defendant which the state or county in any event can be required to pay are the costs for board. Under Sections 550.020 and 550.030, supra, the state or county, as the case may be, is liable for that cost only if the convicted defendant is unable to pay.

We take it then that the board bill for a convicted defendant is "properly chargeable" (Section 221.090, supra) to the state in the event that the convicted defendant is unable to pay, subject, of course, to the other restrictions contained

in Section 550.020, supra. We, therefore, do not believe that paragraph 2 of Section 221.090, supra, removes the liability of the convicted defendant for his board bill, but rather serves to clarify the fact that such item of expense is part of the costs to be assessed in the case.

Although Section 221.100, RSMo 1949, with respect to the board of prisoners in counties of the first and second classes, is phrased differently than Section 221.010, supra, we do not believe that it would have the effect of altering the conclusion above reached under other sections that the board bill of a convicted defendant in a county of the third class may properly be assessed against such defendant and collected from him if he be financially able to pay.

Having resolved the basic question, we now turn to the question designated "First" in the request for opinion.

Section 544.170, RSMo 1949, provides:

"All persons arrested and confined in any jail, calaboose or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within twenty hours from the time of such arrest, unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense; and every such person shall, while so confined, be permitted at all reasonable hours during the day to consult with counsel or other persons in his behalf; and any person or officer who shall violate the provisions of this section, by refusing to release any person who shall be entitled to such release, or by refusing to permit him to see and consult with counsel or other persons, or who shall transfer any such prisoner to the custody or control of another, or to another place, or prefer against such person a false charge, with intent to avoid the provisions of this section, shall be deemed guilty of a misdemeanor."

There is no question but that an officer has the authority to arrest without a warrant for a misdemeanor committed in his presence, and, under the last-quoted section, may have such person confined for not more than twenty hours. At the expiration of said twenty-hour period such person shall be discharged unless prior to such expiration he shall have been charged with a criminal offense by the oath of some credible person, and held by warrant to answer to such offense. It follows, therefore, that for the first twenty hours of the defendant's confinement under the hypothetical submitted he has been "committed * * * by lawful authority" within the meaning of Section 221.070, supra. To rule otherwise would be to hold that the original confinement was unlawful and render Section 554.170, supra, meaningless.

After twenty hours have passed following the lawful arrest and confinement of a defendant without a warrant and the defendant has not been charged with a criminal offense by the oath of some credible person, and held by warrant to answer to such offense, it would seem that thereafter he is no longer "committed * * * by lawful authority" and is entitled to be released. Board bill accruing thereafter should not be chargeable as costs. We realize that practical difficulties may present themselves under the hypothetical submitted, but we know of no exception to the twenty-hour rule contained in Section 544.170, supra, just because the twenty-hour period happens to expire on Sunday.

The amount of costs chargeable to the convicted defendant for board bill should be determined as provided in Section 221.090, supra. That amount is the actual and necessary cost incurred by the sheriff in the boarding of such prisoner.

Questions designated "Second" and "Third" in the request for opinion deal with other situations under which the defendant is committed to the jail. The basic problem presented in each of them is whether he has been "committed * * * by lawful authority."

Section 532.460, RSMo 1949, with regard to bail, provides:

"When the imprisonment is for a criminal or supposed criminal matter, the court or magistrate before whom the prisoner shall be brought, under the provisions of this chapter, shall not discharge him for any informality, insufficiency or irregularity

of the commitment; but if, from the examination taken and certified by the committing magistrate, or other evidence, it appear that there is sufficient legal cause for commitment, he shall proceed to take bail, if the offense be bailable, and good bail be offered; if not, shall commit the prisoner to jail."

Assuming no other defects in the proceeding, the defendant, is lawfully committed both after failure to make bail pending trial and after sentence whether before a magistrate or in the circuit court so that in either or both of such events the convicted defendant would be liable for costs for board accruing thereafter.

The fact that these costs accruing after having been "committed * * * by lawful authority" and prior to actual conviction are to be treated the same as costs accruing after conviction is clarified by Section 221.160, RSMo 1949, which reads:

"The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

This would seem to answer both of the questions designated "Second" and "Third" in the request for opinion. Here again the amount would be determined as directed in Section 221.090, supra, l.c., the actual and necessary costs incurred by the sheriff in boarding such prisoner.

CONCLUSION

It is the opinion of this office that in a county of the third class the board bill of a convicted defendant is a part of the costs to be assessed in the case; that, if such defendant is solvent and able to pay the costs, such board bill should be included in the costs assessed against the defendant

Honorable Robert L. Hoy

and he should be required to pay such costs among others; that a defendant is "committed * * * by lawful authority" within the meaning of Section 221.070, RSMo 1949, if he is arrested by an officer without a warrant for a misdemeanor committed in the presence of the officer, but that after the expiration of twenty hours if no warrant has issued, he is no longer "committed * * * by lawful authority; " that a defendant is "committed * * * by lawful authority" within the meaning of Section 221.070, RSMo 1949, either after failing to make bail pending trial or after sentence whether before a magistrate or in the circuit court and that his board bill accruing after either of those dates should be included in the costs assessed against him; and that the amount of the board bill chargeable to such convicted defendant as costs is determined as set forth in Section 221.090, RSMo 1949, i.e., the actual and necessary costs incurred by the sheriff in boarding such prisoner.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John W. Inglish.

Very truly yours,

JOHN M. DALTON Attorney General

ROADS AND BRIDGES:

Township special road and bridge tax paid to county treasurer under Sec. 1,7.585, RSMo 1949; county may retain not to exceed five cents on the one hundred dollars assessed valuation for the county special road and bridge fund and is not required to spend amount withheld in township in which collected.

JOHN M. DALTON

FILED 42

June 17, 1953

John C. Johnsen

Honorable Charles J. Hoover Prosecuting Attorney Grundy County Trenton, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request is as follows:

"A controversy has arisen in Grundy County concerning the procedure followed by the County Court relative to the County Special Road and Bridge Fund. The County Court requested that I ask your office for an opinion on this matter. I in turn requested the County Court to submit to me information from which I could frame a letter to you. As a result of this request to the County Court, the Court, together with the County Treasurer, wrote a memorandum which appears to adequately set forth the facts. Hence, I am quoting their memorandum and I shall be glad to furnish any specific information which your office might request.

'Grundy County is a township organization county. The County Court of this county ordered the County Treasurer in 1948 to retain an amount of .05¢ on the \$100.00 assessed valuation out of the Special Road and Bridge Fund, and to transfer the same to the County Special Road and Bridge Fund. The authorization of this order is Sec. 137.585 R.S. 1949. This section directs the township collectors to turn in to the county treasurer their collections of Special Road and Bridge Tax.

'The clerk of the Trenton Township board has questioned the right of the county court to retain this .05¢ on the \$100. valuation and the need of the township collectors to pay to the county treasurer their road and bridge collections, and cites Sec. 139.430 R.S. 1949 which directs the township collectors to pay over to the county treasurer and ex-officio collector, all state and county taxes collected by him and to pay to the township directly all township taxes and funds of every kind belonging to the township. The clerk claims that these two sections are contradictory.

'Will you please advise me

- Whether or not the county court is within its rights in requiring the township collectors to pay over to the county treasurer the special road and bridge tax collected by them, together with their state and county collections.
- Their right to retain .05¢ on the \$100. assessed valuation for the county special road and bridge fund.
- 3. The clerk of Trenton Township also raises the question as to whether or not the county court is required to spend the money derived from the .05¢ on the \$100. valuation in the township from which that money was derived. It has been the practice of this county to put money in the special rad and bridge fund and spend it as needed in the county at large.

/s/ Ben W. Gallup County Treasurer!

"I shall appreciate your opinion in regard to the three questions forwarded to me by the Court."

Section 137.585, RSMo 1949, provides:

"1. In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where it shall be known and designated as a special road and bridge fund.

"2. The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used by said townships only for road and bridge purposes, except that amounts collected within the boundaries of road districts formed in accordance with the provisions of chapter 233, RSMo 1949 shall be paid to the treasurers of such road districts; provided that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury; provided, further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

Section 139.430, RSMo 1949, provides, in part:

- "2. On or before the tenth day in each month, the township collector, after deducting his commissions, shall pay over to the county treasurer and ex officio collector all state and county taxes collected by him during the preceding month, as shown by the statement required by this section, and take duplicate receipts therefor, one of which he shall retain and the other he shall file with the county clerk; and the county clerk shall charge the treasurer with the amounts so receipted for, to be accounted for at the annual settlement.
- "3. The township collector, in like manner, on or before the twentieth day of each month, shall pay over to the township trustee and ex officio treasurer after deducting his commission all township taxes and funds of every kind belonging to the township, collected by him during the preceding month, and take duplicate receipts therefor, one of which he shall retain and the other he shall deposit with the township clerk, who shall charge the township trustee and ex officio treasurer with the amount so receipted."

There does appear to be some conflict between Sections 137.585 and 139.430, above quoted, insofar as the duty of the township collector is concerned. However, the application of a well-established principle of statutory construction resolves such conflict. "Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms." Eagleton v. Murphy, 348 Mo. 949, 156 S.W. (2d) 683, l.c. 685.

Applying that rule to these statutes, Section 137.585 is a special statute applicable to the handling of the funds there involved, and consequently will prevail as to such funds over the provisions of Section 139.430.

Honorable Charles J. Hoover

This construction is also supported by Section 12(a) of Article X of the Constitution of Missouri, 1945, under which the tax involved is levied. That section provides, in part:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. * * *"

(Emphasis ours.)

As to the second question, Section 137.585 clearly permits the county court to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of the special road and bridge fund therein provided. We perceive no grounds for holding such provision invalid, and therefore under such section the court does have the right to retain the amount therein provided.

As to the third question, Section 137.585 provides that the amount retained by the county shall be transferred to the county special road and bridge fund. No limitation is provided regarding the place in which the amount withheld shall be expended. The county court is required to retain a uniform amount as to all townships levying and paying the tax, and in the absence of any limitation requiring the county court to expend the amount withheld from the tax levied in a particular township within such county, we are of the opinion that the expenditure of the fund is a matter for determination by the county court.

CONCLUSION

Therefore, it is the opinion of this office that:

1. Township collectors are required to pay the special road and bridge tax levied under Section 137.585, RSMo 1949, to the

county treasurer, in accordance with that section, and not to the township trustee, under Section 139.430, RSMo 1949;

- 2. The county court may retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of the special road and bridge tax assessed under Section 137.585;
- 3. The county court is not required to spend the amount withheld by it in the township in which the special road and bridge tax was collected.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

SCHOOLS:

Section 163.370, RSMo 1949, is not violated by "merchant" in installing and operating coin-operated soft drink and

MERCHANTS: candy vending machine in public schools.



December 2, 1953

Honorable Charles J. Hoover Prosecuting Attorney Grundy County Trenton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"Would your office kindly give me an official opinion relative to Section 163.370, R.S. Missouri, 1949. Specifically, it is desired to know if soft drink and candy bar coin operated vending machines may be placed in the school buildings, and be permitted to operate during the normal school hours."

Section 163.370, RSMo 1949, referred to in your letter, reads as follows:

"No agent, solicitor, peddler or other such person shall solicit, offer for sale or sell any subscription, policy, service, article or thing whatsoever to any teacher or pupil in any public school of this state while such teacher or pupil is upon the premises of such public school during the hours such public school is in session and for one-half hour before such school convenes and for one-half hour after such school has dismissed. Any such person violating any provision of this section shall upon conviction, be deemed guilty of a misdemeanor."

In this opinion we have accorded this statute the presumption of validity which attends all legislative enactments. It is noted

Honorable Charles J. Hoover

that the statute is penal in nature inasmuch as it defines and fixes a penalty for a criminal offense, and therefore in accordance with the usual rules of statutory construction is to be construed strictly.

The statute is directed against one who conducts his business as an "agent, solicitor or peddler." The inclusion of the phrase "or other such person " does not in our opinion broaden the class of persons against whom the statute is directed. Under the rule of ejusdem generis, the inclusion of the phrase does but embrace only other persons whose activities are similar in nature to that of the specifically enumerated group. We quote the rule from Zinn v. City of Steelville, 173 S.W.(2d) 398, where it appears in the following language:

"* * *'Where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified.' * * *"

With this rule in mind, then, we of necessity must examine the nature of the businesses conducted by agents, solicitors and peddlers in an effort to ascertain what other persons are included within the statute by virtue of the use of the phrase "or other such person." These terms have acquired well-defined meanings in mercantile circles. There is, however, one common Distinguishing characteristic about each of the occupations, and that is that while all are frequently merchants in the sense that they sell merchandise, yet none of those enumerated have established places of business. Your attention is directed to Section 150.470, RSMo 1949, wherein is found a definition of the term "peddler." This statute reads as follows:

"Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

Honorable Charles J. Hoover

Similarly, we think that the terms "agent" and "solicitor" as customarily used in mercantile circles are indicative of a type of selling which does not include the actual delivery of merchandise or other articles sold at the time the sale is made. In each instance, including peddlers, the person engaged as an agent, solicitor or peddler is more in the nature of an order taker, with the exception of certain types of peddlers who do make actual deliveries at the time of sale. However, in none of the occupations is the element present of an established place of business at which point sales and deliveries of merchandise are made. From these factors we are led to the belief that the statute is designed to prohibit the activity described therein of persons who are not engaged in a merchandising occupation which includes the establishment of a place of business.

You will note that thereby persons who are engaged in the occupation of "merchants" are excluded from the operation of the statute. We direct your attention to the definition of "merchant" as found in Section 150.010, RSMo 1949, which reads as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. * * *"

Had the Legislature seen fit to designate "merchants" as being within the statute in specific terms, a completely different situation would present itself. However, that was not done and the omission may not be supplied in a penal statute by the use of such a phrase as "or other such persons," for the reasons which we have discussed supra. We therefore believe that such "merchants" are not included.

CONCLUSION

In the premises, we are of the opinion that Section 163.370, RSMo 1949, does not prohibit the installation and operation of a coin-operated soft drink and vending machine in a public school by a regularly established "merchant" as an adjunct to his business. It is, of course, a requisite that the consent of the proper governing board of the school district be obtained.

The foregoing opinion, which I hereby approve, was prepared by by assistant, Mr. Will F. Berry, Jr.

Yours very truly,

WFB:ml:mw

JOHN M. DALTON Attorney General CORCNERS OF FOURTH CLASS JOUNTIES:

Coroner of Jourth class county shall receive, as his total annual compensation, the sum of \$60.00, \$90.00, or \$120.00, depending upon population of county. This compensation is to be paid in equal monthly installments, which would make the monthly pay \$5.00, \$7.50, or \$10.00, depending, as does the total, on population of county.

JOHN M. DALTON



February 13, 1953

John C. Johnsen

Honorable Harold S. Hutchison Prosecuting Attorney Maries County Vienna, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The County Court of Maries County has asked me to request an opinion from your Department, relative to the Coroner's salary.

"This is a county of the fourth class and they desire an opinion as to whether Section 58.130, Revised Statutes 1949 provides for a salary of \$60.00 per month or \$60.00 per year.

"I think that the statute is plain but a number of counties are construing it differently."

Section 58.130, RSMo 1949, which you request us to construe, reads as follows:

"The coroner in all counties of the fourth class shall receive for his services annually, payable out of the county treasury in equal monthly installments the following: In counties with a population of less than ten thousand, the sum of sixty dollars; in counties with a population of ten thousand and less than fifteen thousand, the sum of ninety dollars; and in counties having a population of fifteen thousand and more, the sum of one hundred and twenty dollars."

The meaning of the above section appears to us to be clear. We construe its meaning to be that in a fourth class county the coroner shall receive, as his total annual compensation, if that county has a population of less than 10,000, the total sum of \$60.00, to be paid in equal monthly installments, which would be \$5.00 per month; if the county has a population of 10,000 and less than 15,000, the total annual sum of \$90.00, which would be \$7.50 per month; if the county has a population of 15,000 and more, the total sum of \$120.00, which would be \$10.00 per month.

In this regard I direct your attention to an opinion (a copy of which is enclosed) rendered by this department on January 23, 1953, to Honorable J. W. Thurman, Prosecuting Attorney of Jefferson County. Jefferson County is a third class county, but the law (Section 58.110, RSMo 1949) fixing the salary of a coroner in a third class county reads exactly the same as does the law (Section 58.130, supra,) fixing the salary of a coroner in a fourth class county except as to population figures. In that opinion we followed the same line of reasoning that we have followed above, and come to the same conclusion so far as the basis of determining the compensation of the coroner is concerned.

We may point out that to follow the alternative line of reasoning, to wit, that the sums stated in Section 58.130, supra, are to be paid monthly, would lead to a total annual compensation for the coroner in a sum clearly beyond the contemplation of the Legislature.

CONCLUSION

It is the opinion of this department that the coroner of a fourth class county shall receive, as his total annual compensation, the sum of \$60.00, \$90.00, or \$120.00, depending upon the population of the county. And that this compensation is to be paid in equal monthly installments, which would make the monthly pay \$5.00, \$7.50, or \$10.00, depending, as does the total, on the population of the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

Enc. HPW:ml CITIES, TOWNS AND VILLAGES:
MUNICIPAL CORPORATIONS:

Municipal corporation of Vienna legally reactivated on Nov. 13, 1951; tax levy made in Dec., 1951, by bd. of trustees not made in conformity with law, invalid levy, uncollectible.

XXXXXXXXXX

April 20, 1953

JOHN M. DALTO



J.C. Johnsen

Honorable Harold S. Hutchison Prosecuting Attorney Maries County Vienna, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The town or village of Vienna was incorporated, I think, in 1906 and continued as an acting corporation until about 1916, at which time, the corporation became dormant for lack of election of officers, assessment of taxes and police supervision.

"It remained in this state until about November of 1951, at which time, a few citizens got together and advertised that there would be an election of officers; held said election and said officers so elected started meeting and functioning as the Town Government. In no way did they conform to Sections 72.060 R. S. 1949.

"Upon organizing it is my understanding that they designated one of the trustees as City Collector; had him go to the County Collector's Office and make up an assessment list for the town of Vienna which they levied in December of 1951 for the year of 1951 even though that they had not been in existence for practically eleven months of said year; had exercised no police power or protection and had in no way conformed to Section 80.460 R. S. 1949 relative to their assessment list.

"Approximately one year later they bring the 1951 delinquent tax list made out as above stated to the County Collector and ask him

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to enforce that list of delinquent taxes under his power as collector and under Section 80.480 R.S. 1949.

"Under the above circumstances is the Town of Vienna legally reactivated or is it still dormant?

"Under the above circumstances would the tax assessments be properly made and levied?

"Under the above circumstances if the town was not legally reactivated; the taxes legally assessed or levied; would it be incumbent upon the County Collector to prosecute legal action or defend legal action as part of his duties in connection with such collection?"

From your letter it appears that the town of Vienna was incorporated about 1906; that it functioned as a municipal corporation until about 1916; that from about 1916 until 1951, a period of approximately thirty-five years, it did not so function; that in or near the month of November, 1951, certain acts were done in an attempt to reactivate the municipal corporation of Vienna, and that after these acts certain municipal corporation functions were performed, to wit, the assessment of taxes. Your inquiry goes to the legality of these assessments.

In our consideration of this matter we would first point out that, upon the basis of the facts submitted by you to us, it is our opinion that the municipal corporation of the town of Vienna did not at any time become extinct, or cease to exist. In the case of State v. Crismon, 188 S.W. 2d 937, at 1.c. 939, the Missouri Supreme Court stated:

"We think respondents' contentions overlook certain fundamental principles of the law relating to the municipal corporations. 'The power to create or establish municipal corporations, or to enlarge or diminish their area, to reorganize their governments, or to dis-

solve or abolish them altogether is a political function which rests solely in the legislative branch of the government, and in the absence of constitutional restrictions, the power is practically unlimited. 37 Am. Jur. Municipal Corporations, Sec. 7, p. 626. In this connection this court has said: 'It has long been the rule in this state, and generally throughout the country, that the power of the legislature in the creation of public corporations * * * is absolute except where limited by the constitution. The legislature may also change, divide, consolidate and abolish them as the public welfare demands. State ex rel. Consolidated School District No. 8 of Pemiscot County et al., v. Smith, State Auditor, 343 Mo. 288, 121 S.W. 2d 160, 162, and cases therein cited."

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"In 1 Dillon's Municipal Corporations, 5th Ed., Sec. 338, p. 591, it is said: 'The doctrine of a forfeiture of the right to be a corporation has also, it is believed by the author, no just or proper application to our municipal corporations. * * * In short, unless otherwise specially provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative

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consent or pursuant to legislative provision. 1

"To the same effect is 1 McQuillin's Municipal Corporations, 2d Ed., Sec. 317, pp. 380, 381: 'A municipal corporation can only be dissolved in the manner prescribed by law * * *. Thus a municipal corporation is not ipso facto dissolved or destroyed by a non-user of its powers, in whole or in part, or failure of a term of years to exercise the functions of a municipality, since a judicial sentence or legislative act is necessary to effect a dissolution. In such case the municipal corporation would be suspended for the time, but not civilly dead, since its dormant functions could be revived without action on the part of the sovereignty, the sources from which, in theory of law, corporate life originally came. The result would be the same should all of the inhabitants remove without the corporate limits. The remedy for failure to exercise municipal powers or for illegal acts or misconduct of the officers or agents of the corporation is not dissolution or forfeiture of the charter.'

"The same author says in Sec. 318: 'A municipal corporation is not dissolved by the mere failure to elect or appoint officers and agents to conduct its government, for its continuance as a legal entity does not depend on the existence of officers.'"

Since there is no showing that any positive act of disincorporation was ever taken in regard to the municipal corporation of the town of Vienna, we hold, as we stated above, that the municipal corporation of the town of Vienna had a continued existence and was never extinct. It did, for a long period of time, cease to function.

The matter which we have generally to determine is what was necessary to be done in order for the municipal corporation of the town of Vienna to start functioning, and specifically,

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whether the action taken in or near the month of November, 1951, was sufficient in this respect.

In this regard we would again direct attention to the case of State v. Crismon, supra. This case relates to the town of Bagnell, in Miller County, Missouri. The record shows that this town was duly incorporated in 1926, and that it functioned as a municipal corporation until 1933, but that from 1933 to 1943, a ten year period, no town trustees were elected, no taxes were levied, and no municipal functions were performed. Thus, in this respect, the history of Bagnell parallels that of Vienna.

The opinion in the Crismon case reveals that in the early part of 1944 there were about a dozen residences within the corporate limits of Bagnell. How many qualified voters resided therein is not revealed, but the number was doubtless small. The opinion, at 1.c. 939, states:

"But in the spring of 1944, in an attempt to revive and qualify Bagnell as a town for the formation of the proposed road district a board of trustees was elected from the few adult inhabitants of the incorporated area."

Apparently the election of this board of trustees in Bagnell was held in the same informal manner as was the election of the board of trustees in Vienna, although doubtless many more persons participated in the latter inasmuch as Vienna has a population of some 471 people.

In regard to this election in the town of Bagnell, the Crismon opinion observes, at 1.c. 939:

"The officers do not constitute "the" corporation, nor does the council even constitute "a" corporation. The inhabitants of the designated locality, are the corporators. The officers are the mere servants or agents of the corporation.' Welch v. St. Genevieve, Fed. Cas. No. 17,372, 1 Dill, U.S., 130. Such is the effect of Sec. 7242 resulting from the express provision that the 'inhabitants of any town or village * * * may be incorporated under a police established for their local government.' And said section

further provides that 'they and their successors * * * shall have perpetual succession, unless disincorporated * * *.' Secs. 7295, 7296 declare the reasons, and prescribe the procedure for, disincorporating."

In view of the fact, as we have observed above, that the history of Bagnell and Vienna, in respect to incorporation, a lapse of municipal corporation functions, and reactivation, is nearly identical; and in view of the further fact that in the Crismon case, supra, the court held that the acts done to effect reactivation did effect a reactivation, we hold that the acts done in Vienna in or near the month of November, 1951, did reactivate the municipal corporation of the town of Vienna.

We note your reference to Section 72.060, RSMo 1949. That sectio reads:

"Any city, town or village within this state, now incorporated under the provisions of this chapter, or under any special or local law, as a village, town or city, either of the second, third or fourth classes, as classified in said chapter, and in which the citizens thereof desire incorporation as a village, town or city of a higher class, and believe that since the taking of the last census, state or national, there has been sufficient increase in population to entitle it to such desired incorporation, may, by authority of an ordinance, and at the expense of such village, town or city, cause to be taken a census of its population, and should such census, when so taken, show that the village, town or city taking the same, has the requisite population to entitle it to the right to become incorporated as a village, town or city of a higher class, then such village, town or city may proceed to secure such incorporation as its population may then entitle it to, under and by authority of the provisions of this chapter; provided, that cities or towns that have permitted their organization to become dormant or ineffective, through a failure to elect corporate officers or levy a corporate tax for the two years Hon. Harold S. Hutchison

immediately preceding, may, by a petition of the majority of the taxpayers of such city or town to the county court, have an enumeration taken and be assigned to its proper class; and thereupon the county court shall appoint the proper officers for such city or town, who shall hold their office until the next annual election thereafter and until their successors are elected and qualified."

We do not believe that the above section is applicable in the instant situation. That section is found in Chapter 72, RSMo 1949, and is entitled "Classification and Consolidation of Cities". Section 72.060, supra, relates wholly to the changing of the classification of a city, and indicates the manner in which this change may be made when the municipal corporation is active, and also when it is inactive or dormant. We feel that this construction of the meaning of Section 72.060, supra, is further strengthened by the title of the Section when it was originally enacted, as found in Laws of Missouri 1883, page 33. The title of the Section is:

"AN ACT to authorize villages, towns or cities of the second, third or fourth class to provide for taking a census of their population to ascertain if they have the requisite population to authorize them to become incorporated as villages, towns or cities of the class of which the result of such census shows them to be."

The answer to your first question, therefore, is that the municipal corporation of the town of Vienna was legally reactivated as of the date of the election of trustees, which you have verbally informed us was on November 13, 1951.

The next question which we must consider is whether the tax assessment levied in December, 1951, by the reactivated municipal corporation of Vienna was a legal assessment.

In regard to the manner of th's assessment you state:

"Upon organizing it is my understanding

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that they designated one of the trustees as City Collector; had him go to the County Collector's Office and make up an assessment list for the town of Vienna which they levied in December of 1951 for the year of 1951 even though that they had not been in existence for practically eleven months of said year; had exercised no police power or protection and had in no way conformed to Section 80.460 R.S. 1949 relative to their assessment list."

We will here note that the 1905 Missouri Blue Book reveals that the town of Vienna was incorporated in that year as a "village". There is no record to the effect that this classification was changed prior to the December 1951 tax levy, and you informed us verbally that it was not changed. Therefore, the manner of making the 1951 tax levy was subject to the present law governing "towns and villages."

We would first direct your attention to Section 80.430, RSMo 1949, which relates to taxation of towns and villages. That section states:

"All general and special taxes levied by the board of trustees of any town upon property therein, in conformity to the laws of the state and the ordinances of such town, shall constitute a lien upon the property upon which they are levied, until paid."

From the above it will be noted that the taxing procedure, to be valid, must conform to the applicable law.

In the case of State v. Hamilton, 293 SW 378, 1.c. 379, the court stated:

"We have uniformly held that a valid assessment is essential to a valid tax."

We now direct your attention to Section 80.460, RSMo 1949, which states in part:

"The chairman of the board of trustees of all towns and villages in this state shall procure from the clerk of the county court in which such town is located, and it shall be the duty of said clerk to deliver to the chairman of the board of trustees within twenty days after the date of the final adjournment of the board of equalization a certified abstract from his assessment books, as corrected by the board of equalization. on all property within such town subject to its taxing power and the assessed value the eof as corrected by the board of equalization, which abstract shall be immediately transmitted to the board of trustees, and it shall be the duty of such board of trustees to establish by ordinance the annual rates of tax levy for the year for municipal purposes upon all subjects and objects of taxation within such town. * * *"

We are informed by the clerk of the county court of Maries County that the county board of equalization of Maries County, in the year of 1951, finally adjourned on July 9th of that year. Section 80.460, supra, directs that within twenty days after the final adjournment of the county board of equalization it shall be the duty of the chairman of the board of trustees of any town or village located within such county to get from the clerk of the county court a certified abstract of his assessment books, as corrected by the board of equalization, on all property within such town or village subject to taxation, and that it shall be the duty of the board of trustees to establish by ordinance the annual rate of tax levy for the year for municipal purposes. Since, in 1951, the board of equalization finally adjourned on July 9, this assessment list should have been secured by the chairman of the board of trustees not later than July 30th, and the board of trustees should have at once proceded to establish the tax rate and levy. None of this was done at the time and in the manner directed by the statute, for the reason that at that time there was no board of trustees. You inform us that in December 1951, following reactivation the previous November 13th, one of the trustees who had been designated as city collector, went to the office of the county

Hon. Harold S. Hutchison

collector (not to the clerk of the county court, as the law directs), and made up an assessment list, upon the basis of which a levy was made for the year 1951.

Can it be said that the manner of making the 1951 tax levy was in conformity to the laws of the state," as Section 80.430, supra, says it must be? We think not for several reasons. First, because the tax list was not procured from the proper source, which was the clerk of the county court, who is required by Section 80.460, supra, to make a certified abstract from his assessment books for the chairman of the board of trustees. The list was, instead, made up by the city collector from the books of the county collector. It was therefore not made by the proper party, was not taken from the proper source, and was not certified by the public official whom the law directs shall certify. Second, because the list which was secured, subject to all of the criticism stated above, was not secured for some four months after the time provided by law. Third, because the levy was not made for some four months after the law contemplates that it should have been made.

It is a generally recognized principle that the tax laws are strictly construed against the taxing authority, and that, as stated above, tax levies must be made in conformity with the law. Clearly, this was not done in the instant case, and we do not believe that the levy made by the town of Vienna in December 1951 was a valid levy.

CONCLUSION

It is the opinion of this department that the municipal corporation of the town of Vienna was legally reactivated on November 13, 1951; that the tax levy made in December, 1951, by the board of trustees of the town of Vienna, was not made in conformity with the law, was an invalid levy, and therefore is uncollectible.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm

COUNTY COURTS:

NEWSPAPERS:

(1) Mandamus does not lie against newspaper to compel publication of county financial statement; (2) posting of such statement, as provided by Sec. 50.800, RSMo 1949, is sufficient when newspapers refuse publication; (3) refusal of publication by single owner of all newspapers in county does not violate Anti-Trust law.

JOHN N DALTON



May 1, 1953

John C. Johnsen

Honorable Harold S. Hutchison Prosecuting Attorney Maries County Vienna, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The County Court of Maries County has instructed me to ask you for an opinion, relative to their rights and duties under Section 50.800 COURTS FINANCIAL STATEMENT.

"We have three newspapers in Maries County, now, all owned by The Tri-County Publications. The Home Advisor being recently purchased by said company. The Tri-County Publications has an old bill against the county court for printing and stationery furnished the county in previous years and which the previous and present County Court have refused to pay on the grounds that part of the supplies were never printed or delivered. As far as I know, there are no bills outstanding for the Home Advisor.

"The County Court had their financial statement drawn up and submitted the same to the Managing Editor of the Maries County Gazette and Home Adviser the First of February and was informed by the Managing Editor that the Tri-County Publications would not print the same unless the old bill was taken care of as presented. The Court asked for separate bids on each paper and the Editor refused to submit written bids but informed the Court

that the price would be the maximum allowed by law in any of the three papers. They have refused to print said publication to date in any of the three papers and give no assurance that they will do so.

"Under the above circumstances:

- "1. Will Mandamus lie against said publication?
- "2. Where all the papers in the County refuse to publish financial statement, will publishing and posting in ten public places meet the requirements of the above Statute?
- "3. Where one man owns all three papers in the County; sets price of statement in all papers at the maximum and refuses to print statement in paper that the County does not owe because it owes old bills to the other two; does this come under the anti-trust laws of this state?"
- l. You inquire whether mandamus will lie against said publications. "The proper function of mandamus is to compel inferior or subordinate tribunals and all others exercising public authority to perform their duty. * * * Ordinarily, the writ will not be granted against a private individual unless some obligation in the nature of a public or quasi-public duty is imposed upon him in respect of the act sought to be enforced." 34 Am. Jur., Mandamus, Section 91, page 879.
- In 46 C. J., Newspapers, Section 50, page 35, the rule as to the duty on newspapers accepting and publishing legal notices is stated as follows:

"Publishers of newspapers are not bound to publish legal notices. It is without the power of the legislature to make punishable the refusal of a newspaper publisher to publish the report of a public commission at its regular rates, such legislation being regarded as an interference with the right to contract. * * * *"

In our opinion, publication of the county financial statement would come within this rule. Since there is no duty imposed upon newspapers to publish such report, it is our opinion that mandamus will not lie.

In State ex rel. Crites v. Short, 351 Mo. 1013, 174 S.W. (2d) 821, 1.c. 823, the court stated:

"Before the appellant would be entitled to a writ of mandamus, he must show a clear legal right to compel performance of the particular act. The writ will not lie to establish a legal right, but its office is to enforce one which has already been established. The legal right of appellant 'or relator to the performance of the particular act of which performance is sought to be compelled must be clear and complete. " * * * "

2. You inquire whether publishing notices in ten public places would meet the requirements of the statute since the newspapers refuse to publish the notice. Paragraph 1 of Section 50.800, RSMo 1949, provides:

"On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December thirty-first, preceding."

The above section contemplated that the financial statement would be published in a newspaper published within the county. The assumption seems to be that if there is a newspaper in the county publication would be made. However, if the newspapers in the county refuse to make the publication, we believe that the county court of necessity must post ten notices, as required by this section, and that such action on the part of the county court would meet the requirements of this section. Otherwise, there would be no publication whatsoever in your county of the county financial statement.

3. You further inquire whether or not the refusal by a single owner of all of the newspapers in a county to print the county financial statement would be a violation of the Anti-Trust laws of this state.

The Anti-Trust laws of Missouri are found in Chapter 416, RSMo 1949. Section 416.010 provides:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400."

Section 416.020 prohibits any person from entering into or becoming a member of any "pool, trust, agreement, combination, confederation or understanding with any other person" to regulate, control or fix the price of any article of merchandise or commodity.

Section 416.030 prohibits any two or more persons engaged in buying or selling any articles of commerce from entering into or participating in "any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article."

Section 416.040 prohibits all arrangements, contracts, agreements, combinations or understandings between any two or more persons designed to or which tend to lessen lawful trade or free competition.

It is evident that a conspiracy or an agreement between two or more persons is the prohibited act to which the Anti-Trust statutes are directed. A single owner of more than one newspaper has been held liable for violation of the Federal Anti-Trust Act because of the manner in which such newspapers were operated. United States v. The Times-Picayune Pub. Co., 105 F. Supp. 670. There, however, the violation arose out of contracts made with the customers in the operation of the newspapers. Here, there is no question of agreements or contracts of any form, merely a refusal on the part of the publisher to

Honorable Harold S. Hutchison

accept the county business. Anti-Trust statutes have been held not to "restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." United States v. Colgate and Company, 250 U. S. 300, 307.

CONCLUSION

Therefore, it is the opinion of this department that:

- 1. Where a publisher of all newspapers published in a county refuses to publish the county financial statement he may not be forced by mandamus to do so.
- 2. In such circumstances the posting of such statement in ten public places in the county fulfills the requirements of Section 50.800. RSMo 1949.
- 3. That the publisher of such newspapers who refuses to print the county financial statement does not thereby violate the Missouri Anti-Trust Laws.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly.

JOHN M. DALTON Attorney General

RRW:ml

PUBLIC BUILDINGS:
HIGHWAY COMMISSION:



Contract for addition to State Highway Commission building to be let by Director of Public Buildings. Contract for contemplated State Highway Patrol Warehouse need not be let by Director of Public Buildings, but contract must be approved by him.

May 26, 1953

Honorable Robert L. Hyder Chief Counsel Missouri State Highway Commission Jefferson City, Missouri

Dear Mr. Hyder:

Your letter of March 24, 1953, requested an official opinion on the following questions:

"On several occasions the question of the authority of the Board of Public Buildings with respect to buildings maintained by the State Highway Commission, constructed with State Road Funds, has arisen, and the State Highway Commission respectfully requests your official opinion on the following questions:

The State Highway Commission building in Jefferson City was constructed with State Road Funds and is being maintained wholly by the Commission. Its watchmen are selected and paid by the Commission and its water and light bills are paid by the Commission from State Road Funds. Those buildings which are considered to be under the jurisdiction of the Board of Public Buildings have watchmen selected by the Board and water and light bills, together with the salaries of the watchmen, are paid from General Revenue Funds. All additions and alterations made in the Commission building have been made by the Commission since the building was constructed. Section 226.110 apparently contemplates the maintenance of the state highway building by the Board of Public Buildings. The Commission now contemplates an addition to this building and has requested authority from the Board of Public Buildings for the use of the necessary ground for such addition, which has been given. Funds sufficient to cover the cost of the addition are included in the appropriation

bill now under consideration by the General Assembly. Should the contract for this addition be awarded by the State Highway Commission or by the Board of Public Buildings, or both?

"2. Under subsection 4 of Section 30 of Article IV of the Constitution of 1945, the Commission is empowered to acquire buildings necessary for the construction and maintenance of the state highway system. The State Highway Commission has always assumed that such buildings are not public buildings and are under the exclusive ownership and control of the State through the Highway Commission. In the past, the Missouri State Highway Commission has, by contract, provided for the buildings necessary for the operations of the State Highway Patrol which is under the general supervision of the Missouri State Highway Commission and whose salaries are paid from the State Road Fund, which under the Constitution, is under the control of the Commission. Recently, the Commission has authorized the construction of a warehouse for the use of the Patrol at the office in Cole County situated approximately five miles south of Jefferson City on Highway 63. The Comptroller has suggested that this building would be under the jurisdiction of the Board of Public Buildings and that any contract for same must necessarily be let by that Board. Section 8.010 gives the Board general supervision and charge of the public property of the State at the Seat of Government and this property is well outside Jefferson City as above stated. Is it necessary under the above circumstances that the Board of Public Buildings let the contract for the construction of this warehouse or must the expenditure be approved by it in order that payment may be made from State Road Funds for that purpose?

"Your answers to the foregoing questions at your earliest convenience will be appreciated as the contract for the construction of the Patrol warehouse has been let by the State Highway Commission."

The Missouri State Highway Commission is placed in charge of the Department of Highways by Article IV,

Honorable Robert L. Hyder:

Section 29 of the Missouri Constitution, 1945.

Section 226.020, RSMo 1949, vests the State Highway Commission with powers and duties specified in Chapters 226 and 227, RSMo 1949, and all powers necessary and proper to enable the Commission or any of its officers or employees to carry out fully and effectively all of the purposes of the aforesaid chapters.

Article IV, Section 30, Constitution of Missouri, 1945, deals with the source and application of highway funds as follows:

"Sec. 30. Source and Application of Highway Funds .-- For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof, (2) of maintaining the commission, (3) of maintaining the high-way department, (4) of any workmen's compensation, (5) of the share of the highway department in any retirement program for state employees as may be provided by law, (6) and of administering and enforcing any state motor vehicle laws or traffic regulations. shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:

"First, to the payment of the principal and interest, on any outstanding state road bonds.

"Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes:

- "(4) To acquire materials, equipment and buildings necessary for the purposes herein described and
- "(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the commission may deem necessary and proper."

(Underscoring ours.)

Section 8.020, RSMo 1949, provides for the appointment of a Director of Public Buildings. Among the statutory duties of the Director of Public Buildings is the duty to serve as advisor and consultant to department heads in supervising construction and maintenance of buildings. Section 8.070, RSMo 1949, reads as follows:

"8.070. To serve as consultant to department heads on construction and maintenance of buildings . -- The director shall serve as an advisor and consultant to all department heads in obtaining architectural plans, letting contracts, supervising construction, purchase of real estate, inspection and maintenance of buildings. No contracts shall be let for repair, rehabilita-tion, or construction of buildings, without approval of the director, and no claim for repair, construction or rehabilitation projects under contract shall be accepted for payment by the state without approval by the director; provided, that there is excepted herefrom the design, architectural services, construction, repair, alteration or rehabilitation of all laboratories. libraries, classrooms, technical buildings used for teaching purposes, and those buildings or utilities serving such educational units, and any building or teaching unit wholly or in part from funds other than state appropriations."

(Underscoring ours.)

Honorable Robert L. Hyder:

The Director is enjoined by Section 8.100, RSMo 1949, to preserve public property from injury, as follows:

"8.100. Director shall preserve public property from injury. The director shall preserve from waste and damage all public property at the seat of government and prevent injuries and encroachments thereon. He shall deposit in a place of safety all public property of a movable or perishable nature and preserve the same from decay or loss."

The Director is required to superintend repairs of certain public buildings as follows:

"8.120. Shall superintend repairs.--He shall contract for and superintend the repairs and construction of any public buildings or improvements that may be required, by law, at the seat of government, when no other person or officer is directed to do the same."

(Underscoring ours.)

"226.110. State highway building the official residence of the state highway commission-maintenance and repair in charge of board of public buildings.-The state highway building shall constitute the official residence of the state highway commission. Such building shall under the charge and control of the board of public buildings, which is directed and empowered to provide for the proper maintenance and repair of said buildings, and to preserve the same from waste and damage from fire and other causes. * * *."

(Underscoring ours.)

There appears a possible conflict in the authority of the Board of Public Buildings and its Director, with the State Highway Commission, in the construction, repair and maintenance of buildings used by the Highway Commission. To reconcile any discrepancy all statutes and constitutional provisions must be considered in pari materia.

It should be observed that Article IV, Section 30, Subsection (4) authorizes the Commission to expend from state road funds money to acquire buildings necessary for the purposes described in subparagraphs (1), (2), (3), (4) and (5). That section is the only constitutional provision for construction of buildings by the Highway Commission.

The purposes described in the above-mentioned subparagraphs are to build and maintain roads, bridges and tunnels.

The Legislature has seen fit to create the Board of Public Buildings and provide for a Director thereof, in order to have the state buildings under a single head. The purpose in creating this Board was to provide for an orderly plan for ascertaining what buildings are needed by the State, in what order of urgency such buildings are needed, determine what repairs and maintenance are necessary and desirable to maintain such buildings, and to secure for the State the benefits of economy and efficiency which accrue from an integrated plan for construction and repair of public buildings.

That the Legislature has the power to enact legislation regulating the exercise of a constitutional right is well-settled. The Supreme Court in State ex rel. Randolph County vs. Walden, 357 Mo. 167, 1.c. 176, 177, stated that rule:

> "However, it does not follow from our ruling that the constitutional provision is self-enforcing that the General Assembly did not have the power to enact legislation providing reasonable regulations for the exercise of the right by prescribing the practice to be pursued in its enforcement. Such legislation may be enacted as will facilitate operation, prescribe a practice to be used for enforcement, provide a convenient remedy for the protection of the right secured or the determination thereof, or place reasonable safeguards around the exercise of the right. Cooley's Constitutional Limitations, (7th Ed.) p. 122, (8th Ed.) pages 170, 171, Barker v. St. Louis County, 340 Mo. 986, 104 S.W. (2d) 371, 376, Tremayne v. City of St. Louis, 320 Mo. 120, 132, 6 S.W. (2d) 935, State ex rel.

Elsas v. Workmen's Compensation Commission, 318 Mo. 1004, 2 S.W. (2d) 796, Warner et al. v. Kenny, 165 Pac. (2d) (Cal.) 889, Chesney v. Byram, 101 Pac. (2d) (Cal.) 1106, Samples v. Grady, 182 S.W. (2d) (Ark,),875, 16 C.J.S. Const. Law, p. 99, 11 Am. Juris. Const. Law, p. 694."

Since Section 8.120 requires that contracts be made by the Director of Public Buildings only for buildings at the seat of government, it is necessary to determine whether Patrol warehouse is at the "seat of government."

No definition can be found of the term, but it is reasonable to assume the Legislature intended that both the geographical location of the building in question, and the purpose for which it was to be used, were both to be considered in determining whether said building was at the seat of government. Your office has informed me that the proposed Patrol warehouse is to be located on a state highway approximately five miles from Jefferson City. You have further indicated that the warehouse is to be used to store radio and other electronic repair equipment and that Troop "F" is to maintain a central repair shop for Highway Patrol radio and electronic equipment. It is obvious that the proposed building will not be within the city limits or in the contiguous metropolitan area of Jefferson City. Thus, from the geographical standpoint the proposed warehouse is not at the seat of government. The proposed function of the building is not closely related to the functions of the general headquarters of the Patrol, but instead, is a mere incidental to the over-all supervision and operation of the Patrol. Thus, from the standpoint of usage, the building is not at the seat of government.

Thus, the Highway Commission building being under the control of the Director of Public Buildings, all contracts for repairs and additions should be let by the Director pursuant to Section 8.120. However, the Patrol warehouse not being "at the seat of government" does not fall within the provisions of Section 8.120, but the contract must nevertheless be approved by the Director in accordance with Section 8.070, supra.

Honorable Robert L. Hyder:

CONCLUSION

It is, therefore, the opinion of this office that the contract for the contemplated addition to the State Highway Commission building should be awarded by the Director of Public Buildings, but that the contract for the contemplated State Highway Patrol warehouse need not be awarded by the Director of Public Buildings, but it must nevertheless be approved by him.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

FERRIES:

Missouri Highway Commission has authority to purchase, operate and maintain a ferry STATE HIGHWAY COMMISSION: across the Mississippi River; Missouri Highway Commission has authority to enter into contract with the State of Illinois whereby the two states could share equally the cost of purchase, operation and maintenance of such a ferry.

JOHN M. DALTON

May 27, 1953



J.C. JOHNSEN XXXXXXXX

Honorable William L. Hungate Prosecuting Attorney Troy, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

> "There is a very strong, joint movement in the States of Missouri and Illinois to have a ferry operate on the Mississippi River to connect Missouri State Highway P near Elsberry, Missouri, with Illinois State Highway 96 at Hamburg, Illinois.

"Both of these State Highways end abruptly at the river bank at points opposite each other.

"The following questions have been raised:

- "(1) Does the State Highway Commission have authority to purchase, operate and maintain a ferry across a navigable stream like the Mississippi River?
- "(2) Does the State Highway Commission or the State of Missouri have the power and authority to enter into a compact with the State of Illinois whereby the two states could share equally the costs of purchase, operation and maintenance of such a ferry?

"You will probably find some authority in Section 227.120 Subsection (2) Mo. Rev. St. 1949, on the authority and power of the Commission to operate ferries on navigable streams.

Honorable William L. Hungate

We first direct attention to Section 227.120, RSMo 1949, which reads in part:

"The state highway commission shall have power to purchase, lease, or condemn, lands in the name of the state of Missouri for the following purposes when necessary for the proper and economical construction and maintenance of state highways:

* * * * * * * * * *

"Acquiring bridges or sites therefor and ferries, including the rights and franchises for the maintenance and operation thereof, over navigable streams, at such places as the state highway commission shall have authority to construct, acquire or contribute to the cost of construction of any bridge."

From the above it appears that the State Highway Commission has the power to operate a ferry at such places as it would have authority to "construct, acquire or contribute to the cost of the construction of any bridge." Our question then becomes: would the State Highway Commission have the authority to "construct, acquire or contribute to the cost of construction" of a bridge across the Mississippi River to connect Missouri State Highway P near Elsberry, Missouri, with Illinois State Highway 96 at Hamburg, Illinois?

In this regard, we direct attention to subparagraph (c) of paragraph (3) of Section 30 of Article IV of the 1945 Constitution of Missouri, which states:

"In the discretion of the commission (State Highway Commission) to locate, relocate, establish, acquire, construct and maintain the following:

* * * * * * * * * * *

"(c) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states."

(Words in parenthesis ours)

We would now direct attention to the case of State ex rel. State Highway Commission v. Sevier, 97 SW (2d) 427. At l.c. 427, et seq., the court in its opinion stated:

"In substance the alleged material facts follow: The Misscuri highway commission, Kansas state highway department, and Atchison, Kan., entered into a joint undertaking to construct the bridge with the aid of the federal government, and to construct certain highways in both states leading to the bridge, which highways the federal government required as part of the federal project. Plaintiffs in the injunction suit conclude from certain alleged facts that the city of Atchison and state of Kansas cannot or may not perform their parts of the undertaking. From this they also conclude that construction by the Missouri highway commission of its part of the undertaking would be a waste of public funds. There is no allegation of bad faith, collusion, and fraud. Furthermore, there is no allegation that, under the circumstances, it would be a violation of either the statute or Constitution for the commission to construct its part of the bridge at this time.

"In due course the Missouri highway commission proceeded to perform its part of the undertaking. It accepted the bid of the Bushman Construction Company, defendant in the injunction suit, to construct bridge piers and a highway leading to the bridge, all on the Missouri side of the river. Thereupon respondent judge issued a temporary injunction restraining the commission and company from entering into a contract for said construction.

"Plaintiffs in the injunction suit seek the judgment of the circuit court on the question of waste of public funds. Relators herein contend that the question of thether or not the city of Atchison and state of Kansas cannot or may not perform their parts of the construction of the bridge and highways is solely for the determination of the highway commission.

"It is provided in the Constitution that the money in the state road fund shall be 'administered and expended under the direction and supervision' of the commission for certain highway purposes, including participation in the construction of free interstate bridges, 'and for such other purposes and contingencies relating and appertaining to the construction and maintenance of such highways and bridges as the State Highway Commission may deem proper.' Section has, art. 4, Const.

Since it appears to be clear, on the basis of the above authority, that the State Highway Commission has the power to locate a bridge on the state highway system wherever it deems a bridge to be necessary, and since, by Section 227.120, supra, the State Highway Commission is given the power to maintain and operate a ferry at such places as it has authority to construct or acquire a bridge, it seems clear that the State Highway Commission has authority to purchase, operate, and maintain a ferry across the Mississippi River at the place indicated in your letter, since this place is on the state highway system.

On the basis of the authority of the case of State v. Sevier, supra, it also appears that the State Highway Commission does have the power and authority to enter into a compact with the State of Illinois whereby the two states could share equally the cost of purchase, operation and maintenance of such a ferry.

Honorable William L. Hungate

CONCLUSION

It is the opinion of this department that the Missouri State Highway Commission has authority to purchase, operate and maintain a ferry across the Mississippi River; and that the Missouri State Highway Commission has authority to enter into a contract with the State of Illinois whereby the two states could share equally the cost of purchase, operation and maintenance of such a ferry.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm

SCHOOLS:

SCHOOL DISTRICTS:

School district has no authority to transport children to private schools even though the pro rata cost of transportation might be paid by the private school child so transported.

August 27, 1953

Honorable William L. Hungate Prosecuting Attorney Lincoln County Troy, Missouri



Dear Mr. Hungate:

This is in response to your request for an opinion dated August 6, 1953, which reads, in part, as follows:

"The County Superintendent of Schools has asked me to obtain an opinion of the Attorney General as to whether or not it would be lawful for a bus owned by the free public schools to haul parochial children for hire on the basis of actual per pupil cost for transportation.

"Two of Lincoln County's four reorganized districts are faced with this problem so it is a live issue. When we speak of hauling parochial children, we mean hauling them to a parochial school. The actual per pupil cost would be determined by the school board in each district on a district wide basis."

Free transportation of pupils is authorized by Sections 165.140 and 165.143, RSMo 1949, which sections read as follows:

Sec. 165.140. "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district,

of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 165.037. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district; provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

Sec. 165.143. "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district

makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils; provided, any cost incurred for transporting such pupils in excess of three dollars per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

In the case of McVey et al. v. Hawkins et al., 258 S.W. (2d) 927, the court considered the constitutionality of the added

provisos of these sections which purport to authorize the transportation of children to private schools at public expense. Although the court intimated that appellants (plaintiffs) therein may not have presented the constitutional question in such a manner as to preserve it for review by the court, since respondents (defendants) relied on those sections as a defense to the action the constitutionality of the provisos of those sections was in issue. Having discussed the applicable constitutional and statutory provisions, the court said, l.c. 933:

" * * * If the parts of what are now Section 165.140 and Section 165.143, as added in 1939, see Laws 1939, pp 718-720, are in direct conflict with controlling provisions of the Constitution of Missouri 1945, to wit, Section 5 of Article IX, they do not and can not constitute any defense to the present action and must be disregarded. Since the added portions of these sections do conflict with the mentioned constitutional provisions they constitute no defense to the present action. We may not in this proceeding determine the effect of such holding upon the remaining portions of said sections, however, see Missouri Ins. Co. v. Morris, Mo. Sup., 255 S.W. (2d) 781, 782."

Therefore, the court has held the provises of Sections 165.140 and 165.143, supra, purporting to authorize transportation of children to private schools at public expense, unconstitutional, hence, null and void (12 C. J., Constitutional Law, page 800, Section 228; Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 121 S.W. 138, 24 L.R.A., N.S., 844, 17 Ann. Cas. 888).

In Berghorn et al v. Reorganized School Dist. No. 8, Franklin County, Missouri, et al., recently decided by the Supreme Court and not yet reported, the court in affirming the judgment therein also condemned the practice of intermingling the funds of a school district with those of a church. The court said:

"The court further found that the arrangement with the Roman Catholic Church for the joint operation of motor buses for transporting pupils to the Gildehaus school and to the Gildehaus church constituted an unlawful intermingling of the funds of the said school district and of the St. John's Catholic Church,

and the use of public monies for joint operation of two motor buses was in aid of a religious creed and church for a sectarian purpose, and that said arrangement constituted a donation of personal property for a religious creed and church and for sectarian purposes and was therefore unlawful."

Some question might be raised here as to whether the factual situation outlined in your request would constitute an unlawful intermingling of funds, but in view of the decision reached in this opinion that question need not be decided.

Section 432.070, RSMo 1949, provides that no school district shall make any contract unless the same be within the scope of the powers of the district or be expressly authorized by law. That section reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The courts of this state have on numerous occasions construed the powers of a board of education of a school district. In State v. Kessler, 136 Mo. App. 236, 240, 36 S.W. 494, the Kansas City Court of Appeals said: //75\omega, 85, 76,

" * * * The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. * * * *"

And again, in Consolidated School Dist. No. 6 of Jackson County v. Shawhan et al., Mo. App., 273 S.W. 182, 184, the Kansas City Court of Appeals said:

"Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. Armstrong v. School District, 28 Mo. App. 169. * * *"

In Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 S.W. 43, the Supreme Court said:

"The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication, regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. (Watson Seminary v. County Ct. Pike Co., 149 Mo. 1.c. 70, and cases, 45 L.R.A. 675; Armstrong v. School Dist., 28 Mo. App. 180; 25 R.C.L, p. 1091, sec. 306 and notes."

This rule also seems to be the law generally. 56 C. J., Schools and School Districts, page 193, Section 46, provides:

"A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools. All its functions are a public nature, and its only powers are those expressly granted by, or necessarily implied from, the statutes, by which it is governed and restrained in the exercise of such powers and the performance of its

duties. The legislature may modify or abrogate the powers of school districts as it may see fit. Only such school districts exist as are created or provided for by statute."

56 C. J., Schools and School Districts, page 294, Section 152, provides:

"A county board of education or of school trustees, although a creature of the law, may exercise any powers authorized by law, it however has in general only such powers as are expressly conferred upon it by constitutional or statutory provision or powers which are incidental to those expressly conferred. * * *"

56 C. J., Schools and School Districts, page 331, Section 202, provides:

"The powers and authority of the officers and directors, trustees, or the like, of school districts and other local school organizations, like those of other public officers, are ordinarily purely statutory and derivative, and are under the control of the legislature, which may enlarge or abridge them as it sees fit. So such officers or boards possess such powers, and such only, as have been expressly conferred upon them by statute or are necessarily implied from those so conferred or from the duties imposed upon them; and a fortiori, such an officer or board can have no authority which the state in its sovereign capacity could not delegate or confer. All persons who deal with school boards and officers are presumed to have knowledge of the extent of their powers, and the manner in which such powers may or must be exercised."

On the factual situation presented there are no Missouri cases directly in point. The only case we are able to find dealing with this issue is that of Silver Lake Consolidated School Dist. v. Parker et al., 238 Ia. 984, 29 N.W. (2d) 214 (1947). This was a suit for declaratory judgment, count 2 of

Honorable William L. Hungate

which asked that children attending parochial schools might be carried in the public school bus upon the condition that the parents of said children pay the pro rata cost of transportation. In discussing count 1 of the petition the court said, N.W. (2d) 1.c. 217:

"The only powers of the school district are those expressly granted it or necessarily implied from the statutes by which it is governed and restrained in the exercise of such powers in performance of its duties. Courtright v. Consolidated Independent School Dist., 203 Iowa 26, 212 N.W. 368; Bellmeyer v. Independent Dist. of Marshalltown, 44 Iowa 564."

Plaintiff relied on Section 282.13 of the Iowa Code, which reads:

"The board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation."

However, the court held that this section read with other sections was applicable only when a contract had been entered into between districts and was not operative otherwise.

The court then said (N.W. (2d) 1.c. 221):

" * * * We hold that this statute can have no application other than on the condition stated therein. This limitation, together with the restriction upon the powers and duties of the local boards heretofore mentioned, prevent any such transportation if paid for by the parents of the pupils. * * *"

Now that the Missouri Supreme Court has held the provises at the end of Sections 165.140 and 165.143, supra, unconstitutional, hence, null and void, we find no statutory authority for a school district to enter into any type of contract for the transportation of children to private schools.

It is true that the portions of Sections 165.140 and 165.143 now remaining refer to "school" and "schoolhouse," etc., without specifying that they must be public schools, but as was said in the Parker case, supra (N.W. (2d) l.c. 217):

"The affairs of the public schools are administered by a school board, and such schools are organized into districts for the purpose of management, control, and government. The powers of the board of education or directors, as laid down in the Code, apply only to the public schools, except as otherwise stated. School district has been variously defined. It is a quasi corporation, a creature of the legislature, and is endowed only with powers bestowed upon it by statute. Bruggeman v. Independent School Dist. No. 4, 227 Iowa 661, 289 N.W. 5. It is defined as a political or civil subdivision of the state for the purpose of aiding in the exercise of that governmental function which relates to the education of children. Landis v. Ashworth, 57 N.J.L. 509, 31 A. 1017. Is a district of and for the public schools - Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715. The term 'school district' clearly has reference to the public school system with which alone school districts have to do. Charles Scribner's Sons v. Board of Education of Dist. No. 102, 7 Cir., 278 F. 366."

And again, l.c. 221:

"The public schools are those which the state undertakes, through the various boards and officers, to direct, manage, and control, and the statutes relating to transportation of pupils, read in the light of such duty and obligation, must necessarily apply only to such public schools. To place private schools upon the same basis as the public schools would open up a system of control of such private schools such as would tend to authorize the management and government of those schools by the state - a result in no way sought either by those in control of the state public schools, or of the private schools."

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Therefore, we must and do conclude that, since school districts have only such powers as are conferred by statute or such as may be reasonably implied as necessarily incident to a power expressly conferred, under our statutes a school district has no authority to transport children to a private school even though the pro rata cost of transportation might be paid by the private school child so transported.

We express no opinion as to the constitutionality of a statutory provision authorizing such a contract as that contemplated in your request, should the Legislature at some future date pass such a law, because such an issue is not presented herein.

CONCLUSION

It is the opinion of this office that school districts have no authority to transport children to private schools even though the pro rata cost of transportation might be paid by the private school child so transported.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml

TREASURER:

OFFICERS:

County treasurer not entitled to receive extra compensation for her services performed in receiving, disbursing and keeping account of tolls and other revenues received from the operation of said bridge or bridges.



October 13, 1953

Mr. Robert L. Hyder Chief Counsel Missouri State Highway Commission Jefferson City, Missouri

Dear Mr. Hyder:

We render herewith our opinion based upon your request of October 1, 1953, which request reads as follows:

"Your official opinion is requested as to whether the County Treasurer of Camden County, Missouri, may lawfully be paid compensation in addition to that allowed her by law as County Treasurer for keeping the funds and records of the operations of a toll bridge constructed by the County Court by the issuance of revenue bonds,

"In this case the bonds were issued in 1934 by the County Court of Camden County and the bonds were purchased by the Reconstruction Finance Corporation. So far as I know, there was no extra compensation paid to the County Treasurer at that time for keeping the accounts relative to the toll bridge. In 1948, the County Court authorized the payment of \$2500 to Edith Nelson, the then duly elected and acting County Treasurer, for the extra work required to keep the accounts of the toll bridge fund and to pay the bills which constituted lawful claims against the fund.

"The Reconstruction Finance Corporation brought a proceeding in the Federal

District Court at Jefferson City, Missouri, against the Treasurer on June 25, 1948, being Case No. 332, alleging that such payment of extra compensation was unlawful because said officer was required by law to do all the work pertaining to her office, including that of keeping the records involving the toll bridge. A judgment was duly entered in that court, finding the issues for the Reconstruction Finance Corporation and directing that the defendant, Edith Nelson, take nothing for her alleged extra services.

"Recently the Commission acquired all the outstanding bonds and made the bridge toll free, the bridge being located on State Route 5 over a portion of the Lake of the Ozarks. The County Court of Camden County has stated that it desires to pay Miss Nelson extra compensation for her work in keeping the books of the toll bridge accounts during the past several years and in making the final audit of the books. It has been the position of the State Highway Commission, based on my advice to it concerning the outcome of the trial above mentioned. that the Treasurer can lawfully be paid nothing for such service and that the money involved should be paid to the State Road Fund since the Commission holds the outstanding bonds and will not cancel them until final disposition of all funds has been made.

"It is quite probable that other details may be necessary to a complete determination of the matter, and I will be glad to furnish same on request."

It is elementary that a public official must perform the duties of his office for the compensation fixed by law. For the performance of those duties he is entitled to that much -- no more, no less. It is not a matter of contract. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. (2d) 857.

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There is also substantial authority for the proposition that where a public official performs duties, which though not specifically enjoined upon him by statute still are germane to and incidental to his office, he is not entitled to additional compensation therefor. The law is stated in Mechem, Public Officers, Section 862, page 580, thus:

"An officer who accepts an office, to which a fixed salary or compensation is attached, is deemed to undertake to perform its duties for the salary or compensation fixed, though it may be inadequate, and if the proper authorities increase its duties by the addition of others germane to the office, the officer must perform them without extra compensation. Neither can he recover extra compensation for incidental or collateral services which properly belong to or form a part of the main office. An express contract to pay such extra compensation or an express allowance of it is void."

In Nodaway County v. Kidder, supra, the court said at Mo. 1.c. 801:

"/57 The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S. W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.

"It is well established that a public officer claiming compensation for official

duties performed must point out the statute authorizing such payment.

State ex rel. Buder v. Hackmann,
305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo.
1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.7

"_6/ The duties performed by appellant, and for which the additional fee or salary and mileage, was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties.

"It has been held that employment as city attorney, for which a salary was paid, includes services rendered in connection with a special tax matter, and that compensation as city attorney covers such service, and that a city collector may not contract with such city attorney for additional compensation for services in such matters. Edwards v. City of Kirkwood, 162 Mo. App. 576, 579, 142 S. W. 1109.7"

In City of Decatur v. Vermillion, 77 Ill. 315, a poundmaster, who in order to be able to more efficiently perform his duties was appointed a special policeman, was held not to be entitled to additional compensation as a policeman. The court at 1.c. 317 quoted approvingly the following passage from Dillon on Corporations, Section 172:

> "'* * * to allow changes and addition in the duties of an office to lay the foundation for extra services, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations

seldom prescribe, with much detail and particularity, the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

A contract between the public and the public official for the payment of such extra compensation or a gratuitous allowance of such extra compensation by the governing body is void and of no effect. Griffin v. Clay County, 63 Iowa 413; Adams County v. Hunter, ___ Iowa ___, 43 N.W. 208; Annotation. Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 A.L.R. 606.

Let us look then at the factual situation presented by your request. Over a period of years the treasurer has kept account of the toll bridge receipts and disbursements, such bridge having been constructed and operated by Camden County under authority of Section 234.210, RSMo 1949. She has received the moneys collected from the operation of the bridge and has paid it out on warrants drawn by order of the county court. Although we assume there was never any agreement on the part of the county to pay her additionally for this service, the county court is willing and desires now to pay her extra compensation for this service.

We think it is not permissible to pay her any additional compensation for this service. Section 54.100, RSMo 1949, relating to the duties of the treasurer provides in part:

"* * * He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

The receipt and disbursement of toll bridge moneys and the keeping account thereof at least if the county court has made no other arrangements for the "fixing, collecting, segregating and allocating of the tolls and other revenues received from the operation of said bridge" under Section 234.220, RSMo 1949, we believe to be a part of the county treasurer's duty -- but, if not specifically so, it is at least germane to and incidental to such duties and does not under the above authorities entitle her to additional compensation.

Mr. Robert L. Hyder

Neither would the county court's allowance of such compensation under the authorities above cited be effective. Such authorities hold contracts providing for additional compensation in such instances void; and it would follow that a gratuitous allowance would also be void.

CONCLUSION

It is the opinion of this office that a county treasurer is not entitled to receive extra compensation for her services performed in receiving, disbursing and keeping account of tolls and other revenues received from the operation of a toll bridge or bridges constructed and operated by a county under authority of Section 234.210, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

WDK/fh

JOHN M. DALTON Attorney General APPROPRIATION:

Appropriation under Section 3.120, Laws of Missouri, 1951, page 47, is available only for refund of "taxes."

REFUNDS:



April 21, 1953

Honorable J. Rex James Administrative Officer Division of Health Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

> "I would like to request an opinion as to your interpretation of Section 3.120 of the appropriation laws of 1951 through 1953. This is a Section appropriating funds to the Director of Revenue for paying refunds for various state departments.

"The Division of Health is faced with the necessity of refunding some \$30,000 to \$35,000 per biennium for overpayments or erroneous payments of various fees collected by the Division. These fees are collected for such things as transcripts of birth certificates, inspection and licensing of tourist courts and hotels, beverage fees, water analysis fees, etc. At present we are making these refunds by holding the original payment until it becomes apparent that the service cannot be rendered and then refunding the original payment; or by refunding out of current revenue. The State Auditor informs us that both processes are incorrect. The Director of Revenue has stated that he will make these refunds for us, if in your opinion Section 3.120 is broad enough to cover the refund of fees collected.

"I would appreciate an early opinion in this regard, in that if this Section is not adequate it will be necessary for new legislation to be enacted this session."

Section 3.120, found Laws of Missouri 1951, page 47, referred to in your letter of inquiry, reads as follows:

"There is hereby appropriated out of the State Treasury, the sum of Seventyfive Thousand Dollars (\$75,000.00), of which sum Fifty Thousand Dollars (\$50,000.00) is chargeable to the General Revenue Fund, and Twenty-five Thousand Dollars (\$25,000.00) is chargeable to that portion of the State Revenue set apart for the support of the free public schools, or so much thereof as may be necessary, for the use of the Director of Revenue, for the purpose of paying refunds for any over-payment or erroneous payment of sales tax or any other tax which the state is authorized to collect, and which is credited as State Revenue, as provided by law, for the period beginning July 1, 1951 and ending June 30, 1953."

(Emphasis ours.)

We have emphasized the word "tax" appearing in the appropriation measure for the reason that such word has acquired a fixed technical meaning in law which is peculiar and appropriate to the phraseology employed in the statute. Therefore, we direct your attention to Section 1.090, RSMo 1949, reading as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meening in law shall be understood according to their technical import."

The meaning ascribed to the word "tax" has been set forth in 61 C.J., page 68, from which we quote:

"Essentials of Tax. As indicated in its definitions, the essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportionate character and payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes, and not as payment for some special privilege granted or service rendered. Taxes levied for governmental purposes are not imposed on the basis of a special and particular benefit accruing to each citizen in proportion to the taxes paid, and the amount is only limited by governmental Taxes and taxation are therefore needs. distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes or under particular powers or functions of the government, such as forfeitures, fines, and penalties, and fees of public officers. So there is a distinction between license fees or occupation taxes and ordinary taxes, between taxes and assessments for public improvements. and between the power of taxation and the right of eminent domain. In view of the essential characteristics stated above, the question whether a particular contribution, charge, or burden is to be regarded as a tax depends upon its real nature, and if it is in its nature a tax, it is not material that it may be called by a different name; and conversely if it is not in its nature a tax, it is not material that it may have been so called."

Also, the following appearing on page 73:

"Fees of Public Officers Not Taxes. Fees prescribed to be paid by individuals to public officers, whether in the judicial or executive department of government, for services rendered, are not ordinarily taxes, unless the object of the requirement is to provide general revenue rather than compensation for those officers, as in the case of graduated fees in probate proceedings based upon the valuation of the estate and having no relation to the services rendered or compensation received therefor by the officer. On similar principles, where statutes provide for the inspection of given commodities, with a view to determine their quality and fitness for use, the fees to be paid to the inspectors are not properly classed as taxes."

with this definition of the word "tax" in mind, we have examined the various statutes under which money is collected by the Division of Health. It is noted that in all instances such money arises from the payment of license fees, inspection fees, copies of public records, et cetera. It is apparent that they do not fall within the meaning of the word "tax" as that word is used in legal phraseology. Inasmuch as the General Assembly in writing the appropriation act, quoted supra, has seen fit to refund only "taxes" which have been over-paid or paid through error, we are constrained in construing such act to limit its application only to money paid into the State Treasury arising from imposts having the characteristics of the legal definition of the word "tax."

CONCLUSION

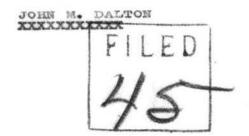
In the premises, we are of the opinion that the appropriation made under Section 3.120, found Laws of Missouri, 1951, page 47, is not available for the repayment of moneys erroneously collected or over-paid as license fees, inspection fees, or fees for the obtention of copies of public records and that refunds thereunder may be made only with respect to "taxes" which have been over-paid or erroneously paid.

Hon. J. Rex James

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General STATE MEN. JEM: EMPLOYEES: POLITICAL ACTIVITIES PROHIBITED WHEN:



Personnel Advisory Board Rule 15.4(b) prohibits employees under State Merit System from being candidates for nomination or election to public office, or engaging in political activities while holding such position. Merit system employee cannot become candidate for election of director to city school board without resigning or securing leave of absence. May attend political mass meeting but cannot take active part except to express opinion or vote on any proposition if afforded the opportunity.

May 1, 1953

XXXXXXX

J. C. Johnsen

Honorable J. Rex James Administrative Officer The Division of Health Jefferson City, Missouri

Dear Mr. James:

This department is in receipt of your recent request for a legal opinion which reads, in part, as follows:

"Section 15.4b of the Personnel Division Rules and Regulations, quoting the original Personnel Act, prohibits employees under the act from holding any public office. In the opinion of the Attorney General does this apply to such elective offices as City School Boards?"

The further question was propounded involving the same subject matter and reads as follows:

"Also, what is your opinion as to people under the Merit System attending political mass meetings, or taking any active part in the meetings?"

Chapter 36, RSMo. 1949, entitled "State Merit System," together with any new laws or amendments embodies all the statutory provisions relating to the Merit System in Missouri.

Chapter 36.070 of said chapter empowers the State Merit System Board to make proper rules and regulations for the administration of the Merit System laws and reads as follows:

"The board shall have power to prescribe such rules and regulations not inconsistent with the provisions of this chapter as it deems suitable

and necessary to carry out the provisions of this chapter. Such rules and regulations shall be effective when filed with the secretary of state as provided by law."

The Merit System Board, in exercising the power conferred upon it by the above quoted section, has promulgated a number of rules and regulations for the administration of laws contained in Chapter 36, supra, among which is Section 15.4(b), supra, the applicable portion of which reads as follows:

"* * * No employee selected under the provisions of this act shall be a member of any national, state, or local committee of a political party, or an officer of a partisan political club, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen to express his opinion and to cast his vote. No employee in a position subject to the act shall be a candidate for nomination or election to any public office except after resigning, or obtaining a regularly granted leave of absence, from such position." (Act, Sec. 43(e).)

"'No person elected to public office shall, while holding said office, be appointed to any position in the classified service.' (Act, Sec. 43(f).)"

The above quoted regulation appears to be based upon subsections 5, 6 and 7, of Section 36.150, RSMo. 1949, and the regulation is practically a word for word duplication of said statute. We find it unnecessary to quote said section herein, but call attention to it as the apparent authority for making said regulation.

As noted above, said regulation prohibits any state employee, holding a classified position under the Merit System, from being a candidate for nomination or election to any public office during the time he is so employed except after he resigns or obtains a regularly granted leave of absence from his position. The rule further prohibits a public officer, while holding said office from being appointed to any classified position under the merit system.

In order to arrive at a correct answer to the first inquiry, it is necessary for us to determine whether or not the position of school director is a public office within the meaning of Rule 15.4(b), supra.

Hon. J. Rex James

Various definitions of the terms "public office" and "public office" have been given and adopted by the courts of this state, among which are those referred to by the Supreme Court of Missouri in the case of State ex rel. Zevely v. Hackman, 300 Mo. 59. At l.c. 65, the court said:

"From the very language of the statute quoted we must approach this question by first ascertaining what is an officer, and whether or not Zevely comes within that application.

"Counsel for respondents have collected from all over the country a large number of definitions and adjudications defining 'offices' and 'officers,' and in my opinion, I can do no better than to reproduce them in this connection.

* * * * * * * * * * * * *

"An office is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are interested. Every office is considered public, the duties of which concern the public. (People v. Hayes, 7 How. Prac. (N. Y.) 1.c. 250.)

"In the most general and comprehensive sense a 'public office is an agency for the State and a person whose duty it is to perform this agency is a 'public office.' Stated more definitely a 'public office' is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. (State ex rel. Smith v. Theus, 38 So. 870-72, 114 La. 1098; cited in State ex rel. v. Maroney, 191 Mo. 1.c. 545.)

"A 'public office' is an agency for the State, and the person whose duty it is to perform this agency is a 'public officer;' the essence of it is the duty of performing an agency; that is, of doing some act or acts, or a series of acts,

for the State. (Malone v. Williams, 103 S.W. 798.)

"An 'officer' is simply an agent of the public, whose power of attorney is the law, which prescribes his duties and limits his authority to such acts only as are necessary and incidental to a proper discharge of such duties as it imposes. (Callaghan v. McGown, 90 S.W. (Tex.) 1.c. 327.)"

Again in the case of State ex inf. McKittrick v. Whittle, 333 Mo. 705, it was held that a school district is a political subdivision of the State of Missouri within the meaning of the nepotism amendment of the state constitution, and that a school director is a public officer within the meaning of said constitutional amendment. At l.c. 710, the court said:

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdicitions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer.' (State ex rel. v. Bus, 135 Mo. 325, l.c. 331, 332, 36 S.W. 636.) To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, l.c. 66, 67, 254 S.W. 53; Hasting v. Jasper County, 314 Mo. 144, l.c. 149, 150, 282 S.W. 700.

"Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

In Section 29 of the title of "Schools," 47 Am. Jur. 316, school officers are held to be public officers and said section reads, in part, as follows:

"The affairs of schools and school districts are usually instrusted to state or local officers variously known as superintendents, trustees, directors, and the like. In some jurisdictions, boards of education are public corporations, created by statute for public

educational purposes. School officers constitute an administrative body, charged with the duty of administering the law governing the public schools within their districts. They are public officers. * * *"

From the foregoing it appears that the general definitions given of "public office" and "public office" are fully applicable to the members of a board of school directors; consequently, the position of school director would be a public office and a person who occupies that position would be a public officer within the meaning of said definitions.

Said school director is a public officer, for the reasons given above, and in answer to the first inquiry of your opinion request, it is out thought that the provisions of Section 15.4(b) of the Rules and Regulations, supra, are fully applicable to the situation referred to in the opinion request. It is our further thought that under the provisions of said section any employee of the State of Missouri holding a classified position under the Merit System is prohibited by said regulation from becoming a candidate for election to the office of director of a city school board while holding said position. However, if he resigns his position or obtains a regularly granted leave of absence, he may thereafter run for that office without violating said regulation.

We next take up for consideration the second inquiry of the opinion request, which we interpret as asking whether or not state employees under the Merit System may, under the provisions of Section 15.4(b) of the Personnel Division Rules and Regulations, attend political mass meetings or take any active part in said meetings.

It is noted that this section does not provide that state employees under the Merit System are prohibited from attending political meetings of any kind, but that said section does prohibit such employees from being members of any national, state, or local committee of a political party, or officers of any partisan political club and that they shall take no part in the management of the affairs of any political party or political campaign.

When Merit System employees attend political mass meetings, it is believed that under the provisions of Section 15.4(b), supra, that such employees are prohibited from taking any active part in said meeting except to express their opinions and to vote upon any matter before the meeting, if and when said employees are

Hon. J. Rex James

afforded the opportunity to do so.

Therefore, in answer to the second inquiry of the opinion request, it is our thought that employees under the Merit System may attend political mass meetings without violating the provisions of Section 15.4(b), supra, of the Merit System regulations, but that said employees are prohibited from taking any active part in the meeting except to express their opinions and to vote upon any proposition before the meeting, if and when the opportunity to exercise said rights, or either of them, are presented.

CONCLUSION

It is the opinion of this department that Rule 15.4(b) promulgated by the Personnel Advisory Board of the State of Missouri, under authority of Chapter 36, RSMo. 1949, entitled "State Merit System" prohibiting any state employee, while holding a classified position under the Merit System, from becoming a candidate for nomination or election to any public office is applicable to that of school director, consequently a state employee while holding a classified position under the merit system cannot become a candidate for election to the office of director of a city school board unless he first resign or obtain a regularly granted leave of absence from his position.

It is the further opinion of this department that one holding a classified position under the State Merit System is not prohibited by said Rule 15.4(b) from attending any political mass meeting but that while in attendance he can take no active part in said meeting except that he may exercise the right to express his opinion and to vote upon any proposition presented if afforded the opportunity to do so.

This opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General

PNC:mw

COUNTY BUDGET LAW:

Attempted purchase of unbudgeted item by county officer does not create obligation against county.



February 25, 1953

Honorable Olin B. Johnson Prosecuting Attorney Schuyler County Lancaster, Missouri

Dear Mr. Johnson:

Reference is made to your request for an official opinion of this department reading as follows:

"I am desirous of knowing whether your department has issued any opinions which might be relevant to a problem we are confronted with in this county.

"A former Probate and Magistrate Judge of this county made certain budgetary requests for sectional book cases which were refused by the county court. The official then proceeded to order such cases apparently intending to force the county court to pay for them. The official died in office and his successor has been appointed. The cases have arrived but have not been accepted.

"The present holder of the office does not intend to take any action on the metter but my principal concern is with regard to the enforceability of this obligation, if any, by the supplier against the county.

Honorable Olin B. Johnson

"As there are several hundred dollars involved I would appreciate any assistance your department might be able to give this office in this matter."

We note that Schuyler County is one of the fourth class, and, therefore, will be governed by the provisions of Section 50.670 to 50.740, inclusive, RSMo 1949.

We note from your letter of inquiry that although included in the estimate filed by the officer, the county court did not approve the budgetary request for an expenditure covering the item of furniture. This action no doubt was taken in accordance with the provisions of Section 50.740, RSMo 1949, providing in part as follows:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes one and three below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval."

(Emphasis ours.)

In construing this portion of the statute the Supreme Court said in Bradford v. Phelps County, 210 S.W. (2d) 996, 1.c. 999:

"* * * It is evident from the language of the County Budget Law that county courts in complying with the Law have duties of a discretionary nature in examining, revising and changing the estimates of the county's expenditures to the end of promoting the standard of 'efficiency and economy in county government,' Section 10917, supra. * * *

"* * As was the county court in
the Daues case exercising discretion
in reducing the compensation to the
county treasurer to an amount which
it deemed 'just and reasonable' (the
standard stated in the statute
involved in that case), so was the
county court in the case at bar, in
examining, revising and changing
the estimates as required by the
County Budget Law, exercising discretionary action in the public interest
and with the purpose of promoting
'efficiency and economy in county
government.'"

From the foregoing it appears that the County Court of Schuyler County acted within its statutory authority in deleting the item of proposed expenditure from the estimate of the officer.

There yet remains the question as to whether or not the supplier of such item may maintain an action against the county for the payment of the value thereof. We note at the outset that the item has not been "received." We take it from that statement that no acceptance of the item has been made by any person on behalf of the county. This, of course, could not serve to void a validly contracted obligation, although if the rejection were for good cause, it might of itself serve to defeat any claim for the value of the item.

However, it is our thought that in any event the supplier cannot recover. We direct your attention to the

case of Elkins-Swyers Office Equipment Co. v. Moniteau County, 209 S.W. (2d) 127, wherein the Supreme Court, after discussing the failure of the County Court of Moniteau County to budget an expenditure for an item quite similar to that involved in your opinion request, said at 1.c. 130 and 131:

"Section 10917 requires the county court to review the estimates and revise, amend, alter or change 'any estimate as public interest may require and to balance the budget * * *. * The budget thus revised is to be entered and approved of record and the county clerk is required to file certified copies thereof with the county treasurer and state auditor; and: 'Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this law shall be void and of no binding force or effect # # #. !

"From all the provisions of the County Budget Law, we hold the items of the instant case, although within Class 6, should have been budgeted to enforce payment by the County. * * *

"Plaintiff seeks compensation out of public funds. The just compensation clause of the Constitution contemplates a lawful taking of private property for public use. Public officials are servants of the public and in the performance of their duties regarding public funds do not deal with their own. Public funds are trust funds and public officials act in a trust capacity with respect thereto, subject to all limitations of whatever nature upon their authority imposed by the public. All persons are charged with knowledge of the laws enacted by the

sovereign for the protection of its property and are required to take due notice thereof. * * * A broad distinction exists between the acts of a public official and those of the agent of an individual within the apparent scope of the agent's authority. The unauthorized acts of public officials are, and in law are known to be, unauthorized and consequently not binding on the principal, their mistakes being their own and not the mistakes of the sovereign. All this rests in a sound public policy for the protection of the public. A private citizen who acquiesces in and aids and abets unauthorized acts of a public official by voluntarily commingling his private property with property of the public cannot successfully invoke the just compensation clause of the constitution because there has been no taking of private property for public use by the sovereign. * * *"

CONCLUSION

In the premises we are of the opinion that an unbudgeted item of expenditure cannot become the basis of a valid claim against a county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB/fh

CIRCUIT CLERK:
COMPENSATION:
TAXATION:
CERTIFICATE OF PURCHASE AT
LAND SALES--Rights of holder;
rights of county.



Circuit Clerk in Class 4 Counties, with an assessed valuation of more than Five Million Dollars, entitled to \$700.00 annually as Parole Commissioner, effective April 12, 1952. Holder of certificate of purchase loses all rights in land and purchase price paid if County Collector does not execute and record deed to purchaser within 4 years after date of certificate under Sec. 140.410, RSMo 1949. County does not thereby become the owner of such lands.

October 16, 1953

Honorable Olin B. Johnson Prosecuting Attorney Schuyler County Lancaster, Missouri

Dear Mr. Johnson:

This is the opinion you requested from this office for the construction of statutes of Missouri referring to compensation of public officers named in your letter, and respecting the rights of individuals and counties involved in the sale of lands for delinquent taxes in this State. Your letter in this behalf reads as follows:

"Two problems have been brought to my attention by county officials in this county and I would like to have the opinion of your office thereon.

"1. Since the effective date of Section 483.367 Missouri Revised Statutes, Cum. Supp. 1951, the circuit clerk of this county has through an error received six hundred dollars annually as compensation under this section when his rate of compensation should have been seven hundred dollars inasmuch as this is a county of the fourth class with an assessed valuation in excess of five million dollars.

- "Queries: (a) is this official entitled to a backpayment of all such compensation earned but not received?
 - (b) was April 12, 1952, the effective date of such section?
- "2. A person purchased certain real estate at the county collectors tax sale and received a purchase certificate therefor. The person

fails to obtain a collectors deed for such property for more than four years after the date of such purchase certificate.

- "Queries: (a) has the purchaser forfeited all interest in the real estate and the amount of his purchase price?
 - (b) if so, would the county now be the owners of this land?"

You recite in your request for an opinion, with respect to these matters, that the Circuit Clerk of your county, a county of the Fourth Class under our statutes with an assessed valuation in excess of Five Million Dollars, through error has received \$600.00 as compensation under Section \$483.367, Laws of Missouri, 1951, pages \$459, \$460; Laws of Missouri, 1951, pages \$435, \$436; Cumulative Supplement, Laws of Missouri, 1951, page \$408, for duties imposed upon the Circuit Clerk as Parole Commissioner, whereas, under the terms of said Section \$483.367, supra, he should have received the sum of \$700.00.

You submit two questions for our consideration under the terms of said Section 483.367 which are:

- (a) Is this Official entitled to a back payment of all such compensation earned but not received?
- (b) Was April 12, 1952, the effective date of such section?

In answer to your question (a) we are enclosing copy of an opinion issued by this office on March 10, 1936, for Honorable Charles A. Hardin, Judge of the Probate Court of Jefferson County, Hillsboro, Missouri, in which opinion it is held on pages 8 and 9, citing authorities, that public officers may collect back salary earned but not received, subject to the five year Statute of Limitations in this State.

Your question (b) in paragraph 1 of your letter asks our construction of the statutes and Constitution of this State to determine if April 12, 1952, was the effective date of said Section 483.367. It will be observed by referring to the citation of Laws of Missouri, 1951, pages 435, 436,

that the Act, (S.B. No. 280), fixing the compensation of Clerks of Circuit Courts in Fourth Class counties in this State where the assessed valuation is more than Five Million Dollars, as Parole Commissioner, in Section 2 thereof, provides an emergency clause or section included in the body of said Act.

It is indicated, as a footnote, at the end of Section 483.367, Laws of Missouri, 1951, Cumulative Supplement, page 408, that the Bill creating such additional duties for the Circuit Clerk and fixing his compensation in counties of the Fourth Class having an assessed valuation of more than Five Million Dollars, was: "sent governor 4-2-52. Approved 4-12-52. Emergency clause."

Section 29, Article III of the Constitution of this State, 1945, provides that no law passed by the General Assembly shall take effect until ninety days after the adjournment of the session in which it was enacted, except in case of an emergency which must be expressed in the preamble or in the body of the Act. In this case, as recited, there was, and is, an emergency clause or section contained in the Bill itself.

Section 31, Article III of the present Constitution of this State provides, among other things, that all Bills and Joint Resolutions passed by both Houses shall be presented to and considered by the Governor. This section continues and states: "If the bill be approved by the governor it shall become a law."

If, as we may safely assume was the case, the Act creating the additional duties to be performed by a Circuit Clerk as Parole Commissioner, and so fixing his salary as stated in said Section 483.367 in counties of the Fourth Class at \$700.00, was approved by the Governor on the twelfth day of April, 1952, as stated in said footnote, then, and in that event, under the constitutional provision herein recited, April 12, 1952 became and was the effective date of said Section 483.367. The copy of said opinion dated March 10, 1936, holding that public officers may collect back pay due them, and our recital of the provisions of the Constitution, respecting the effective dates of Bills passed by the Legislature with an emergency clause and approved by the Governor, will answer your questions (a) and (b) in paragraph 1 of your letter.

In paragraph 2 of your letter you submit the proposition that an individual purchased certain real estate at

Honorable Olin B. Johnson:

the County Collector's tax sale and received a purchase certificate therefor; that said person failed to require the delivery of a deed from the County Collector to such property for more than four years after the date of such purchase certificate. In this condition of facts you submit two queries:

(a) Has the purchaser forfeited all interest in the real estate and the amount of his purchase price?

In reply to question (a) in said paragraph 2, we are enclosing a copy of the opinion of this office dated March 8, 1940, prepared for Mr. W. A. Holloway, Chief Clerk, Auditor's Office, Jefferson City, construing the original Jones-Munger Law, passed by the Legislature of this State, Laws of Missouri, 1933, page 425, holding that under Section 9954c, Laws of Missouri, 1933, pages 435,436 (now Section 140.410, RSMo 1949), in the last paragraph of said opinion, quoting said Section 9954c, appearing on pages 4 and 5 of said opinion, and in the conclusion of said opinion, that if a person became a purchaser at such delinquent land tax sale of real estate sold and a certificate has been issued to such person, and such purchaser or his representatives does not comply with the statutory duty imposed upon him or them by said section, by causing a deed to be executed to him and placed on record in the proper county, within four years from the date of said sale, as indicated by such certificate of purchase, such purchaser and holder of the certificate of purchase loses the benefits of the lien on the lands described in the certificate and thereby loses all rights thereunder, leaving the lands in statu quo as to the tax lien for the particular years involved, and that a Collector may not, after such four-year period has expired, after the date of the certificate of purchase, execute and record a deed to such holder of a certificate of purchase or his assignee.

Your question (b) in paragraph 2 of your letter submits the query that, if the purchaser has, by failure to comply with the terms of said Section 140.410, forfeited his interest in the real estate and the amount of his purchase price, would the county now be the owner of this land?

You do not say in your letter if the sale of real estate for delinquent taxes in your county in this case arose from a first sale or a second sale. We assume, however, that since your letter was silent on that matter, the sale was a first sale by the County Collector as a first offering of such real estate for sale, according to the provisions of Section 140.190, RSMo 1949. As will be observed in said

opinion, and the conclusion thereto, of March 8, 1940, it is held that where the certificate holder at any such sale does not require a deed within the four years prescribed by the statute after the date of his certificate of purchase to be executed and recorded, the holder of said certificate loses all rights thereunder, leaving the lands in statu quo as to the tax liens for the particular years involved. This, we understand the opinion to mean, and to be based upon the fact that there would be, in such instance, no sale of the real estate against which there were delinquent taxes and that in such event the titleholder of such land would still be the owner thereof and that such real estate would be subject to a second or third offering, as the case might be, for sale under the lien, and that clearly the county would not, and could not, automatically become the owner of such real estate because of the default and loss of rights by the certificate holder by reason of not complying with the provisions of said Section 140.410.

A county may acquire the title and ownership of lands against which taxes are delinquent and which land is sold to recover and collect such delinquent tax by complying with the terms of the statutes. Subsection 1 of Section 140.260, RSMo 1949, permitting the County Court to become a bidder through its agent, or agents, and to purchase real estate so sold, reads as follows:

"It shall be lawful for the county court of any county, and the comptroller, mayor and president of the board of assessors of the city of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which section 140.250 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids."

Attention is directed in said Subsection 1 of said Section 140.260, to sales for which provision is made in Section 140.250 of the same chapter. We do not deem it necessary to quote here said Section 140.250 in full, because of its length. The section, however, provides that, if lands shall have been offered for sale for delinquent

taxes, interest, penalty and costs by the Collector of the proper county for any two successive years and no person shall have paid therefor a sum equal to such total accumulation of such debts, then the County Collector shall, at the next regular tax sale (the third offering for sale), sell the same to the highest bidder and there shall be no period of redemption for such sale. This section further provides that no certificate of purchase shall issue after such sale, but that the purchaser shall be entitled to the immediate issuance and delivery of the Collector's deed, unless the purchaser at such sale shall be the owner of lands or lots purchased, in which event no deed shall issue, but he must pay the taxes, the delinquency of which causes such lands or lots to be sold, and the interest and penalties in addition. and in such event no deed shall issue to such purchaser or to anyone acting for him.

It appears plain, we believe, that only under these circumstances may a county bid in lands at a third offering of sale thereof for delinquent taxes and become the owner of the title to such lands. The copy of said opinion dated March 8, 1940, holding that if the certificate holder at a sale of real estate for delinquent taxes does not require a deed from the Collector within four years after the date of his certificate, such purchaser loses all rights under such certificate and the amount of his purchase price, leaving the lands in statu quo as to the tax liens for the particular years involved. The terms of Section 140.260, providing the only procedure whereby a county may become the owner of the title to lands and lots so sold for delinquent taxes, and our observations that the county does not, and could not, become the owner of lands or lots merely because of the default and loss of rights by the certificate holder by reason of his not complying with provisions of said Section 140.410, RSMo 1949, answer, respectively, each of your questions (a) and (b) in paragraph 2 of your letter.

CONCLUSION

It is, therefore, the opinion of this office, considering the premises, that:

1) Public officers are entitled to back payment of compensation earned but not received;

- 2) That April 12, 1952, was, and is, the effective date of Section 483.367, Laws of Missouri, 1951, Cumulative Supplement, page 408, fixing the compensation of Clerks of Circuit Courts at \$700.00 for additional duties performed as Parole Commissioner in Class Four Counties of this State where the assessed valuation is more than Five Million Dollars;
- 3) That where the purchaser or a certificate holder at a sale of lands for delinquent taxes does not require a deed to be executed and recorded by the Collector of the proper county within four years after the date of his certificate of purchase, the holder of such certificate loses all rights thereunder, including his purchase price, leaving the lands in statu quo as to the tax liens for the particular years involved;
- 4) That under such conditions the county does not become the owner of such lands or lots because of the default and loss of rights by the certificate holder, by reason of his not complying with the provisions of said Section 140.410, and that there was no sale of such lands or lots accomplished, the original owner still being the owner of such lands or lots, and that the county may only become the purchaser and owner of lands or lots so sold for delinquent taxes under and by complying with the provisions of Section 140.260, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC;irk Enc: KANSAS CITY SCHOOL DISTRICT: GENERAL OBLIGATION BONDS: BLEACHERS:



Honorable Ray O. Joslyn President School District of Kansas City, 1010 West 39th Street, Kansas City, Missouri

Dear Sir:

Proceeds from the sale of General Obligation Bonds of the Kansas City School District, issued pursuant to a favorable vote on May 29, 1951, of more than twothirds of the electors voting at a special election, may be used for the construction of bleachers and accompanying facilities on athletic fields on public high school sites owned and operated by the Kansas City School District.

December 31, 1953

I am in receipt of your request, in which the school district of Kansas City joins, for an opinion on the question:

"May proceeds from the sale of General Obligation Bonds, of the School District, issued pursuant to vote of more than two-thirds of the electors voting at a special election, in accordance with the provisions of Sec. 165.497 RSMo 1949, be used for the construction of bleachers and accompanying facilities on athletic fields on public high school sites owned and operated by the school district?"

You inform us that the public notices of the election and the printed ballots used at the election, which was held May 29, 1951, read:

"A proposition authorizing the Board of Directors of the School District to borrow on behalf of the School District the sum of \$18,000,000 for the purpose of purchasing sites for school houses, janitors! houses, repair buildings, and supply houses used in operation and maintenance of the schools, public library buildings containing offices of the Board, art galleries and museums, in said School District, or additional ground attached to sites already owned, and of erecting school houses, janitors' houses, repair buildings, and supply houses used in operation and maintenance of the schools, and library buildings containing offices of the Board, art galleries and museums, and building additions to, remodeling and reconstructing buildings existing at the time of making the loan, and furnishing same, within said

School District, and for the payment thereof to issue bonds of the School District, which bonds may be issued from time to time in various series;"

The aforesaid ballot, based upon the aforesaid Section 165.497, supra, lists the purposes for which the money to be raised by the General Obligation Bonds was to be used. We believe that the expenditure of any money which was raised by the General Obligation Bonds must fall within the classification of at least one of the purposes stated in the ballot for which the money to be raised was to be expended. The purposes are stated in the ballot which has been printed above.

An examination of the purposes itemized make it clear that the only one of these classifications into which bleachers could come would be "school houses", which word we assume to be synonymous with "school buildings".

The Supreme Court of Missouri has held in State ex rel School District of Kansas City v. Thompson, 327 Mo. 144, 36 S.W. 2d, 109, that it is lawful under the constitution and the statutes for a School District to issue such bonds serially from time to time as part of the aggregate issue authorized by such an election, and it has held in Hart v. Board of Education, 299 Mo. 36, 252 S.W. 44, that the only matters to be submitted to the electors is the question of whether or not to incur the loan in the amount submitted, the determination as to which particular projects or buildings within the class submitted should be constructed, is a matter for the discretionary determination of the School Board and the inclusion of various separate and distinct projects in one proposal to incur the loan does not render the proposal multifarious. See also Kellams v. Compton, 206 S.W. 2d 498, 4 A.L.R. 2d 612, in which incidentally one of the purposes of the bond issue was to build bleachers at an athletic field.

We have noted the memorandum of Mark W. Bills, Superintendent of Schools, dated November 24, 1953, and the attached letter of Dr. Roscoe B. Shores, Deputy Superintendent of Schools of the School District of Kansas City, dated November 30, 1953, relating to this matter. We particularly note Mr. Bills' statement that:

"The holding of athletic contests and exhibitions and similar events are a part of the legally established and recognized courses of physical education promulgated by the State Board of Education pursuant to Sections 163.250 to 163.300, inclusive, RSMo 1949.

The question thus appears to resolve itself into one of whether bleachers erected on an abhletic field come within the classification and definition of "school house" and "school building."

In the case of In re Savannah Special Consolidated School District, 44 So. 2d 545, at 1.c. 547, the Supreme Court of Mississippi stated:

"As to objection number two, umbrage was taken at the language of the petition, as set out in the second paragraph of this opinion. The language of Section 6370, Code of 1942, is '* * * erect, repair, and equip school buildings. ! We think a gymnasium is a school building, within the meaning of the statute. See Nichols v. Calhoun et al., 204 Miss. 291, 37 So. 2d 313, where this Court held that a stadium is a school building within the meaning of the statute authorizing the issuance of municipal bonds for the erection of school buildings. Assuredly, they could either erect a new one, or repair the old one. 'Improving water system' was equipping a school building. because water and its distribution are necessities. 'Repair and reroffing school buildings' manifestly constitute repair within the meaning of the statute. If the purposes to be accomplished are within the purposes specified by the statute, they are within the statute. Ashcraft v. Board of Supervisors. supra."

In the case of Gibson v. State Board of Education, 148 S.W. 2d, 329, the Supreme Court of Arkansas held that a gymnasium was a school building within the meaning of their statute.

The leading case sustaining such use of bond moneys under similar statutory and constitutional provisions is Alexander vs. Phillips, 31 Ariz. 503, 254 Pac. 1056, 52 A.L.R. 244, decided by the Supreme Court of Arizona in 1927. In that case the statute authorized the issuance of bonds pursuant to election of the electors residing in the district "for the purpose of raising money for purchasing or leasing school lots, for building school houses, and supplying same with furniture and apparatus, and improving grounds." The proposal submitted to the voters was whether bonds of the Phoenix Union High School District should be issued in the amount of \$80,000.00 for the purpose of erecting a stadium for the Phoenix union high school. The Court held that the building of a stadium for athletic contests was within the terms of the phrase "for building school houses" as found in the statute. Finding that athletic contests and exercises are part of the legally recognized courses of instruction and training in the schools, the Court said (52 A.L.R., 1.c. 247)

"We therefore hold that the proper definition of a 'schoolhouse' within the meaning of P. 2736, supra, is: Any building which is appropriated for a use prescribed or permitted by the law to public schools.

"While the purpose of the public school and its justification for existence is always the same, like all other human institutions, it changes from time to time in the methods by which that purpose may be carried out."

In the course of its opinion, the Court further said:

"But, with our modern industrial civilization, a great change has come over the land. At present over half our population is urban, with little no chance for physical training for children in the home, and with the increase of human knowledge we are beginning to realize that the work of the farm and home even in the rural districts does not generally give a complete or properly rounded physical development. For this reason the new generation of educators has added to the mental education, which was all that was given by the public schools of the past, the proper training of the body, and a gymnasium is now accepted to be as properly a schoolhouse as is the chemical laboratory or the study hall. * *

"We thus see that the branches of human knowledge taught in the public schools have been vastly expanded in the last few generations. Has this expansion been sufficient to bring within its scope a structure of the class in question? It is a well-known fact, of which this court properly takes judicial notice, the large majority of the higher institutions of learning in the country are erecting stadiums differing from that proposed for the Phoenix Union high school only in size, and it is commonly accepted that they are not only a proper but almost a necessary part of the modern college. This is true both of our privately endowed and our publicly maintained universities. That athletic games under proper supervision tend to the proper development of the body is a self-evident fact. It is not always realized, however, that they have a most powerful and beneficial effect upon the development of character and morale. To use the one game of football as an illustration, the boy who makes a successful football player must necessarily learn self-control under the most trying circumstances, courage, both physical and moral,

in the face of strong opposition, sacrifice of individual ease for a community purpose, team-work to the exclusion of individual glorification, and above all that 'die in the last ditch spirit which leads a man to do for a cause everything that is reasonably possible, and, when that is done, to achieve the impossible by sheer will power. The same is true to a greater or lesser degree of practically every athletic sport which is exhibited in a stadium.

"It seems to us that, to hold things of this kind are less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens, physically, mentally, and morally, than the study of algebra and Latin, is an absurdity. Competitive athletic games, therefore, from every standpoint may properly be included in a public school curriculum. The question then is, Does the law of Arizona so include them?"

And with respect to the propriety of providing a stadium for the seating of spectators the Court said:

"If physical education be one of the special subjects permitted by law, it is a matter for the reasonable discretion of our school authorities as to
how such subjects should be taught, and no parent
who has ever had a child participate in any form
of the athletic games and contests recognized and
given by the various schools of this state, and who
has noted the increased interest shown and effort put
forth by the participants when such games and sports
are open to the view of their schoolmates, friends,
and parents, both in intra and inter mural competition, but will realize the educational value both of
the games and of a suitable place for giving them."

And the Court finally concluded:

"For the foregoing reasons, we are of the opinion (1) that physical education is one of the branches of knowledge legally imparted in the Phoenix union high school; (2) that competitive athletic games and sports in both intra and inter mural games are legal and laudable methods of imparting such knowledge; and (3) that a structure whose chief purpose is to provide for the better giving of such competitive athletic games and sports as aforesaid is reasonably a schoolhouse within

the true spirit and meaning of P. 2736, supra."

In McNair vs. School District No. 1 of Cascade County, Mont. 288 Pac. 188, 69 A.L.R. 866 (1930) a proposal had been submitted to the electors of the School District to issue bonds in the amount of \$90,000.00 "for the purpose of constructing an outdoor gymnasium and athletic field in said district, furnishing and equipping same." The statute relied upon provided for the issuance of bonds of the School District for the purposes, among others, "of building, enlarging, altering repairing or acquiring by purchase one or more school houses in said District; furnishing and equipping the same, and purchasing the necessary lands therefore." The question as stated by the Court was whether the Board of Trustees of the School District had the power and authority under such statute to issue and sell bonds for the purpose of constructing and equipping an outdoor gymnasium and athletic field in connection with a high school. The Court held that it did have such authority under such statute and in the course of the opinion said (69 A.L.R., L.C. 869):

"Under the heading 'Education,' our Constitution declares that 'it shall be the duty of the legis-lative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.'* * * *

"What, then constitutes a 'thorough' system of education in our public schools? By its voluntary act. the state has assumed the function of education primarily resting upon the parents, and by laws on compulsory education has decreed that the custody of children be yielded to the state during the major portion of their waking hours for five days in the week, and, usually, nine months in the year. In doing so, the state is not actuated by motives of philanthropy or charity, but for the good of the state, and, for what it expends on education, it expects substantial returns in good citizenship. With this fact in mind, it is clear that the solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship -- the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert."

And further L.C. 870:

"This court has held that the term 'schoolhouse, ' as used in the statute, does not mean simply the house, but refers to the entire school plant (State ex rel. Jay v. Marshall, 13 Mont. 136,32 P. 648), and, under statutes at least no broader than ours, it has been uniformly held that playgrounds established and used in connection with public schools are a part of the school plant, and their taking for that purpose is a taking for a public use; that such ground is as essential to the school as is the ground on which the schoolhouse stands. State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484; Independent School District v. Hewitt, 105 Iowa, 663, 75 N.W. 497; Cousens v. Lyman School District, 67 Me. 280; Ferree v. School District, 76 Pa. 376. What playgrounds, with their swings, chutes, teeters, and the like, are to the grade schools, athletic fields are to high schools and stadiums to our universities; the difference is only in extent and dignity, not in kind, and it would seem that, if the first are legitimate parts of the school plant, so are the second and third."

Then referring to the Arizona case of Alexander vs. Phillips supra, the Montana Court said:

"And in Arizona, where the statutory authority to issue bonds extended only to the purpose of erecting 'schoolhouses,' the Supreme Court found therein sufficient authority to warrant the issuance of bonds for the construction of a high school stadium, to all intents and purposes an 'athletic field and outdoor gymnasium. Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52 A.L.R. 244. This result was reached by holding that a schoolhouse is a place 'appropriated for a use prescribed or permitted by law to public schools, and, finding that school boards were empowered to add special courses to the prescribed branches of study and employ instructors, and that the school in question had added physical culture and athletics and employed instructors, the court pointed out the benefits of such training, and then said: 'It seems to us that, to hold things of this kind are less fitted for the ultimate purpose of public schools, to-wit: The making of good citizens, physically, mentally and morally, than the study of algebra and Latin, is an absurdity. Competitive athletic games, therefore, from every standpoint may properly be included in a

public school curriculum. and 'a structure whose chief purpose is to provide for the better giving of such competitive athletic games and sports, as aforesaid, is reasonably a schoolhouse within the true spirit and meaning of the law."

In the case of Jones v. Sharyland Independent School District, 239 S.W. 2d 216, the Supreme Court of Texas held that money voted for the erection of a school building could be used for the erection of a gymnasium. At l.c. 218 of its opinion, the court stated:

"* * * It has been definitely held in this State that a gymnasium is a school building. Landrum v. Centennial High School District, Tex. Civ. App. 146 S.W. 2d 799. Article 2663a, Vernon's Ann, Civ. Stats., in effect, required that physical education be taught in our public schools and it is apparent that a gymnasium is necessary to the proper teaching of physical education. Therefore, the Trustees of the Sharyland Independent School District would be justified under the constitution and the statutes in using a portion of the proceeds of the sale of these bonds, which were duly voted by the electors of that district, for the purpose of erecting a gymnasium."

It is true that these last two cases cited by us relate to gymnasium, and not to bleachers. However, we believe that a sufficiently close relationship exists between these two subjects to make these cases relevant to the issue herein.

CONCLUSION

It is the opinion of this department that proceeds from the sale of General Obligation Bonds of the Kansas City School District, issued pursuant to a favorable vote on May 29, 1951, of more than two-thirds of the electors voting at a special election, may be used for the construction of bleachers and accompanying facilities in athletic fields on public high school sites owned and operated by the Kansas City School District.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/ld

MOTOR VEHICLES: PROBATE COURTS: Creditor who obtains refusal of letters on estate of decedent in accordance with Section 461.120, RSMo 1949, entitled to transfer of motor vehicle but must show Director of Revenue authority from proper court if director requires.

XXXXXXXXXXX

JOHN M. DAL TON



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J. C. Johnsen

Honorable H. A. Kelso Judge Magistrate and Probate Court Vernon County Nevada, Missouri

Dear Mr. Kelso:

This is in reply to your recent request for an opinion in which you state as follows:

"In my official capacity as Probate Judge of Vernon County, Missouri, I wish to request an official opinion from your department on the following set of facts. In the event an opinion has already been prepared, I would appreciate receiving a copy of the same.

"In answer to a letter which I had written to the Motor Registration Department concerning this same set of facts, which response was both prompt and courteous, I was advised that 'There is no circumstances whatever under which an automobile of a deceased person might be transferred to a first class claimant without the appointment of an administrator.'

"My facts are briefly as follows (and unfortunately this same set of facts arises again and again and for this reason the question assumes some importance). One Majors died leaving no widow, no minor heirs and no assets except an automobile valued at less than \$100.00. My question is whether a first class claimant might not have this automobile transferred to him in payment of his claim

without the expense and trouble incident to a formal administration.

"Under Section 261.120, Revised Statutes of 1949, it is provided 'Proof may be allowed by or in behalf of . . . creditor . . . that the estate does not exceed \$100.00, when application is made by a creditor the Court or Judge may order no letters of administration be issued on such estate unless upon the application of other creditors or parties interested, the existence of other or further property be shown.'

"The statute goes on to say 'and after making such order and until such time as the same may be revoked . . . creditor . . . shall be authorized to collect and sue for personal property belonging to such estate; in the same manner and with the same effect as if he or she had been appointed and qualified as Executor or Executrix of such estate . . . and the creditor shall apply the proceeds thereof to the debts of the estate. !"

We understand that your reference was intended to be to Section 461.120, RSMo 1949, from the context of these sections.

A title to personal property certainly will vest in one who takes or purchases under the proper administration of the above section. As we see it, Section 461.120 places the widower, widow, minor child or creditor in the position of a representative of the deceased in making a transfer of a certificate of ownership.

In regard to application for a certificate of ownership for a motor vehicle, the duties of the Director of Revenue are prescribed by the first part of paragraph 2 of Section 391.190, RSMo 1949, as follows:

"2. The director of revenue shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise

entitled to have the same registered in his name, shall, thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. * * *."

It is this section that has caused the Director of Revenue to require evidence of ownership and leaves a duty with the Director to determine the truth of the matter stated in the application. In the matter of Hoshaw vs. Fenton, 110 S.W. (2d) 1140, the Springfield Court of Appeals considered a certificate of ownership transferred by an executor of an estate, at 1.c. 1143, as follows:

"* * * Replevin is primarily an action for possession of personal property, but, incidentally, the question of title may become involved, and in such cases, plaintiff must recover, if at all, upon the strength of his own title and not because of defects in the title of defendant. Leete v. State Bank of St. Louis, 141 Mo. 584, 42 S.W. 927. The evidence discloses that John E. Hoshaw was the registered owner of the car, his certificate of title being dated September 18, 1935; that he died October 13, 1935; that Wm. O. Hoshaw thereafter qualified as executor of the estate of deceased, whereupon, no legal impediments intervening, he became entitled, as such executor, to the possession of all the personal property of deceased, including the Dodge car. Since plaintiff claims title, and the evidence discloses that he has title to the car, and defendant in her answer admits that he has the legal title thereto, he is therefore entitled to the possession of the car."

The Court in further regard to this transfer stated:

"Section 7774, R.S.Mo. 1929 (Mo. St. Ann. g 7774, p. 5193), sets forth clearly and unequivocably the steps to be taken in order to transfer title to a registered motor vehicle. * * * *."

It is provided in paragraph 4 of Section 301.210, RSMo 1949, for the sale or transfer of vehicles as follows:

"4. It shall be unlawful for any person to buy or sell in this state any motor vehicle or trailer registered under the laws of this state, unless at the time of the delivery thereof, there shall pass between the parties such certificate of ownership with an assignment thereof, as herein provided, and the sale of any motor vehicle or trailer registered under the laws of this state, without the assignment of such certificate of ownership, shall be fraudulent and void."

The transfer of a motor vehicle by an executor in Hoshaw vs. Fenton, supra, has passed the approval of the Appellate Court. The provisions in Section 7774, R.S.Mo 1929, confirming transfer of motor vehicles, are now found in Section 301.210, R.S.Mo. 1949. We feel that a transfer by an executor or an administrator or a creditor under Section 461.120, R.S.Mo. 1949, is a valid transfer when the provisions of Section 301.190, R.S.Mo. 1949, are complied with.

But it is still directed by statute that the director be satisfied that the applicant is the lawful owner.

It has been held by our courts that the then Commissioner of Motor Vehicles had authority to require a certificate of acknowledgement by a notary public upon a transfer of title to a motor vehicle.

In State v. Wilson, 207 S.W. (2d) 785, l.c. 790, it was said in part:

"The statute leaves the form of the assignment to be prescribed by the Commissioner. The form the Commissioner did prescribe, and which is printed thereon, includes a certificate of acknowledgment by a Notary Public. This was a proper requirement and the assignment would not be complete or effective without it. The Commissioner could have prescribed any other form for the proof to him of the genuineness of the assignment, such as requiring that the signature of the vendor be attested by one or more witnesses, or that the vendor make oath to the assignment, but what the Commissioner did do was make a requirement that the assignment be acknowledged. would be an open gate to fraud and forgery for the law to require the Commissioner to accept an assignment of a certificate of ownership without proof that it was genuine. * * *

Since the statutes require satisfaction on behalf of lawful ownership and he is charged with "reasonable diligence" to ascertain the truth of statements we believe that the Director of Revenue has authority under the statutes in regard to motor vehicle registration to require proof of the right of any one other than the holder of a certificate to assign it either under refusal of letters, appointment as administrator or as an executor. When the above right stems from an order of a court of proper jurisdiction, in view of the quoted statutes and the court decisions on them, we think the director will be within his authority in requesting a copy of that order.

Our answer then to the first question presented by your inquiry is that a creditor may under proper letters of refusal of the probate court transfer the certificate of ownership to a motor vehicle. As to the method of proof necessary for such transfer of ownership the Director of Revenue may require evidence of the transaction which placed the creditor in the position to make a bona fide transfer and he may call upon the applicant for authenticated records of the action of the proper court to prove "lawful ownership."

CONCLUSION

Therefore, it is the opinion of this office that a creditor may under proper letters of refusal of the probate court transfer the certificate of ownership to a motor vehicle when letters of refusal have been granted to him under Section 461.120, RSMo. 1949. It is further the opinion of this office that the Director of Revenue may require submission of authenticated records of a proper court showing the authority of the transferor to make such transfer on behalf of deceased.

This opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Very truly yours,

JOHN M. DALTON Attorney General LIQUOR: No intoxicating liquor or 3.2 per cent non-intoxicating liquor WATERS: license may be issued to boats operating on Lake of the Ozarks.



June 9, 1953

Mr. Hollis M. Ketchum Supervisor Department of Liquor Control Jefferson City, Missouri

Dear Mr. Ketchum:

This will acknowledge receipt of your request for an opinion, which reads:

"This is to request an official opinion, as to whether the Department of Liquor Control can issue Intoxicating Liquor licenses and 3.2% Non-Intoxicating Beer licenses to boats on the Lake of the Ozarks.

"I have an application for a 3.2 Non-Intoxicating Beer license, for the Larry Don Excursion Boat, whose docks are near Bagnell Dam. This dock is of permanent construction, made of concrete and steel. The boat leaves on excursions on a route prescribed by the Coast Guard, and is possibly 8 or 10 miles long. These excursions are possibly of an hour's duration. This boat is not allowed to deviate from the route prescribed by the Coast Guard. The boat then returns and is anchored at the permanent docks."

You inquire if the Supervisor of Liquor Control of the State of Missouri may issue an intoxicating liquor license and a 3.2 per cent non-intoxicating beer license to boats operating on the Lake of the Ozarks. This department under date of March 10, 1937 rendered an opinion to the Department of Liquor Control, State of Missouri, holding that it would be illegal to issue licenses for the sale of intoxicating Miquor and beer on boats and vessels operating on navigable streams in this state. Subsequent thereto, and on November 17, 1939, this department rendered an opinion to the then supervisor of Liquor Control, State of Missouri, holding that boats operating on navigable streams within this state cannot be licensed to sell intoxicating liquor, and, therefore, all such sales thereon are illegal.

Mr. Hollis M. Ketchum

The law relative to the authority of the Supervisor of Liquor Control, State of Missouri, to issue licenses for the sale of intoxicating liquor and beer on boats and vessels so far as we are able to determine is still the same.

CONCLUSION.

Therefore, it is the opinion of this department in the absence of some specific statute authorizing the Supervisor of Liquor Control, State of Missouri, to issue licenses for boats and vessels for sale of intoxicating liquor and beer similar to that now in full force and effect for railroad companies or railway sleeping cars operating in this state under Section 311.200, RSMo 1949, that such licenses cannot be issued.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH:SW

BOARD OF ACCOUNTANCY:

State Board of Accountancy has no power with or without a rule to that effect to prohibit the use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy; nor does it have any power to refuse, on that ground alone, to register the name of a partnership or issue a permit to practice.

September 23, 1953



Honorable Thomas M. Keyes President State Board of Accountancy 209 Monroe Street Jefferson City, Missouri

Dear Sir:

Following is our opinion based on your request of August 4, 1953, which request reads as follows:

"For some time it has been the policy of the Missouri State Board of Accountancy to refuse to permit the use of a firm name by two practitioners of public accountancy which includes the two partners' names in conjunction with 'and Company. For example, the board has approved the designation of a firm such as 'Sharon and Headley' or 'Sharon, Headley Company'; but has refused to approve the designation 'Sharon, Headley and Company' where in fact Messrs. Sharon and Headley are the only members of the firm. The apparent policy behind this restriction has been that the addition of the two words 'and Company' is misleading in that it impliedly represents the association of other persons with the principals where in fact no other persons are so associated with the firm.

"The board has been unable to find within the Missouri law regulating the practice of public accountancy any authority for approving or restricting the aboverelated policy. We would appreciate
your opinion as to whether such a
policy is violative of any rule of
law, or is in any way an infringement
upon a firm's right to designate their
name as they may choose. In other
words, is the State Board of Accountancy empowered to force the deletion
of the words 'and Company' from the
name of a firm under the circumstance
outlined above?"

We infer from the request that the board has promulgated no rule or regulation prohibiting use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy. We assume that the board has from time to time denied registration and has denied the permit provided for in Section 326.040, RSMo 1949, to partnerships whose names include the words "and Company," as a matter of policy and not because the use of such words contravene any duly adopted regulation filed with the Secretary of State.

We believe it is beyond the authority of the Missouri State Board of Accountancy to prohibit the use of the words "and Company" in the name of a partnership practicing public accountancy.

First, let us look at the refusal of registration and permit as a matter of "policy" to a partnership using these words in its name.

Section 326.040, RSMo 1949, provides that "the board shall authorize the registration, as certified public accountants, of firms and partnerships, provided it be shown to the board that * * *" and there follows a number of conditions with which the partnership seeking registration and permit must comply. Having complied with these conditions, the statute provides the board "shall authorize" the registration.

The board, by the terms of this statute, "shall authorize" the registration. "Shall" is ordinarily held to be a word of mandate negating permissiveness or discretion on the part of the subject of the action. In State v. Wade, 360 Mo. 895, 231 S.W. (2d) 179, 1.c. 181, the court made this observation:

" * * * Certainly statutes that use the word 'shall', and then provide a penalty for failure to do what is required, are mandatory statutes. * * *"

The only inquiry the board is permitted to make relating to the name of the partnership is where the name is a fictitious or assumed name, in which case the board must be shown that the name has been registered with the Secretary of State in compliance with the law of this state, which is embodied in Section 417.200, RSMo 1949. The inclusion of the words "and Company" in a partnership name, so long as the true names of the partners are included, probably does not necessitate the registration of such name with the Secretary of State as a fictitious name under Section 417 .-200, supra, although there is no authority on the point in Missouri and the cases in other states are divided. See 65 C.J.S., Names, Sec. 9, N. 51. The requirement of compliance with the law relating to registration appears to be the only limitation upon the right to use a fictitious name. That having been done, Section 362.040, RSMo 1949, Subsection 5, provides, "a firm or partnership may make use of a fictitious name." The board has no authority to limit the law in this respect.

Second, we concern ourselves with the power of the board to promulgate a rule forbidding the use of the words "and Company" in the name of a partnership practicing public accountancy.

We think no such power is vested in the Board. The rule-making power of the Board is provided by Section 326.170, Subsection 1, RSMo 1949, which gives the power "to make and amend all rules deemed necessary for the proper administration of this chapter." We think this rule is not necessary to the administration of the chapter.

Nor do we think such a rule--or policy--could be related to the power "to do and perform all other acts and things herein committed to their charge and administration, or incidental thereto," contained in Section 326.170, Subsection 1, RSMo 1949. This evidently does not refer to rule making, since that has been previously covered in the same section. The rule under consideration would seek to limit Section 326.040, RSMo 1949, in that it would purport to impose an additional condition upon permit and registration. This is beyond the power of any administrative agency.

"Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the law-makers' intent in other statutes." 42 Am. Jur., Public Administrative Law, Sec. 53.

CONCLUSION

It is the opinion of this office that the Missouri State Board of Accountancy has no power with or without a rule to that effect to prohibit the use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy; nor does it have any power to refuse, on that ground alone, to register the name of a partnership or issue a permit to practice.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

ELEEMOSYNARY INSTITUTIONS: CONSTRUCTION OF HOUSE BILLS NOS. 457 and 459:

The grant by the City of St. Louis to the State of Missouri, on July 19, 1948, of the colony for feeble-minded and epileptics, and the state hospital for the insane, were absolute grants unconditioned and without possibility of reverter; the state of Missouri is not bound to perpetually maintain the two above institutions; personal property or additions made to them after the grant cannot revert to the City of St. Louis.

4/8

Honorable Edgar J. Keating, Senator, 9th District of Missouri 1250 Dierks Building Kansas City, Missouri November 25, 1953

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

"The Sixty-fourth General Assembly passed two bills providing for the transfer of the St. Louis City Sanitarium and the St. Louis Training School to the State of Missouri. See Laws of 1947, pages 247 and 250. Section three of each of these bills contains a provision that the title acquired by the state would be upon the express condition that upon acquiring the institutions the state would take charge of the same and maintain them for the previous purposes, etc.

"I have been informed that the transfer to the state was by deed containing a reservation to the effect that if the state ceased to maintain the institutions the title would revert to the City of St. Louis. I do not believe that this reversion can be read into the provisions of the above laws, therefore I do not believe that the laws bound the state to operate these institutions at their present locations perpetually."

- "1. Does the City of St. Louis under these laws have a right to the property and improvements in the event the General Assembly decided to abandon these institutions and build new institutions elsewhere?
- "2. Is the state perpetually bound under these laws to maintain these institutions at their present locations, even though changing circumstances may indicate the necessity for abandoning the present locations?

"3. In the event of such abandonment would the City of St. Louis be entitled to the additions, capital improvements, and the additional personal property such as X-Ray, laboratory equipment, etc., provided after the transfer of title by the 1947 laws?"

In order to fully present the issues here involved we deem it necessary to set forth in detail the events leading up to the situation with which we are here presented.

On June 24, 1947, the City of St. Louis, through its duly authorized representatives, enacted Ordinance No. 14153, Sections 1 and 2 of which read:

"Be it ordained by the City of St. Louis, as follows:

"Section One. The Mayor and Comptroller are hereby authorized to transfer and convey to the State of Missouri or to such agency or department of the State as may be duly designated by the General Assembly thereof, the institution, buildings and ground known as the City Sanitarium located on Arsenal Street west of Brannon Avenue and east of Sublette Avenue in the City of St. Louis, Missouri, including the equipment therein for the sum of One Dollar (#1.00). and to sell to the State all medical supplies, food and coal at said institution at the time of such transfer at a price to be agreed upon between the City, acting by and through its Comptroller and the State, acting by and through its proper officers and agents, and to enter into a contract with the State providing for the temporary furnishing to the City of St. Louis of electric current, heat, hot water, refrigeration, and other services now being supplied to other City institutions by the power plant located in the City Sanitarium at a charge for such services to be mutually agreed upon between the City, acting by and through its Comptroller and the State, acting by and through its proper officers and agents.

"Section Two. The authority conferred upon the Mayor and Comptroller in the preceding Section shall not be exercised until the General Assembly of the State of Missouri shall have enacted legislation authorizing the State of Missouri to accept the City Sanitarium from the City of St. Louis with the understanding that the State of Missouri shall maintain and operate said institution as a State Hospital for the insane."

On December 22nd, 1947, the City of St. Louis, through its duly authorized representatives, enacted Ordinance No. 44325 Section 1 of which ordinance reads in part:

"Section One. The Mayor and Comptublier are hereby authorized to transfer and convey to the State of Missouri, or to such agency or department of the State as may be duly designated by the General Assembly thereof, the institution and buildings located at Bellefontaine and Hall Roads in St. Louis County, Missouri, known as the St. Louis Training School, together with the equipment and supplies therein, and the whole or any part of the ground upon which the St. Louis Training School is located, for the sum of One Dollar; the said lands, the conveyance of the whole or any part of which is hereby authorized, being more particularly described substantially as follows; " "

Section 2 of the aforesaid Ordinance reads:

"Section Two. The authority conferred upon the Mayor and Comptroller in the preceding section shall not be exercised until the General Assembly of the State of Missouri shall have enacted legislation authorizing the State of Missouri to accept the St. Louis Training School from the City of St. Louis, and providing that, after acquiring the said institution, buildings and ground, or a designated part thereof, the State of Missouri, through the Department of Public Health and Welfare, or any other than existing or thereafter established appropriate agency. shall take charge of said institution, and the same shall be maintained, managed, controlled and operated as a State school or colony for feeble-minded and epileptics in accordance with the provisions of Article VI, Chapter 51, of the Revised Statutes of Missouri, 1939, and any other law now existing or which may be hereafter enacted relating to the institutions provided for in said article." (Underscoring ours).

Thereafter, on April 13, 1948, the 64th General Assembly of Missouri enacted House Bill No. 457, Section 1 of which reads in part as follows:

"Section 1. Transfer of property on which is located the St. Louis City Sanitarium to the State of Missouri. -- The State of Missouri is hereby authorized and directed to accept, in the manner and subject to the conditions hereinafter provided, the transfer and conveyance from The City of St. Louis, or from the Mayor and Comptroller thereof, of the institution, buildings and ground located on Arsenal

Street west of Brannon Avenue and east of Sublette Avenue in the City of St. Louis, Missouri, known as the City Sanitarium, together with the equipment therein, for the sum of One Dollar; the said grounds, the conveyance of which is hereby authorized and directed to be accepted, being more particularly described substantially as follows:

Sections 2 and 3 of the aforesaid bill read as follows:

"Section 2. Director of Department of Public Health and Welfare designated to accept transfer. -- The director of the Department of Public Health and Welfare is hereby designated as the state officer authorized and directed on behalf of the State of Missouri to accept the transfer and conveyance of all or any part of the above-described lands. The property so transferred and conveyed shall be held, occupied and controlled by the Department of Public Health and Welfare, and title thereto shall vest in the Director of Public Health and Welfare, as trustee, for and on behalf of the State of Missouri, pursuant to the Laws of Missouri, 1945, page 948, section 10.

"Section 3. City sanitarium to be operated as a state hospital .-- The title acquired by the State of Missouri to the lands, buildings and equipment described herein shall be upon the following express conditions, to-wit, that after acquiring the said institution, buildings and ground, the State of Missouri, through the Department of Public Health and Welfare, or any other then existing or thereafter established appropriate agency, shall take charge of said institution, buildings and ground, and the same shall be maintained, managed, controlled and operated as a State hospital for the insame in accordance with the provisions of Articles 1, 2 and 4, Chapter 51 of the Revised Statutes of Missouri, 1939; of Sections 1 to 36, inclusive, Laws of Missouri, 1945, pages 945 to 956, inclusive; of Laws of Missouri, 1945, pages 902, 903, 905, 906-913, inclusive; and of any other law now existing or which may be hereafter enacted relating to state hospitals for the care and treatment of the insene: Provided, that nothing in this Act shall be construed to prevent the State of Missouri or any proper agency thereof from providing for the care and treatment of any insane person or persons upon any premises or at any institution other than the premises and institution transferred to the State pursuant to this (Underscoring ours).

Honorable Edger J. Keating

And on the same day the 64th General Assembly of Missouri enacted House Bill No. 459, Section 1 of which reads in part:

WSection 1. Transfer of property on which is located the St. Louis Training School to the state of Missouri .-- The state of Missouri is hereby authorized and directed to accept, in the manner and subject to the conditions hereinafter provided, the transfer and conveyance from The City of St. Louis, or from the Mayor and Comptroller thereof, of the institution and buildings located at Bellefontaine and Hall Roads in St. Louis County, Missouri, known as the St. Louis Training School, together with the equipment and supplies therein, and the ground upon which the St. Louis Training School is located, for the sum of One Dollar; the said lands, the conveyance of which is hereby authorized and directed to be accepted, being more particularly described substantially as follows:

Sections 2 and 3 of said bill read as follows:

"Section 2. Director of Department of Public Health and Welfare designated to accept transfer. -- The Director of the Department of Public Health and Welfare is hereby designated as the state officer authorized and directed on behalf of the State of Missouri to accept the transfer and conveyance of the above-described lands. The property so transferred and conveyed shall be held, occupied and controlled by the Department of Public Health and Welfare, and title thereto shall vest in the Director of Public Health and Welfare, as trustee, for and on behalf of the State of Missouri, pursuant to the Laws of Missouri, 1945, page 948, section 10.

"Section 3. Training school to be operated as state school or colony for feeble-minded.--The title acquired by the State of Missouri to the lands, buildings and equipment described herein shall be upon the following express conditions, to-wit, that after acquiring the said institution, buildings and ground, the State of Missouri, through the Department of Public Health and Welfare, or any other then existing or thereafter established appropriate agency, shall take charge of said institution, buildings and ground, and the same shall be maintained, managed controlled and operated as a State school or colony for feeble-minded and epileptics in accordance with the provisions of Article 6,

Chapter 51, of the Revised Statutes of Missouri, 1939, of Sections 1 to 36, inclusive, Laws of Missouri, 1945, pages 945 to 956, inclusive, and of any other law now existing or which may be hereafter enacted relating to institutions for the care and treatment of feeble-minded and epileptics: Provided, that nothing in this Act shall be construed to prevent the State of Missouri or any proper agency thereof from providing for the care and treatment of any feeble-minded or epileptic person or persons upon any premises or at any institution other than the premises and institution transferred to the State pursuant to this Act."

Thereafter, on July 19, 1948, the City of St. Louis, through its duly authorized representatives, executed two quit claim deeds, which, omitting the legal description of the property conveyed and the attestation clause, read as follows:

"THIS DEED, Made and entered into this nineteenth day of July, nineteen hundred and fortyeight, by and between THE CITY OF ST. LOUIS, a municipal corporation, by and through Aloys P. Kaufmann, Mayor, and Louis Nolte, Comptro ller, of The City of St. Louis, State of Missouri, Party of the First Part, and the DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF THE STATE OF MISSOURI, as Trustee for the State of Missouri, Party of the Second Part.

"WITNESSETH, that the said Party of the First Part, for and in consideration of the sum of One Dollar (\$1.00), paid by the said Party of the Second Part, the receipt of which is hereby acknowledged, does by these presents REMISE, RELEASE AND FOREVER QUIT-CLAIM unto the said Party of the Second Part the institutions, buildings and ground known as the City Sanitarium, located on Arsenal Street west of Brannon Avenue and east of Sublette Avenue in the City of St. Louis and State of Missouri, with the understanding that the State of Missouri shall maintain and operate said institutions as a State Hospital for the insene, the above grounds being more particularly described substantially as follows:

* * * * * * *

"TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said Party of the Second Part, its successors and assigns forever, with the understanding that the state of Missouri shall maintain and operate

said institutions as a State Hospital for the insane.

"IN WITNESS WHEREOF, the said Party of the First Part has executed these presents the day and year first above written.

"THIS DEED, Made and Entered into this nineteenth day of July, nineteen Hundred and Forty-eight, by and between THE CITY OF ST. LOUIS, a municipal corporation, by and through Aloys P. Kaufmann, Mayor, and Louis Nolte, Comptroller, of The City of St. Louis, State of Missouri, Party of the First Part, and the DIRECTOR OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF THE STATE OF MISSOURI, as Trustee for the State of Missouri, Party of the Second Part.

"WITNESSETH, that the said Party of the First Part, for and in consideration of the sum of One Dollar (@1.00), paid by the said Party of the Second Part, the receipt of which is hereby acknowledged, does by these presents REMISE, RE-LEASE AND FOREVER QUIT-CLAIM unto the said Party of the Second Part, the institution, buildings and ground located at Bellefontaine and Hall Roads in St. Louis County, Missouri, known as the St. Louis Training School, providing that, after acquiring the said institution, buildings and ground, or a designated part thereof, the State of Missouri, through the Department of Public Health and Welfare, or any other then existing or thereafter established appropriate agency, shall take charge of said institution, and the same shall be maintained, managed, controlled and operated as a State school or colony for feeble-minded and epileptics in accordance with the provisions of Article VI, Chapter 51, of the Revised Statutes of Missouri, 1939, and any other law now existing or which may be hereafter enacted relating to the institutions provided for in said article, the said lands being more particularly described substantially as follows:

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"TO HAVE AND TO HOLD the same, together with all rights and appurtenances to the same belonging, unto the said Party of the Second Part, its successors and assigns forever, providing that, after acquiring the said institution, buildings and ground, or a designated part thereof, the State of Missouri, through the Department of Public Health and Welfare,

or any other then existing or thereafter established appropriate agency, shall take charge of said institution, and the same shall be maintained, managed, controlled and operated as a State school or colony feeble-minded and epileptics in accordance with the provisions of Article VI, Chapter 51, of the Revised Statutes of Missouri, 1939, and any other law now existing or which may be hereafter enacted relating to the institutions provided for in said article.

"IN WITNESS WHEREOF, the said Party of the First Part has executed these presents the day and year first above written." (Underscoring ours.)

Your first question is: "Does the City of St. Louis, under these laws, have a right to the property and improvements (of these two properties conveyed) in the event the General Assembly decided to abandon these institutions and build new institutions elsewhere?"

Stated in legal terms, the question which we have to decide is whether these two grants by the City of St. Louis to the State of Missouri were conditioned upon use and could be said to contain a reverter clause so that if at any future time the State of Missouri ceased to use these two properties, or either of them, for the type of state institution for which these two properties were being used at the time of the grant, the property would revert to the City of St. Louis.

In the deed of the City Sanitarium the only words which touch upon this issue are . . "with the understanding that the State of Missouri shall maintain and operate said institution as a state hospital for the insane...".

In the deed of the feeble-minded and epileptic institution the only words which touch upon this issue are . . "providing that, after acquiring the said institution. . . the State of Missouri. . . shall take charge of said institution . . . and the same shall be maintained as a state school or colony for feeble-minded and epileptics . . ".

If there is a reverter in these two deeds it must be found in the above portions of the deeds.

We would first direct attention to the case of Chouteau v. City of St. Louis, 55 S.W.(2d) 299, l.c. 301, in which the Supreme Court of Missouri discusses the matter of a conditional fee and of reverter as follows:

"In counts two and three of the petition plaintiff pleaded in the alternative. He thereby pleads that the deed conveyed, either a determinable fee or a conditional fee. However, he insists that the deed conveyed a determinable fee. In a determinable estate the condition is incorporated into and forms part of the limita-

tion (grant). Goodeve: Modern Law of Real Property (3d Ed.) p. 180. The grant in such case is not upon a condition subsequent, and no re-entry is necessary; but by the terms of the grant the estate is to continue until the happening of some event. And upon the happening of said event, the estate will cease and determine by its own limitation. The proper words for the creation of such an estate are, 'until,' 'during,' 'so long as,' and the like. Thompson on Real Property, Sec.2105, pp. 170, 171. Challis: Real Property, 1885, p. 206.

"(4) As stated by defendant city, 'the deed under consideration uses none of these words, nor does it use any other expression indicating an intention to cut the title to a base or determinable fee, nor is there any clause in the deed providing for a reverter. The conveyance of tall of their right, title, claim, interest and estate, by the grantors directly negatives the idea of a reverter. The grant was forever, and not "so long as", "while", "during" or "until".

"Plaintiff argues that the words of condition following the habendum clause of the deed is an expression indicating an intention to convey a determinable fee. We do not think so. The condition follows: ** * * But upon this Condition nevertheless that the said piece of ground by these presents given and Conveyed shall be used and appropriated "forever" as the site on which the Court house of the County of St. Louis shall be erected. The words 'upon condition' may be used to form a part of a limitation (grant) and thereby convey a determinable fee. But in this deed said words introduced a new clause. 3 Thompson, Real Prop., Sec. They were superadded to the limitation of the estate. Goodeve: Modern Law of Real Property (3d Ed.) p. 180; i Tiffany: Real Prop. (2d Ed.) Sec. 90. It follows that the deed did not convey a determinable fee."

It will be noted that the Court held that the proper words for the creation of a conditional fee in a grant are "until," "during," "so long as," and the like. It is noted that no such words are present in either of the deeds in the instant case.

We would next direct attention to the case of Holekamp Lumber Co. v. State Highway Commission, 173 S.W. 2d, 938, at l.c. 942, et seq. of its opinion the Missouri Supreme Court states in regard to the matter of conditional grant and reverter:

"The question whether a clause in a deed (or contract) is a condition subsequent or a covenant is one of intent to be gathered from the whole instrument by following out the object and the spirit of the deed or contract. City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615; Haydon v. St. Louis & S. F. R. Co., 222 Mo. 126, 121 S.W. 15.14 * * conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates. * * * When relied on to work a forfeiture, they must be created in express terms or by clear implication. * * * Morrill v. Wabash St. L. & P. Ry. Co., 96 Mo. 174, 9 S.W. 657, 659. This is the universal rule. University City v. Chicago R. I. & P. R. Co., supra; Haydon v. St. Louis & S. F. R. Co., supra; Catron v. Scarritt Collegiate Institute, 264 Mo. 713, 175 S.W. 571; German Evangelical Church v. Schreiber, 277 Mo. 113, 209 S.W. 914; Chouteau v. City of St. Louis, 331 Mo. 781, 55 S.W. 2d 299; Bagby et al. v. Missouri-Kansas-Texas R. Co., Mo. Sup. 171 S.W. 2d 673. Plaintiff has not alleged that the grant contained express terms that a breach of the condition should work a forfeiture, or any provision for a reverter of the fee (of of the use) upon the breach of the condition, or any provision, we believe, from which an intention that there should be a forfeiture may be clearly implied. The defendant (grantee) is charged by law with the responsibilities and vested with the powers necessary to construct and maintain the state highway system of Missouri, of which Missouri State Highway No. 30 is a part. After the grant, the defendant did maintain the highway along plaintiff's premises at the then existing grade for a period of approximately six years. But, considering the object of the grant -- use 'as a part of said highway for highway purposes! -- it may not be clearly implied that the parties intended, should the defendant find it necessary to change the grade of the highway from the grade which was existent at the time of the grant. that the defendant should forfeit the land, or its use, and that the fee, or user, should revert to plaintiff and the public be deprived of the use thereof, thus defeating the very object to the grant. (Underscoring ours.)

"Nor does the language of the grant, as alleged, amount to the creation of a determinable fee qualified by limitation (fee simple determinable), which terminated ipso facto upon the occurrence of the event, or upon the cessation of the use, by which the estate is qualified. In order to create such a fee, it is necessary that words (absent in the grant as alleged herein) in the grant by which the limitation is expressed should relate to time. Appropriate words for the creation of such a fee are 'until,' 'during,' 'so long as,' and the like. Chouteau v. City of St. Louis, supra; Vol. I, Property. Restatement of the Law, Sec. 44, Comment 1, p. 128."

We would now direct attention to the case of Fuchs v. Reorganized School Dist. No. 2, Gasconade Co., 251 S.W. 2d 677, at 1.c. 678, et seq., the Court in its opinion states:

"Plaintiffs, the only heirs of the grantors in the deed later set forth, base their claim of title on the propositions that the deed conveyed to School District 51 (defendant's predecessor in title) a determinable fee with a possibility of reverter; that defendant had abandoned the real estate for school purposes; that the intent of the grantors was to provide for the automatic reversion of the fee simple estate upon abandonment; and that the possibility of reverter has descended to plaintiffs as the heirs of the grantors.

"Defendant contends that the deed conveyed a fee simple title with no limitations or conditions on the grant.

"The deed, dated August 30, 1892, was: 'Know All Men By These Presents: That Anton Fuchs, and Annie Buchs, of the County of Gasconade, in the State of Missouri, have this day, for and in consideration of the sum of One and no/100 Dollars to the said Anton Fuchs in hand paid by School District No. Fifty-One, Township No. 11, Range Five West, of the County of Gasconade, in the State of Missouri, Granted, Bargained, and Sold, and by these presents do Grant, Bargain and Sell, unto the said School District on which to Keep and Maintain a Public School-House, the following described tracts or parcels of Rand, situated in the County of Gasconade, in the State of Missouri, that is to say:

"'one Acre, bounded as follows: Commencing at the Northwest corner of the Southeast Qr. of the Northwest Qr. of Section No. Eleven, in Township No. Forty-One (41) Range No. Five (5) West; thence running South 8 Rods; thence East 20 Rods, thence North 8 Rods and thence West 20 Rods to the place of beginning.

"'To Have And To Hold The premises hereby conveyed, with all the rights, privileges and appurtenances thereto belonging or in anywise appertaining, unto the said School District No. 51. Twp. 41, Range 5 West, for the above purpose, forever, I, the said Anton Fuchs hereby covenanting to and with the said School District No. 51, Twp. 41, Range 5 West and its assigns, for himself, his heirs, executors and administrators to Warrant and Defend the title to the premises hereby conveyed, against the claim of every person whatsoever.'

"Plaintiffs contend that the language in the granting clause 'on which to Keep and Maintain a Public School-House' and the language 'for the above purpose' in the habendum clause, limited the estate conveyed to a determinable fee.

"We are of the opinion that the deed conveyed a fee simple title without limitation or condition. The language relied upon by plaintiffs constitutes nothing more than an expression or declaration of the purpose for which the grantors expected the land to be used. The deed contains no express exception or reservation, no express limitation upon the duration of the estate conveyed, no express condition upon which the estate was conveyed, and no express provision for forfeiture, for re-entry, or for reverter.

"Plaintiffs concede that there are no express terms in the deed which provide for a reverter in the event that a public school house is no longer kept and maintained. However, they contend that such intention is manifest from a consideration of the deed as a whole; that the words on which to Keep and Maintain a Public School-House' and 'for the above purpose' are 'insufficient to create "a possibility of reverter" even though it (the limitation) may be lacking in completeness and precision, and that to 'give force

to a "possibility of reverter", the law implies a reverter as of necessity to effect the for-feiture.! The difficulty with plaintiffs! contention is that there is nothing in the deed or in the evidence as to circumstances under which it was executed from which an intention to convey a determinable fee may be found. No words usually employed to create such an estate, like 'until', 'during', 'so long as', are used, nor is any other language used in the deed expressing or indicating an intention to limit the title to a determinable fee. Chouteau v. City of St. Louis, 331 Mo. 781, 790 (3), 791 (4), 55 S.W. 2d 299, 301 (3), (4). This is not a case in which language has been used which, though not complete or precise, is sufficient to permit the court to find an intent to convey a determinable fee. Plaintiffs rely upon Koehler v. Rowland, 275 Mo. 573, 582, 205 S.W. 217, 219, 9 A.L.R. 107. That case on its facts lends no support to plaintiffs' position. The rule of construction there stated is a proper one, viz., 'If the grantors fail to express their contract with completeness and precision, but the intention, nevertheless, clearly appears from the instrument, if its spirit and purpose are manifest from a consideration of the instrument as a whole, it will be given an interpretation in accordance with such intention. 205 S.W. 219. But this rule may not be applied to the instant deed. Here. there is no manifest purpose clearly appearing from the deed as a whole justifying the interpretation contended for by plaintiffs. We may not rewrite a deed in order to effectuate what conjecturally may have been the unexpressed intention of the grantors.

"It is well established that language which merely states the purpose for which land is conveyed and which does not contain words which relate to time, does not create a determinable fee. Holekamp Lumber Co. v. State Highway Commission, Mo. Sup., 173 S.W. 2d 938, 943 (8,9); Chouteau v. City of St. Louis, supra; note 44 L.R.A., N.S., 1220, 1222 (III).

"It is true that the consideration expressed in the instant deed was \$1. Consideration may be a proper circumstance to consider as an aid in determining the intention of the parties. The fact that the consideration was nominal might, in connection with language lacking in preciseness or in connection with other circumstances surrounding the conveyance, be an important aid in determining whether a determinable fee was intended to be conveyed. But, as here, the fact of nominal consideration, standing alone, is not sufficient from which to find an intention to convey other than an unlimited fee.

"Plaintiffs do not contend that the deed conveyed an estate upon condition subsequent. Clearly, it did not. Chouteau v. City of St. Louis, supra, 55 S.W. 2d 301; Holekamp Lumber Co. v. State Highway Commission, supra, 173 S.W. 2d 942 (5-7).

"We hold that the deed from Mr. and Mrs. Fuchs conveyed an absolute estate in fee simple; that defendant is vested with fee simple title to the described real estate; that plaintiffs have no right, claim, interest, or title in or thereto."

We particularly note the statement above, "language which merely states the purpose for which land is conveyed and which does not contain words which relate to time, does not create a determinable fee." This, it seems to us, is the situation in the instant cases, for these deeds merely state the purpose for which the property conveyed is to be used, and no time limit is included or indicated.

We feel, furthermore, that if it had been the intention that in case the state ceased to maintain and use these properties for the original purposes, that the property would revert, that the representatives of the City of St. Louis would have so stated in these deeds, and that not having done so such intention cannot be read into either of these documents.

Finally, it is our feeling that the State of Missouri, in the enabling acts quoted above (House Bill No. 457 and House Bill No. 459) was very careful not to bind itself to perpetually maintain these two institutions for any particular length of time or to maintain them at all. It will be noted that House Bill No. 457 states:

"Provided, that nothing in this Act shall be construed to prevent the State of Missouri or any proper agency thereof from providing for the care and treatment of any insane person or persons upon any premises or at any institution other than the premises and institution transferred to the State pursuant to this Act."

House Bill No. 459 states:

"Provided, that nothing in this Act shall be construed to prevent the State of Missouri or any proper agency thereof from providing for the care and treatment of any feeble-minded or epileptic person or persons upon any premises or at any institution other than the premises and institution transferred to the State pursuant to this Act."

These provisions could only mean that the State of Missouri could provide for the care of all of its insane, feeble-minded, and epileptic persons, away from these institutions, which would constitute an abandonment of the use made of these two institutions at the time of transfer.

It would also seem that these provisions stated above would go far to negative any construction which would hold that these two deeds contained reverter clauses which would, in case the State of Missouri ceased to maintain these two institutions for the original purpose, revert back to the City of St. Louis the title in these properties. Let us now look at the enabling ordinances (No. 14153 and No. 14325) supra, to determine whether, under the grant of authority made by them to the mayor and comptroller, these two officials had the authority to convey the property discussed above, without a reverter clause.

The only words in Ordinance No. 44153 which could be construed as restrictive were "with the understanding that the state of Missouri shall maintain and operate said institution as a state hospital for the insane".

In Ordinance No. 141325, the words used were "the same (property) shall be maintained, managed, controlled and operated as a state school or colony for feeble-minded and epileptics * * *".

The deed made by the City of St. Louis under authority of Ordinance No. 44153 uses the very same words that are used in the ordinance. The deed executed by the city under the authority of Ordinance No. 44325 contained the words "provided that, after acquiring the said institution * * * the state * * * shall take charge of said institution * * * and the same shall be maintained * * * as a state school or colony for epileptics * * *".

As we pointed out above, the deed executed under authority of Ordinance No. 14153 used exactly the same words that the ordinance used, which words we have held above did not constitute a reverter in the deed. The deed drawn under Ordinance No. 141325 used the words "provided that * * * the institution shall be maintained * * * as a state school * * *".

We also held above that these words, in the deed, did not provide for a reverter. Can we say, then, that words which are used in a deed, when so used do not provide for a reverter, do, when used in a city ordinance, not constitute authority to execute a deed without a reverter clause? We believe that such words, when used in a city ordinance, do give such authority; to hold otherwise would be to hold that when exactly the same words are used in a city ordinance and in a deed they have entirely different meanings in such a significant manner as to not constitute a reverter in the case of the deed, but to constitute a reverter in the case

of the ordinance. For coming to such a conclusion, we find no scintilla of authority in law or justification in reason. We do helieve, therefore, that the above ordinances gave the mayor and comptroller of St. Louis the authority to convey the property without a possibility of reverter.

Let us now look briefly at the enabling acts of the Missouri Legislature 'House Bills Nos. 457 and 459), which constitute an authorization for the state to accept the two St. Louis properties. Both bills state: "The title acquired by the State of Missouri * * shall be upon the following express conditions, to-wit, that after acquiring the said institution * * * the State of Missouri * * * shall take charge of said institution * * * and the same shall be maintained as a state hospital for the insane* * *."

Both bills also state: "Provided, that nothing in this act shall be construed to prevent the State of Missouri or any property agency thereof from providing for the care and treatment of any insane person or persons upon any premises or at any institution other than the premises and institution transferred to the state pursuant to this act."

We believe that the first quoted portion of this bill does nothing more than state the uses to which these properties shall be put after acquisition, and that the last quoted portion 6learly provides that the state is not obligating itself to maintain these institutions perpetually because the reservation in the state of the power to provide for the care of "any insane person or persons" elsewhere, means that if the state so chooses it may not care for any insane persons at the St. Louis institution. do not, therefore, believe that the enabling acts referred to above would prevent the state from accepting title without possibility of reverter to the grantor City of St. Louis. Therefore, our answer to your first question is that if at any time the State of Missouri should cease to use the two properties in question for the use for which they were granted to the state, the properties would not revert to the City of St. Louis. In view of our answer to your first question, our answer to the second question is that the state is not perpetually bound to maintain these two institutions at their present location.

It also follows from the above that our answer to your 3rd question is that in case the State of Missouri ceases to maintain these institutions, the City of St. Louis would not be entitled to the additions, capital improvements, and the additional personal property provided after the transfer of title.

CONCLUSION

It is the opinion of this department that the grant by the City of St. Louis to the State of Missouri, on July19, 1948, of the colony for feeble-minded and epileptics, and the state hospital

Honorable Edgar J. Keating

for the insane, were absolute grants unconditioned and without possibility of reverter; that the State of Missouri is not bound to perpetually maintain the two above institutions; that in case the state should cease to maintain these two institutions the personal property or additions made to them after the grant cannot revert to the City of St. Louis.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON Attorney General ELECTIONS: STATE REPRESENTATIVES: A voter residing in that portion of Kansas City located in Clay County and who desires to vote in a special election to fill a vacancy in the office of state representative must comply with the city registration laws; precinct judges and clerks to be same in number as at general elections.

FILED 49

January 5, 1953 // 13

Honorable Robert G. Kirkland Prosecuting Attorney of Clay County Liberty, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office regarding a special election to be held to fill a vacancy in the office of state representative created by the death of the incumbent who was reelected at the general election held in November 1952.

Your first inquiry is as follows:

"Is a candidate on the ballot duly and legally nominated if the only nomination he receives is that of the county central committee?"

In this regard, I am enclosing a copy of an opinion to Mr. David P. Plummer, Clerk of the County Court, Clinton County, November 16, 1950, discussing the question of the authority of political committies to nominate a candidate for public office to fill a vacancy created after the general election, which I believe is applicable to your question.

You next inquire whether registration is required in Ward 21 of Kansas City, which is located within the boundaries of Clay County, in connection with said election. Chapter 117, RSMo 1949, relates to registrations for elections in cities of 300,000 to 700,000, which would, of course, include the City of Kansas City.

Section 117.020, RSMo 1949, provides that there shall be a registration of voters in cities which have three hundred thousand to seven hundred thousand inhabitants as follows:

"In all cities of this state now having or which hereafter may have three hundred thousand inhabitants and not over seven hundred thousand inhabitants, there shall be a registration of all qualified voters, and the registration of voters and the conduct of elections held in such cities shall be governed by the provisions of this chapter and be subject to the general election laws of this state, so far as the same are not inconsistent or in conflict herewith."

Section 117.010, sub-part 5, defines the word "election" as used in this chapter, to include a special election as follows:

"5. 'Election' shall mean any general, special, municipal or primary election, unless otherwise specified."

(Underscoring ours.)

Section 117.290, et seq., specifies the time and method of registration.

From the foregoing provisions, we are of the opinion that a voter residing in Ward 21 of the City of Kansas City, located in Clay County, would first have to comply with the registration requirements imposed by Chapter 117, RSMo 1949, in order to be eligible to vote in said election.

Your next inquiry is as follows:

"In connection with the procedure of holding the election, may voting precincts be consolidated and how many judges and clerks are required for each voting precinct?"

We are unable to find any provision in the statutes for consolidating the number of precincts for a special election for state representative and must therefore conclude that the county court or board of election commissioners, as the case may be, have no such authority. We are likewise unable to find any provision specifying the number of election judges and clerks to be used at such election and are of the opinion that the same number of judges and clerks would be appointed as are appointed at the regular elections.

CONCLUSION

Therefore, it is the opinion of this office that in a special election held to fill a vacancy in the office of state representative, a voter residing in that portion of Kansas City located in Clay County, would have to comply with the registration laws governing such city in order to be entitled to vote in the election.

We are further of the opinion that in such election the same number of judges and clerks would be appointed as are appointed at the regular general elections.

Respectfully submitted,

D. D. GUFFEY Assistant Attorney General

APPROVED:

J. E. TAYLOR

Attorney General

DDG:hr encl. OFFICERS:

PUBLIC OFFICIALS:

The term of Honorable Charles F. Ford as Commissioner of the Bi-State Development Agency is for the term of five years from the regular expiration date of the term of his predecessor in office rather than five years from the date of his own appointment and qualification.



July 21, 1953

Honorable Milton M. Kinsey Chief Engineer Bi-State Development Agency 915 Olive Street St. Louis 1, Missouri

Dear Sir:

You request an official opinion of this Department as follows:

"On April 28, 1953, the Missouri Senate gave its consent to the appointment of Charles F. Ford as a Commissioner of the Bi-State Development Agency. The letter from the Secretary of the Senate to Governor Donnelly stated that the appointment was for 'a term ending 5 years from the time of his appointment and qualification,' and that the appointment was 'vice Wm. G. Marbury, term expired.'

"Mr. Ford qualified and took oath of office on May 14, 1953. The term of Mr. Wm. G. Marbury had expired on November 9, 1952, but he continued to serve, inasmuch as his successor had not been appointed.

"S.B. No. 100, 65th G.A., which provides for the appointment of these commissioners, states in Section 2 that succeeding commissioners 'shall hold office for a term of 5 years.' It occurs to us that if the term of office of the succeeding commissioner is to begin on the date when they qualify, as stated by the Secretary of the Senate in his letter to the Governor, then the provisions of S.B. No. 100 which call for an overlapping of terms would be completely vitiated. On the other hand, if the term begins at the date of expiration of the preceding commissioner,

Honorable Milton M. Kinsey:

then the successor commissioner would not hold office for a full 5 year term.

"The question we would like answered is - does Mr. Ford's term of office expire on November 9, 1957, or on May 14, 1958, or at some other date?"

Provision for appointment of Commissioners of the Bi-State Development Agency is made by the following statutes: Sections 70.380; 70.390 and 70.400, RSMo 1949:

"70.380. Commissioners of bi-state agency, appointment, qualifications.--Within ninety days after sections 70.380 to 70.440 become effective the governor shall, by and with the advice and consent of the senate, appoint five commissioners of the bi-state development agency created by compact between the states of Missouri and Illinois. If the senate is not in session at the time for making any appointment, the governor shall make a temporary appointment as in case of a vacancy. All commissioners so appointed shall be qualified voters of the state of Missouri and shall reside within the bi-state development district established by the compact."

"70.390. Terms of commissioners.--Of the commissioners first appointed one shall be appointed to serve for a term of one year, one for two years, one for three years, one for four years and one for five years. At the expiration of the term of each commissioner and of each succeeding commissioner, the governor shall, by and with the advice and consent of the senate, appoint a successor who shall hold office for a term of five years. Each commissioner shall hold office until his successor has been appointed and qualified."

"70.400. Vacancies filled, how. -- Vacancies occurring in the office of any commissioner shall be filled by appointment by the governor, by and with the advice and consent of the senate, for the unexpired term. In any case of vacancy, while the senate is not in session.

the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office."

The question to which you wish an answer is: Is the term of a Commissioner for five years from the date of appointment or is his term for the period of five years from the expiration of the term of his predecessor.

A substantially identical question was answered by the Supreme Court of Missouri in 1889 in State ex rel. Withers vs. Stonestreet, 99 Mo. 361. The pertinent facts in that case were as follows: The Legislature in 1879 provided for the appointment of an Inspector of petroleum oils. The statutory provisions for such appointments were:

(These statutes are quoted in State vs. Stonestreet, supra, 1.c. 370, 371:)

"Sec. 5838. The governor shall appoint, for each of the cities of St. Louis, Hannibal, St. Joseph and Kansas City, and for such other cities and towns as shall, by the authorities thereof, petition to him therefor, an inspector of petroleum oils, kerosene, gasoline, or any product of petroleum, by whatever name known. which may be manufactured, offered for sale, or sold for consumption for illuminating purposes, within the state. Each inspector shall be a resident of the city or town for which he is appointed, hold his office for two years from the date of his appointment, and until his successor is duly appointed and qualified. and shall, at his own expense, provide himself with the necessary instruments and apparatus for testing, gauging and branding the oils and fluids by him inspected.

"'Sec. 5852. Whenever any vacancy occurs under this article by death, resignation, removal from office or otherwise, the mayor of the city, where the vacancy happens, shall immediately certify the same to the governor, who shall appoint and commission his successor for the remainder of the term of office as herein provided; and in all cases where an inspector shall be charged, by indictment or information, for a violation of the duties of

his office, as hereinbefore provided, the governor may suspend him from the duties of his office and appoint another one to fill such vacancy during the time such inspector shall remain suspended."

It should be noted that the above statutes provided for the term of two years, but set no time for the commencement or ending of such term. In compliance with said statutes the Governor of Missouri appointed the first Inspector for Kansas City for the term of two years from June 18, 1879. Thereafter, other persons were appointed for two year terms, all of which were to expire on June 18 of odd years. On June 4, 1885, one Keedy was appointed for a term expiring June 18, 1887. However, no appointment was made for the term commencing June 18, 1887, and Keedy remained in office until September 26, 1888, when the Governor appointed one Belt to that office and issued to him a commission for two years expiring September 26, 1890. On June 7, 1889, the succeeding Governor appointed Stonestreet for a term of two years from and after June 18, 1889, to fill the office which Belt then occupied. an action in Quo Warranto against Stonestreet to determine the legality of his claim to the office. It was necessary to determine whether Belt's term was for two years from the date of his appointment as stated in his commission or whether his term was for two years from the regular expiration date of the term of his predecessor in office. The Court decided that Stonestreet was legally entitled to said office, and that the appointment of Belt was for the term of two years from and after June 18, 1887, rather than two years from his appointment on September 26, 1888. The reasoning of the Court is, in part, as follows, at 1.c. 372, 373 and 374:

"The statute is silent on the point as to the beginning of the first appointee's term, and the reason for this is most obvious, since, the power of appointment being lodged in the executive, it belonged to him in fact, if not in law, to determine the time of the inception of the actual official term of such appointee; the duration of that term was already fixed by law. But if the legislature, being possessed of the power, had fixed the date of the commencement of the first appointee's official term, it would not be questioned that such initial point, being once made sure and steadfast, would recur at every corresponding period of two years.

This must be true, or else the premises from which this conclusion is drawn, sustained as it is by authority, that a 'term of office uniformly designates a fixed and definite period of time, must be false. As the legislature did not fix the date when the official term of the first appointee under the new law was to begin, this date was necessarily left to be fixed by the appointing power; but, when fixed, the determination thus reached must have been as effectual in all its incidents and consequences as if previously made by the legislature. This also must be true, or else it must be true that the executive was incapable of fixing such initial point, and that, therefore, it never was fixed, which is an impossible, as well as an absurd, supposition.

"This reasoning leads to this result: That the date of the appointment, first made by the governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. This conclusion is well sustained by authority. Attorney General ex rel. v. Love, 39 N.J.L. 476, is decisive of this point. And the general rule is elsewhere recognized that when no time is mentioned in the law, from which the term shall commence, it must begin to run from the date of election. State ex rel. v. Constable, 7 Ohio, 7; Marshall v. Harwood, 5 Md. 423; Hughes v. Buckingham, 5 S. & M. 632.

"These last, though election cases, furnish a strong analogous support to the view already expressed, showing as they do, the urgent necessity felt of having some determinate period at which and from which official terms shall begin. The law favors uniformity, but uniformity cannot be obtained except by the establishment of an inflexible rule. And the course in the

office of the executive in regard to appointment of the first appointee, the language of his commission, and the language of all subsequent commissions, except that of relator, fixing the beginning of such official term at June 18, biennially, as the period from which to reckon the duration of such term, affords a contemporaneous, as well as a continuous, exposition of the meaning of the law, and of the intention of its makers, that is not without value in the present investigation. Such contemporaneous and continuous construction, in the absence of anything of a countervailing character, should be sufficient per se to settle the controversy on the point in hand adversely to the relator.

(L.C. 375, 376:)

"* * * inasmuch as the term of office of the first appointee began on the eighteenth day of June, 1879, and continued for two years from and after that date, that the term of office of each successive appointee, whether for a whole term or for the part of an unexpired term, was regulated and controlled by the date fixed by the first appointment; and that it was beyond the power of the executive, when making subsequent appointments, to ignore or disregard the tenure of office thus first established. It was as binding upon after-coming executives, as if in terms it had been so fixed by the legislature. And it may be said, in concluding this paragraph, that the sections of the statutes, which have been discussed, are by no means peculiar in providing that a coal oil inspector shall hold his office until his successor is elected and qualified. This provision is one common both to our organic and statutory law. * * *.

This case was extensively quoted with approval by the Supreme Court in State ex inf. vs. Williams, 222 Mo. 268, 1.c. 278, et seq. The statutory provisions provided for the appointment of Commissioners to the Bi-State Development Agency quoted above are similar to the provisions of the statutes in State ex rel. Withers vs. Stonestreet, supra, in that the Governor is authorized to appoint Commissioners for a definite term of years but no specific time of commencement or ending of such terms are specified. It is further apparent that the intent of the Legislature was to provide for rotation of the terms of each Commissioner, so that there would be a Commissioner appointed each year, and yet there would remain on the Board at all times, four experienced Commissioners. It is further apparent that, where the term of a Commissioner commences at the time of his appointment and runs for five years thereafter, any delay in appointing a new Commissioner would. over a period of years, have the effect of destroying the legislative scheme for the regular rotation of the Commissioners of the Agency.

CONCLUSION

It is, therefore, the opinion of this office that the term of Honorable Charles F. Ford as Commissioner of the Bi-State Development Agency is for the term of five years from the regular expiration date of the term of his predecessor in office rather than five years from the date of his own appointment and qualification.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

SHERIFFS: MILEAGE: COSTS:



When subpoenas, summons and warrants, all in one case, are given to the sheriff for service on one trip, that for all such service by the sheriff, he is entitled to receive mileage only for service had on one person which should be computed on service to the most remote point and return. If, for good cause shown, sheriff is unable to make all such service on the same trip, he shall be entitled to additional necessary mileage required to make such service which must be approved by the prosecuting attorney and county court. However, in no case shall the sheriff be entitled to but one mileage for service in any single case on any one person.

October 16 1953

Honorable Paul Knudsen Prosecuting Attorney Caldwell County Kingston, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion which reads:

"The Magistrate of our county has asked me to write for your opinion in relation to Court costs on Sheriff's mileage.

"When there are subpoenas, summons and warrants, etc., delivered to the Sheriff for service, and it is not possible for the Sheriff to serve said papers on his first trip, and he must make a second trip to serve said papers, is the Court then justified in taxing the extra mileage for the second trip as Court costs?

"If there is justification for the extra mileage, then is there a limit to the number of trips that can be made for the purpose of serving said papers, or is it left entirely up to the Court to determine what would be a reasonable mileage for said purpose?"

We assume, for the sake of this opinion, that the subpoenas, summons and warrants referred to in your request all apply to just one case. In Ring v. Charles Vogel Paint and Glass Co., 46 Mo. App. 374, 1. c. 377, the court held that the entire subject of costs in both civil and criminal cases is a matter of statutory enactment and all statutes must be strictly construed and an officer claiming costs must be able to put his finger on the statute authorizing their taxation. See also State ex rel. Brown, 146 Mo. 401, 1. c. 406, wherein the court held that no public officer is entitled to any fee or compensation unless it is so provided by statute. This same rule will likewise apply to mileage. Sections 57.280 and 57.300, RSMo 1949, and Section 57.290, Vernon's Annotated Missouri Statutes, August 1953, are the particular statutory provisions providing for fees and mileage for services rendered by sheriffs and costs in the case. Section 57.280, supra, reads in part:

"57.280. Fees of sheriffs.--Fees of sheriffs shall be allowed for their services as follows:

"For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip. * * *

"* * *No mileage fees for serving any writ, summons or other legal process shall be collected unless the sheriff shall actually travel the distance for which he makes such charge; * * *"

Section 57.300, supra, reads:

"57.300. Mileage of sheriffs in criminal cases. -- Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place

where the court is held; provided, that such mileage shall not be charged for more than one witness subpoensed or venire summons or other writ served in the same cause on the same trip."

The two foregoing provisions, namely Sections 57.280 and 57.300, supra, respectively, clearly indicate that it was the legislative intent that the sheriff shall serve, if at all possible, all subpoenas, summons and warrants in any one case on the same trip, and that for all such services rendered during the one trip, he shall receive only mileage for service on one person and, in such case, this mileage should be computed on service to the most remote point and return. However, this is not true, as this department has frequently held in previous opinions, when service is had on persons not in the same cause or not on the same trip.

Just what the legislative intent was in providing that sheriffs shall be entitled to only mileage for one service in serving subpoenas, summons and warrants in the same cause on the same trip is not certain. However, we believe that it was to eliminate a lot of additional and, in many instances, unnecessary costs in the case. Frequently, service on all persons can easily be made on one trip, however, we are inclined to believe that if, for some good cause, such as the sheriff being unable to serve any one person because of their absence from the address given and no one was present that service can be had upon at said address or the sheriff was unable to complete the service for lack of time. in such case it would require an additional trip to complete service and, in such instance, the sheriff would be entitled to additional mileage.

You further inquire if there is justification for extra mileage, then is there a limit to the number of trips that can be made or is it left entirely up to the court what would be a reasonable mileage for said purpose.

Under Section 550.190 and Section 550.220, RSMo 1949, it is provided that the prosecuting attorney shall strictly examine fee bills on costs in criminal cases for allowances against the state or county and when he finds them to be correct, he shall report same to the judge of the court. Under the foregoing provisions, we are of the opinion that the prosecuting attorney must approve said fee bills and that before so doing, he certainly should be convinced that any extra mileage traveled on additional trips was absolutely

necessary and, likewise, every bill of costs presented to the county court must be examined and certified to by the judge and presecuting attorney.

Therefore, we are of the opinion that notwithstanding the fact that summons, subpoenas and warrants all in one case were directed to the sheriff for service on one trip, if, for good cause shown, it became necessary for the sheriff to make an additional trip for such service, that he should be allowed additional mileage traveled which, of course, must finally be approved by the prosecuting attorney and court before such costs can be paid.

CONCLUSION

Therefore, it is the opinion of this department that when subpoenas, summons and warrants, all in one case, are given to the sheriff for service on one trip, that for all such service by the sheriff, he is entitled to receive mileage only for service had on one person which should be computed on service to the most remote point and return.

If, for good cause shown, the sheriff is unable to make all such service on the same trip, then he shall be entitled to additional necessary mileage required to make such service, which must be approved by the prosecuting attorney and county court. However, in no case shall the sheriff be entitled to but one mileage for service in any single case on any one person.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH/mv

VOTING: ELECTIONS:



If an employer seeks to penalize an employee for taking time off from his employment to vote, on the ground that such employee did not utilize such time to vote, the burden of proof that the employee did not vote is upon the employer.

All of the employees or any number of such employees of a company, may designate a representative to request of their employer that they be absent from their employment for the purpose of voting.

November 13, 1953

Honorable Frank Kostron Representative, 7th District of St. Louis 1915 Congress St. Louis, Missouri

Dear Sir:

In your recent request for an official opinion you state:

"In reference to our discussion at the Council meeting on October 14, pertaining to the statutes of the State of Missouri under Section 129.060, I am enclosing, for the refreshment of your memory, the language of the Section as presently constituted.

"I am in possession of an opinion from the Attorney General which, in essence, states that this Section covers all elections, whether they be state, local, or national in scope. The other matters which need to be determined are:

"First, it states that the individual so absenting himself for the purpose of voting shall not be threatened with discharge or any other penalty from the employer 'if he votes.' In this regard, it might be well to isolate the burden of proof, that is, if the employee must prove that he has voted when given time off. How can this be accomplished under our present system in the City of St. Louis? Or, if the burden of proof is on the employer, we need not worry about that side of it.

"Secondly, and more important, is the question of notifying the employer, which under the Section states that request shall be made for such leave of absence prior to the day of election. The question involved is this:--Does each and every employee have to notify their employer as

individuals that they wish allotted time off on election day, or will it suffice in the event there is an organization representing all employees, for that organization to notify the employer in behalf of its members. We must bear in mind that the employer has entered into contractual relations with the employee group as such for representation purposes, and to prevent the necessity of individual representation. Whether this applies in the broader scope beyond wages, hours and working conditions, and many other matters which come under a contractual agreement is a matter we need to determine.

"So I think that there are two questions we would like clarified:

- "1. As above stated, is the burden of proof on the individual that he has voted when given time off, or is it up to the employer to prove that he has not.
- "2. Again as above mentioned, must each individual request time off under this Section, or can an organization under representative contract with the company speak in behalf of all employees who are members of that organization.

"I deem it to be extremely important that these matters be clarified and certainly, whatever you can do in this respect will be most helpful and greatly appreciated."

Section 129.060, RSMo 1949, as amended by Senate Bill 235, which was enacted by the 67th General Assembly, reads as follows:

"Any person entitled to vote at a general election held within this State, or any primary election held in preparation for such general election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting; and any absence for such purpose shall not be sufficient reason for the discharge of or the threat to discharge any such person from such services or employment; and such employee, if he votes, shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made on account of such absence from his usual salary or wages; provided, however, that request shall be made for such leave

of absence prior to the day of election, and provided further, that this section shall not apply to a voter on the day of election if there be three successive hours, while the polls are open, in which he is not in the service of his employer.

"The employer may specify any three hours between the time of opening and the time of closing the polls during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or who shall discharge or threaten to discharge any employee for so exercising the privilege, or who shall subject the employee to a penalty or reduction of wages because of the exercise of such privilege, or who shall directly or indirectly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$500.00."

We believe that you are correct in interpreting the language of the above bill to mean that the avoidance of any penalties by an employee is dependent upon the employee voting in the time allotted by his employer for him to do so; that is to say, that if an employee takes off from his employment for the three hours to vote and does not vote he may be penalized by his employer for so doing. Such appears to be the clear meaning of the bill.

Your first question is: Is the burden of proof on the individual that he has voted when given time off, or is it up to the employer to prove that he has not?

In the normal course of events it would seem that there would be no occasion for the employee either to have to prove that he had voted or for the employer to seek to prove that the employee had not voted. Obviously the employee would not raise the question against himself. This issue would, therefore, only arise when the employer sought to penalize the employee for taking time out for voting and not voting. In such circumstances we believe that the burden would be upon the employer to prove that the employee did not vote. It is a general principle of law that a person who predicates an action upon an assumed fact, must, if called upon to justify the action, prove the fact.

It is also a principle of law that a person is assumed, in the absence of proof to the contrary, to obey the law. In this instance we believe that the meaning of Section 129.060, supra, as amended by Senate Bill No. 235 is, as we have said, that if an employee takes time off from his employment to vote he will vote.

If an employer seeks to penalize an employee for taking time off to vote and not using that time to vote, we believe that the employer must, in order to justify his penalizing action, prove that the employee did not vote.

Your second question is: Must each individual request time off under this section, or can an organization under representative contract with the company speak in behalf of all employees who are members of that organization?

We are unable to see anything in Section 129.060, supra, which would prohibit all of the employees of a company from designating a representative to request of the employer a leave of absence for each such employee for voting purposes, and to arrange with the employer for the time of absence from his employment of each employee. Such procedure would appear to be practicable, and would effect a considerable saving of time of both the employee and the employer.

CONCLUSION

It is the opinion of this department that if an employer seeks to penalize an employee for taking time off from his employment to vote, on the ground that such employee did not utilize such time to vote, that the burden of proof that the employee did not vote is upon the employer.

It is the further opinion of this department that all of the employees, or any number of such employees, of a company, may designate a representative to request of their employer that they be absent from their employment for the purpose of voting.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

HPW/ld

JOHN M. DALTON Attorney General INSURANCE: Articles of Incorporation of Automobile Owners Safety Insurance Company.

January 7, 1953



1/8/5-3

Honorable C. Lawrence Leggett Superintendent, Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of January 5th in which you submitted to this office an executed copy of original incorporators' declaration of intention to form a stock casualty insurance company under the name of Automobile Owners Safety Insurance Company, together with proof of publication of such declaration as required by law.

An examination of the publication fails to disclose the signatures and addresses of the thirteen original incorporators as shown in the executed copy of declaration of intention forwarded with the affidavit of publication. It is not considered that this apparent oversight on the part of the publisher will make it necessary to republish the declaration of intention. The documents mentioned have been examined and found to be in accordance with the provisions of Section 379.010 to Section 379.200, RBMo 1949, and not inconsistent with the Constitution and Laws of the State of Missouri and the United States.

Respectfully submitted,

JULIAN L. O'MALLEY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

JLJ'M:1w

INSURANCE: Articles of incorporation of Grant Mutual Insurance Company.

April 1, 1953



Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson Building Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your request of recent date, an executed copy of original articles of incorporation of the proposed Grant Mutual Insurance Company, together with proof of publication of the same, have been reviewed by this office pursuant to the directive contained in Section 379.220 RSMo 1949.

It is the opinion of this office that the articles of incorporation of the proposed Grant Mutual Insurance Company, to be organized subject to the provisions of Sections 379.205 to 379.310 RSMo 1949, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this state and the United States.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE: Amendment of Articles of Incorporation of Postal Life and Casualty Insurance Company.



4.10-53

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson Building Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your recent request, a certified copy of the minutes of the annual meetings of directors and stockholders of Postal Life and Casualty Insurance Company, Kansas City, Missouri, convened on January 27, 1953, has been reviewed.

It is the opinion of this office that the proceedings described in the preceding paragraph are in accordance with applicable statutes and not inconsistent with the constitution and laws of this state and the United States.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General TAXATION: Insurance companies may deduct intangible

personal property tax in computing premium tax under Section 148.400, RS Mo 1949.

INSURANCE:



April 14, 1953

John C. Johnsen

Honorable C. Lawrence Leggett Superintendent Division of Insurance Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

> "Section 148.400, R.S. Mo. 1949, allows certain deductions, enumerated therein, from premium taxes payable to the State by insurance companies organized in or admitted to this State.

"Certain domestic insurance companies are now contending, and so reporting on their tax reports to this office, that they are permitted under said section to deduct intangible personal property taxes paid under Laws, 1945, p. 1914, Sections 146.010-146.130, R.S. Mo. 1949.

"Your opinion is respectfully requested as to whether we may allow such intangible personal property taxes as a deduction from premium taxes and so assess the companies concerned."

Section 148.400, RSMo 1949, provides as follows:

"All insurance companies or associations organized in or admitted to this state may deduct from premium taxes payable to this state, in addition to all other credits allowed by law, income taxes, franchise taxes, personal property taxes, valuation fees, registration fees and examination fees paid under any law of this state."

This section authorizes insurance companies to deduct certain taxes in computing their premium tax. It is a general rule of law that deductions in computing taxes are allowed only according to statutory authorization and the burden is upon the taxpayer to show that he is entitled to the deduction claimed. 27 Am. Jur., Income Taxes, Sec. 93, p. 359.

Subject to constitutional limitations regarding uniformity and equality, which are not here involved, the matter of deductions is one for the Legislature, and authority in such regard is not limited by constitutional restrictions such as are found when dealing with exemptions from taxation. See Section 6, Article X of the Constitution of Missouri, 1945. Thus, the basic question presented by you is one of statutory construction in which the intention of the Legislature is a paramount factor.

What is now Section 148.400, RSMo 1949, first appeared in Laws of Missouri, 1945, at page 993. It was approved April 28, 1945. At that time all personal property, tangible and intangible, was taxed alike (Sec. 10939, R.S. Mo. 1939). At that time Section 655, R.S. Mo. 1939 (Sec. 1.020(8), RSMo 1949) provided: "The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * tenth, the words 'personal property' shall include money, goods, chattels, things in action and evidences of debt; * * * Section 11211, R.S. Mo. 1939, then in effect, found in the chapter relative to taxation and revenue, contained the following provision: "The term 'personal property,' wherever used in this chapter, shall be held to mean and include bonds, stocks, moneys, credits, * * *"

At the time of the adoption of what is now Section 148.400, RSMo 1949, the 1945 Constitution had been adopted with its novel treatment of intangible personal property for the purpose of taxation (Sec. 4, Art. X, Const. of Mo. 1945). However, the statutes effectuating that provision were not approved until April 19, 1946 (Laws of Mo. 1945, p. 1914). Said statutes became effective on July 1, 1946.

In view of the fact that at the time of the adoption of Section 148.400, RSMo 1949, all personal property was treated alike for the purpose of taxation, it seems clear that the Legislature intended to permit the deduction of taxes paid on all personal property, tangible and intangible. The new system for the taxation of intangible personal property, which became

effective under the new Constitution on July 1, 1946, did not change the tax on intangible personal property from a personal property tax.

In the case of In Re Armistead, 362 Mo. 960, 245 S.W. (2d) 145, the court, in discussing the intangible personal property tax, stated (245 S.W. (2d) 1.c. 147):

" * * * The tax is a property tax levied upon specified intangible personal property and is based upon the property's yield during the preceding calendar year at the rate of 4% of such yield. * * *"

(Emphasis ours.)

In the case of General American Life Ins. Co. v. Bates, 249 S.W. (2d) 458, the Supreme Court, in referring to the intangible personal property tax, stated (1.c. 462):

" * * * The instant case involves a property tax, expressly so designated in the constitution, Art. 10, Sec. 4, quoted supra, and made subject to specific constitutional inhibitions.

Thus, it is clear that the intangible personal property tax is a tax on personal property. In view of the fact that the Legislature has not seen fit to limit the deduction allowable in computing the premium tax to any particular type of personal property, we are of the opinion that deduction of all taxes paid on personal property, tangible and intangible, is permitted.

CONCLUSION

Therefore, it is the opinion of this department that under Section 148.400, RSMo 1949, taxes paid on intangible personal property may be deducted in computing the premium tax therein referred to.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

INSURANCE: Contract, "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214", offered by The Guardian Credit Indemnity Corporation is a contract of insurance. Agent acting for unauthorized company in selling contract subject to prosecution under Section 375.300, RSMo 1949.



April 17, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

> "Inclosed herewith is a photostatic copy of a specimen contract designated 'Retail Credit Discount Warranty and issued by the Guardian Credit Indemnity Corporation of Painesville, Ohio.

"Your opinion is respectfully requested as to whether or not this contract is one of insurance within the terms and provisions of the insurance laws of Missouri. If your answer is in the affirmative, please advise whether or not the issuance of this contract in this state is a violation of our laws since this corporation is not licensed by this office to transact an insurance business."

From the photostatic copy of the specimen contract submitted the following identification is shown: "Form C-104, Edition 7-152, Retail Credit Discount warranty, E-No. 11214." In State ex rel. v. Revelle, 257 Mo. 529, 1.c. 535, we find the essential elements of a contract of insurance described in this language:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In 44 C.J.S., Insurance, Sec. 10, we find "credit insurance" defined as follows:

"Credit insurance is a modern form of guaranty insurance, which provides for an indemnity, wholly or in part, to merchants or traders against the insolvency of customers to whom they extend credit."

A contract similar to the one here being construed was before the St. Louis Court of Appeals in the case of State v. Phelan, 66 Mo. App. 548, and the Court spoke as follows at l.c. 558:

> "Defendant, however, insists that the bond of indemnity is a contract of guaranty and not of insurance. 'Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. 1 May on Insurance, sec. 1. This definition has been adopted by the appellate courts of this state. Duff v. Fire Association, 129 Mo. loc. cit. 465. A contract having these elements, and not opposed to public policy, is one of insurance. By the bond of indemnity in this record the American Credit Indemnity Company upon the payment of \$90, and in further consideration of the acceptance of all the terms and conditions made a part of said bond, guaranteed the Hunicke Glove Company, for the period of one year, against loss, to the extent of and not exceeding \$3,000 gross, resulting from insolvency of debtors, as defined in said bond, over and above a loss of \$1,000 agreed to be borne by the assured on sales, shipments and deliveries of goods to be \$75,000 or less. This contract violates no rule of public policy, and is within the scope of the above definition. That

the contingency provided against is a proper matter of insurance has been determined in a recent opinion by the supreme court of Massachusetts (Claflin v. Credit System Co., April, 1896). The indemnity contracted for is essentially the same as that secured by insurance against risk from all forms of dishonesty. That it may have some of the features of suretyship or guaranty does not detract from its character as a contract of insurance, when, as in this case, it is within the strict terms of the latter as defined by law. The contract to indemnify against loss of claims is one of indemnity against loss of property; for it is selfevident that valid demands, although mere choses in action, are, equally with tangible effects, personal property. Hence, their loss or destruction may be provided against by a contract resting upon a sufficient consideration. Such insurance is practiced both in England and America. Beach on Insurance. secs. 331, 332, 329, and cases cited. May on Insurance, sec. 544, Mercantile Credit Co. v. Wood, 68 Fed. Rep. 529.

"Our conclusion is that the bond of indemnity in this record, in virtue of its terms, is a contract of insurance in the statutory sense, and the defendant having received the premium therefor, without any license to act as agent for his principal, was guilty of a violation of the statute warranting the judgment."

Having defined insurance and credit insurance, and having shown how a contract indemnifying against loss arising from ordinary commercial credit risks may be the proper subject of an insurance contract, it becomes necessary to review the specimen contract to determine if it has the essential elements of an insurance contract. In doing this we construe the application for the warranty along with the warranty and all of its terms and conditions.

The plan may be described as follows. A person or corporation engaged in business makes application for the

Retail Credit Discount Warranty in a stated amount of dollars, with the warranty to be in effect for one year. With the application is remitted a "prepaid fee" in a stated sum of money as consideration for the warranty. When the company accepts the client's original remittance it will issue the Retail Credit Discount Warranty which is to be effective according to the terms, conditions and stipulations made a part thereof. Under such conditions and terms the company agrees to pay the client the principal sum shown on the face of the warranty. The company expects to realize the face of the warranty by receiving and processing, by collection, accounts which the client submits to the company. When collections are realized on said accounts such sums are applied on the principal amount of the warranty, and are so credited. The client, over and above his "prepaid fee" forwarded with his application, agrees to allow the company a charge and/or discount of 15% of the face value of any account or note coming within the provisions of the warranty. The company is obligated to pay to the client, without recourse, the face value of any account or claim less the company's charges, subject to and approved by the company for discount. The normal period during which the warranty is in effect is one year, but the same may be terminated by (a) the client's receipt of the principal amount of the warranty at an earlier date, or (b) by the company choosing to cancel the warranty upon return to the client of the "prepaid fee" which accompanied the application for the warranty.

As we view the plan, it offers the client a contract whereby the corporation, for a lawful consideration moving to it, represented by a prepaid fee in a stated amount and the forwarding to the corporation by the client of his debtor accounts in an aggregate amount not in excess of the face value of the Retail Credit Discount Warranty, agrees to pay to the client within one year the face value of such warranty. Throughout all the terms, conditions and stipulations contained in the plan the fact is inescapable that the purpose is to insure against loss of debtor accounts, and the plan is considered to be well within the scope of the ruling in State v. Phelan, cited supra. The contract offered is ruled to be an insurance contract, and offering of the same will constitute engaging in the insurance business in Missouri.

In the request for this opinion it is stated that The Guardian Credit Indemnity Corporation of Painesville, Ohio, is not licensed to conduct an insurance business in Missouri.

This being so, any negotiation of the contract in question by an agent for such corporation will cause such agent to be in violation of Section 375.300, RSMo 1949, which makes it a misdemeanor for any agent to act for any individual, association of individuals or corporation engaged in the insurance business in this State before such individual, association of individuals or corporation has been licensed by the Superintendent of the Division of Insurance.

CONCLUSION

It is the opinion of this office that "Form C-104, Edition 7-152, Retail Credit Discount Warranty, E-No. 11214" offered by The Guardian Credit Indemnity Corporation of Painesville, Ohio, is a contract of insurance and may not be offered for sale in the State of Missouri by any agent of such company until the company is licensed to conduct its business in this State by the Superintendent of the Division of Insurance, and any agent so acting for the unlicensed company is subject to prosecution under Section 375.300, RSMo 1949.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE: Amendment of Articles of Incorporation of Great Republic Life Insurance Company.

FILED 52

April 24, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Mr. Leggett:

This office has reviewed the certified copy of proceedings of directors and stockholders of Great Republic Life Insurance Company which you submitted for review by your letter of April 18, 1953.

Upon examination of the certified copy of proceedings of directors and stockholders of Great Republic Life Insurance Company held on April 11, 1953, whereby the articles of incorporation of said company were amended to change the location of the principal office of said company from the City of Kirksville, Adair County, Missouri, to Kansas City, Jackson County, Missouri, it is the opinion of this office that such amendment is within the powers granted to said company by Sections 377.200 to 377.460, RSMo 1949, and is not inconsistent with the Constitution and laws of this State and of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General INSURANCE: Amendment of Articles of Incorporation of Automobile Owners Safety Insurance Company.

May 12, 1953



Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of May 11, 1953, in which you enclosed certified copies of proceedings of directors and stockholders of Automobile Owners Safety Insurance Company, had on April 24, 1953, and May 6, 1953, respectively, whereby such insurance company amended its Articles of Incorporation so as to increase its capital stock from two hundred thousand dollars to three hundred thousand dollars.

An examination of the certified proceedings referred to in the preceding paragraph discloses that the same are in accordance with the provisions of Section 379.010 to Section 379.200, RSMo 1949, and not inconsistent with the Constitution and laws of the State of Missouri and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General INSURANCE: Articles of Incorporation of Mid-America Fire and Marine Insurance Company.



May 14, 1953

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Sir:

Pursuant to your request of May 12, 1953, an examination has been made of an executed copy of Declaration of Intention by original incorporators, together with proof of publication of the same, to form an insurance company to be known as Mid-America Fire and Marine Insurance Company.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160, RSMo 1949, and not inconsistent with the Constitution and Laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE:

Amendment of Articles of Incorporation of Mid-Continent Casualty Company inconsistent with laws of Missouri.



May 14, 1953

Honorable C. Lawrence Leggett
Superintendent of the Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your recent request regarding amendment of Articles of Incorporation of Mid-Continent Casualty Company, such request reading as follows:

"Inclosed herewith is a certified copy of the proceedings of the above captioned company to amend its Articles of Incorporation.

"Your opinion is respectfully requested as to whether said proceedings are in conformity to Sections 379.010 to 379.200, inclusive, R. S. Mo. 1949, and not inconsistent with the Constitution and laws of this state and the United States. The inclosure may be retained for your files."

The "Certified Copy of The Proceedings of Mid-Continent Casualty Company" forwarded with the above quoted request clearly discloses that the principal objective sought to be obtained by so amending the original Articles of Incorporation is to authorize the company to write all three classes of coverage outlined in Section 379.010, RSMo 1949. The statute just referred to clearly authorizes such amendment when the company has a fully paid capital of four hundred thousand dollars, and such capital stock requirement has been met by Mid-Continent Casualty Company by virtue of amendment to its Articles of Incorporation effected on or about February 23, 1952.

Of necessity, this opinion must point out what appear to be deficiencies not only in the certified copy of proceedings but also in the actual amendments accomplished by such proceedings.

The first paragraph of the certificate prepared by the Secretary of Mid-Continent Casualty Company recites that the certificate is prepared in compliance with Section 379.010, RSMo 1949. Although Section 379.010, RSMo 1949 authorizes the amendment touching power to write additional lines of coverage, such statute does not provide for certifying such an amendment, and consequently the proceedings being reviewed are not, we believe, certified under Section 379.010, RSMo 1949.

It is believed that the Secretary of Mid-Continent Casualty Company is seeking to certify the proceedings effecting amendment of Articles of Incorporation under the directive contained in Section 351.095, RSMo 1949 of The General and Business Corporation Law of Missouri. In the absence of any provision in the law particularly applicable to Mid-Continent Casualty Company (Secs. 379.010 to 379.200 RSMo 1949) relative to procedure for certifying proceedings touching this type of amendment to Articles of Incorporation, a procedure in line with The General and Business Corporation Law of Missouri may be employed if not inconsistent with the original Articles of Incorporation of such company.

At paragraph numbered 2, of the certificate of proceedings being reviewed, it is therein stated that notice of the proposed amendment was given to stockholders in the manner required by the by-laws and by Section 251.230, RSMo 1949. It is believed that such statutory reference should have been to Section 351.230, RSMo 1949.

The proceedings being reviewed amend Article III of the original Articles of Incorporation in two important aspects which cannot be overlooked. Paragraph (21) of Article III of the original Articles of Incorporation has been deleted by the new amendment. It provided as follows:

"The powers of this corporation are nevertheless limited to include only those powers which are, or may hereafter be, granted to an insurance corporation organized and doing business under Section 379.010, Subparagraph 1, Subdivision 3, Revised Statutes of Missouri, 1949, and all amendments thereto."

Just why the proceedings being reviewed do not contain a provision similar to that just quoted above is not clear to us. Such a provision becomes of paramount importance when an insurance company is organized and seeks to take unto itself broad corporate powers not specifically granted to it by the law of its incorporation, but rather seeks to incorporate in its charter broad powers given to private business corporations by The General and Business Corporation Law of Missouri. In examining Articles of Incorporation, and amendments thereto, of insurance companies organized in this State, this office has countenanced the inclusion of broad powers in such Articles of Incorporation when the grant thereof is limited to the law of the company's incorporation by a provision such as we have quoted above from Mid-Continent Casualty's original Articles of Incorporation.

The deletion of paragraph (21) from Article III of the original Articles of Incorporation of Mid-Continent Casualty Company, by the amendments being reviewed, cannot help but focus attention on the new powers which the company seeks to exercise by virtue of paragraph (28) of the amended Article III of its Articles of Incorporation. Such paragraph provides as follows:

"(28) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise hold and possess or otherwise dispose of shares of capital stock of, or any bonds, securities or evidences of indebtedness created by any other corporation or corporations of this State or any other state, country, nation or government, and while owner of said stock to exercise all the rights, powers and privileges of ownership including the right to vote thereon, subject to the provisions of the laws of the State of Missouri."

A reading of the above quoted paragraph (28) of amended Article III of Mid-Continent Casualty Company's Articles of Incorporation discloses a broad power to invest its capital and surplus "subject to the provisions of the laws of the State of Missouri." Section 379.080, RSMo 1949 discloses how this particular type of insurance company is permitted to invest its capital and surplus and such statute should be referred to as the proper limitation on such power. If those proposing this particular amendment did not care to spell out such powers in the language of Section 379.080, RSMo 1949, they could have incorporated the power and referred to the

statute by section number. The language of Section 379.080, RSMo 1949, discloses specific limitations which make the power found in paragraph (28) of the amended Articles of Incorporation inconsistent with said statute.

In the case of McWilliams v. Central States Life Insurance Company, 137 S.W. (2d) 641, the St. Louis Court of Appeals was ruling a point relative to power of an insurance company to make a certain type of investment in realty. In allowing the company's plea of ultra vires as a defense the Court spoke as fillows at 137 S.W. (2d) 641, 1.c. 646:

"It should be observed in this connection that insurance companies are not regarded as mere private business corporations. On the contrary, they are regarded as quasi-public corporations. The business of insurance is affected with a public interest, so much so that it is subject to the regulatory power of the state. It has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary business of the commercial world. Contracts of insurance are said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of insurance or a credit, the companies being the depositaries of the moneys of the insureds, possessing great power thereby, and charged with a great responsibility. solvency of such companies manifestly is a matter of grave public concern. State ex rel. Missouri State Life Ins. Co. v. Hall, 330 Mo. 1107, 1116, 52 S.W. 2d 174, loc. cit. 177."

While it might be stated in defense of the proceedings being reviewed that the directing hand of Mid-Continent Casualty Company does not intend to make full use of broad powers contained in its Articles of Incorporation, the request for this opinion and review calls upon this office to disclose wherein the amended Articles of Incorporation may be inconsistent with the provisions of Sections 379.010 to 379.200, RSMo 1949, and with other applicable laws of Missouri.

CONCLUSION

It is the opinion of this office that proceedings of directors and stockholders of Mid-Continent Casualty Company effecting amendment to said company's Articles of Incorporation, as certified by its secretary under date of April 24, 1953, are not in conformity with Sections 379.010 to 379.200, RSMo 1949, and are inconsistent with the laws of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE: Amendment of Articles of Incorporation of American Automobile Insurance Company.

May 26, 1953



Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter transmitting a certified copy of the proceedings of directors and stockholders of American Automobile Insurance Company had on May 11, 1953, and May 26, 1953, respectively, whereby such insurance company amended its Articles of Incorporation so as to increase its capital stock from Two Million Dollars (\$2,000,000.00) divided into Five Hundred Thousand (500,000) shares of the par value of Four Dollars (\$4.00), to Two Million Five Hundred Thousand Dollars (\$2,500,000.00) divided into Six Hundred and Twenty-five Thousand (625,000) shares of the par value of Four Dollars (\$4.00) each.

An examination of the certified proceedings referred to in the preceding paragraph discloses that the same are in accordance with the provisions of Section 379.010 to 379.200, RSMo 1949, and not inconsistent with the Constitution and laws of the State of Missouri and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M:lw

INSURANCE: Amendment of Articles of Incorporation of Mid-Continent Casualty Company.



May 28, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

Receipt is acknowledged of your letter of May 27, 1953, in which you enclosed a Certificate of Amendment to Articles of Incorporation of Mid-Continent Casualty Company, by which said company has amended its Articles of Incorporation so as to authorize the writing of all three classes of insurance enumerated in Section 379.010, RSMo, 1949.

The Certificate of Amendment referred to above has been examined, and the same is found to be in accordance with the provisions of Section 379.010 to Section 379.200, RSMo 1949, and not inconsistent with the Constitution and Laws of the State of Missouri and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M:lw

INSURANCE: Articles of Incorporation of Meramec Mutual Insurance Company.



June 5, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Mr. Leggett:

I am in receipt of your letter of June 3, 1953, in which you enclosed a copy of correspondence you received under date of June 2, 1953, from attorneys for incorporators of the proposed Meramec Mutual Insurance Company. The communication of June 2nd, just referred to, discloses a definite address in St. Louis County for the home office of the proposed company, as well as definite St. Louis County addresses of those composing the board of directors in which management of the proposed company will be vested until the first meeting of the members of the company. This information meets the requirements of subparagraphs (1) and (2) of Section 379.210, RSMo 1949.

This office has reviewed the executed copy of Articles of Incorporation of the proposed Meramec Mutual Insurance Company, together with proof of publication thereof, submitted to this office by your letter of May 22, 1953, and it is the opinion of this office that said Articles of Incorporation are so executed as to be in accordance with the provisions of Sections 379.205 to 379.310, RSMo 1949, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General INSURANCE: Articles of Incorporation of Columbia Mutual Insurance Company.



July 31, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Mr. Leggett:

In compliance with your request of July 29, 1953, a copy of the original Articles of Incorporation of the proposed Colonial Mutual Insurance Company, together with proof of publication of the same as required by Section 379.030 RSMo 1949, have been reviewed by this office pursuant to the directive contained in Section 379.220 RSMo 1949.

It is the opinion of this office that the Articles of Incorporation of the proposed Colonial Mutual Insurance Company, to be organized pursuant to the provisions of Sections 379.205 to 379.310 RSMo 1949, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE: Described contract of Hill Funeral Home constitutes an insurance contract, and offering of the same to the public without meeting requirements of Missouri Insurance Code is an offense under Sec. 375.310, RSMo 1949.



August 7, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Jefferson Building Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your request reading as follows:

"You will find attached hereto a document which purports to be a so-called 'Service Agreement' between the Hill Funeral Home of Lilbourn, Missouri, and Claude C. Loftis and Ethel M. Loftis.

"We respectfully ask for an opinion from your office as to whether or not this document constitutes an insurance contract under the applicable statutes of the State of Missouri."

In view of the fact that this opinion is addressed to a particular contract, the full provisions appearing on the face of the contract and on the reverse side thereof are herewith quoted:

"No. I.210

"AN AGREEMENT, made this 14 day of FEBRUARY
19 53

"BY AND BETWEEN HILL FUNERAL HOME LILBOURN, MISSOURI AND

"Claude C. Loftis & Ethel M. Loftis

and the members of his family, whose names are placed upon this agreement, as follows:

	.00
"Witnesseth: That in conside	eration of a subscription
in the sum of \$1.50 cts, and	the further payment of a
sum on the First day of each	month hereafter, during
term of this agreement, the H	HILL FUNERAL HOME will fur
of Three HUNDRED DOLLARS tion with burial or func- member of this family, e lot or grave. "2. Ambulance service t	eral expenses of any exclusive of cemetery
required by the order or physician when total dis does not exceed 100 mile additional charge of Ter made for each mile over traveled.	r advice of a licensed stance to be traveled es, round trip. An n Cents (.10¢) will be
	orce and effect upon delig
and payment of the subscripti period of 10 days for payment of HILL FUNERAL HOME is grant	t to be received at the of
and payment of the subscripti period of 10 days for payment	t to be received at the or ted. t, effective and enforceal
and payment of the subscripti period of 10 days for payment of HILL FUNERAL HOME is grant "Strictly a service agreement	t to be received at the or ted. t, effective and enforceal
and payment of the subscripting period of 10 days for payment of HILL FUNERAL HOME is grant "Strictly a service agreement only between the parties name	t to be received at the or ted. t, effective and enforceal ed herein.

"HILL FUNERAL HOME Phone No. 3141 Lilbourn, Missouri

"No. I.210

"HILL FUNERAL HOME Phone No. 2141 Lilbourn, Missouri

"AGREEMENT WITH:

Claude C. Loftis
And Wife
Ethel M. Loftis

and members of his family named hereir.

"Service charge payable monthly to HILL FUNERAL HOME or to a person designated in writing by them to receive payments. Payments made to any other person will not bind the Company.

Payments \$1.50 Monthly

"The terms of this agreement are limited to the persons named on this instrument, and if accepted by any other person or company for credit on services rendered, then the HILL FUNERAL HOME will be liable only for return of consideration actually paid to them."

Section 375.310, RSMo 1949, provides, in part, as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, * * *."

In State ex rel. Inter-Insurance Auxiliary Company v. Revelle, 165 S.W. 1084, 257 Mo. 529, 1.c. 535, the Supreme Court of Missouri spoke as follows:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers v. Shawnee Fire Insurance Company of Topeka, Kansas, 111 S.W. 592, 132 Mo. App. 275, 1.c. 278, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

"Indemnity signifies to reimburse, to make good and to compensate for loss or injury. (4 Words and Phrases, p. 3539.) Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him."

In the case of State ex inf. v. Black, 145 S.W. (2d) 406, 347 Mo. 19, 1.c. 24, the insurance character of burial associations was alluded to in the following language:

"The insurance character of this business is recognized by the provision of the act exempting such associations from the general insurance laws."

The insurance character of burial associations is also attested by the following language found in Section 376.020, RSMo 1949, of Missouri's regular life insurance company law:

> " * * * provided, that any association consisting of not more than one thousand five hundred citizens, residents of the state of Missouri, all living within the boundaries of not more than three counties in

this state, said counties to be contiguous to each other, organized not for profit and solely for the purpose of assessing each of the members thereof upon the death of a member, the entire amount of said assessment, except ten cents paid by each member, to be given to a beneficiary or beneficiaries named by the deceased member in his or her certificate of membership, said certificate of membership to be issued by such association, shall not be construed to be life insurance company under the laws of this state, * * *."

At 44 C.J.S., Insurance, Sec. 27, we find the subject of burial benefit treated as follows:

"'Burial benefit' or 'funeral benefit' has been regarded as life insurance."

In the footnote to the text of C.J.S., just quoted, we are cited to the case of State ex rel. Reece v. Stout, 17 Tenn. App., 65 S.W. (2d) 827, in which case the following language is found at 65 S.W. (2d) 827, 1.c. 829:

"Burial or funeral benefit, being determinable upon the cessation of human life, and dependent upon that contingency, constitutes life insurance. Such a contract has, however, been held void as against public policy and in restraint of trade, where, although the purpose of the association was to provide, at their death, a funeral and proper burial for the members, the association was organized on the mutual plan, the members contributing a stipulated sum weekly, and the funeral, certain funeral furnishings, and outfit were to be furnished, by and through a designated undertaker, or official undertaker."

In the case of Knight v. Finnegan (D.C. Mo.), 74 F. Supp. 900, the Court, in the course of defining life insurance spoke as follows at 74 F. Supp. 900, l.c. 901:

"Moreover, the elements and requisites of an insurance policy are, among others, 'a risk or contingency insured against and the duration thereof.' 'A promise to pay or indemnify in a fixed or ascertainable amount.'"

We now consider the various provisions of the contract offered by Hill Funeral Home, and quoted in its entirety in the forepart of this opinion. The face of the contract discloses that the funeral services and merchandise provided for therein are furnished by the Hill Funeral Home only after the other party to the contract has paid a subscription fee and an additional like sum on each succeeding month during the term of the contract: that the Hill Funeral Home will furnish funeral services and merchandise of the value of Three Hundred Dollars in connection with the "burial or funeral" expenses of any single member of the family, named in the contract; and a "grace period" is provided in which time an overdue monthly payment on the contract may be made and thereby save the contract's benefits to the party contracting with Hill Funeral Home. On the reverse side of the contract we find that full benefits under the contract can be obtained only if Hill Funeral Home renders the services and furnishes the merchandise; and if Hill Funeral Home is denied the right to furnish the benefits under the contract, only consideration actually paid on the contract will be returned to the other contracting party, and to no one else.

Viewed simply, the contract being considered provides that for a stated monthly consideration measured in money, the Hill Funeral Home agrees to pay a sum certain in the event of death of a named person, the sum payable bearing no true or correct relationship to the monthly payments made on the contract, since termination of said contract with full benefits thereunder rests upon the contingency of cessation of human life.

In view of the foregoing authorities and the terms of the contract being considered, the conclusion that such contract is one of insurance is inescapable.

CONCLUSION

It is the opinion of this office that the contract of Hill Funeral Home, fully described in the foregoing opinion, constitutes an insurance contract, and offering of the same to the public without meeting requirements of Missouri's laws relating to organization and regulation of insurance companies will cause persons so offering such contracts to be subject to the penalties prescribed by Section 375.310, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General INSURANCE: Articles of Incorporation of Missouri National Life Insurance Company.



September 8, 1953

Monorable C. Lawrence Leggett Superintendent of the Division of Insurance Jefferson Building Jefferson City, Missouri

Dear Sir:

Pursuant to your request of September 1, 1953, an examination has been made of an executed copy of Articles of Incorporation of the proposed Missouri National Life Insurance Company.

It is the opinion of this office that the Articles of incorporation heretofore referred to fully comply with the provisions of Sections 377.200 to 377.460, REMO 1949, and the same are hereby approved under the directive contained in Section 377.220, REMO 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

INSURANCE:

Farmers' mutual insurance companies subject to Sections 380.480 to 380.570, RSMo 1949, may not write "full coverage" policy on motor vehicles covering member's liability for personal injury or property damage to third persons.



November 16, 1953

Honorable C. Lawrence Leggett Superintendent of the Division of Insurance Department of Business and Administration Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your recent inquiry reading as follows:

"This is to respectfully ask for an official opinion of your office as to whether or not farmers mutual insurance companies operating under Sections 380.480 to 380.570, R. S. Mo., 1949, are entitled to write bodily injury or property damage liability automobile insurance under the applicable laws of this state."

A farmers mutual insurance company operating under the provisions of Sections 380.480 to 380.570, RSMo 1949, is subject to the following general rule found at 44 C.J.S., Insurance, Sec. 110:

"An incorporated mutual insurance company has, like any other private corporation, such powers, and only such, as are conferred by its charter or by the act under which it is incorporated, including the powers expressly granted and such incidental powers as are necessary to carry into effect those specifically conferred, and those which may have been added under provision for reincorporation or extension of charter.

Three distinct types of farmers mutual insurance companies are contemplated by Sections 380.480 to 380.570, RSMo 1949, namely, (1) farmers' mutual fire and lightning insurance companies, (2) farmers' mutual tornado, windstorm and cyclone insurance companies, and (3) farmers' mutual hail insurance companies. Although farmers' mutual insurance companies organized under the law above cited are, under the provisions of Section 380.520, RSMo 1949, permitted to issue an extended coverage endorsement to their policies, the language of the statute does not disclose that such extended coverage will embrace any coverage other than direct property damage resulting from the risks named. Section 380.520, RSMo 1949, provides:

"Farmers' mutual insurance companies organized in accordance with the provisions of sections 380.480 to 380.570 are hereby authorized to issue extended coverage endorsements to their policies to insure the property of members against loss from windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, and smoke."

This office construes the opinion request as posing a question as to whether a farmers' mutual insurance company, incorporated under the law heretofore alluded to, may write what is commonly known as a "full coverage" policy on a motor vehicle as such coverage is referred to in the following language found at 44 C.J.S., Insurance, Sec. 38:

"* * * A full coverage policy, as respects insurance on a motor vehicle, means a policy which insures against risks of fire, theft, collision, property damage, and indemnity on the owner's liability."

In a well reasoned opinion rendered by this office under date of November 17, 1947, it was concluded that a farmers' mutual fire and lightning insurance company formed under the law now being reviewed, was not authorized by such law to mutually insure personal property of its members against theft, for the reason that such a risk was not contemplated in the language of statutes governing such companies.

While this opinion concludes that a farmers mutual insurance company subject to the provisions of Sections 380.480 to 380.570, RSMo 1949, may not write a "full coverage" policy on motor vehicles

so as to cover the members liability for personal injury or property damage to third persons, it is deemed necessary to refer to House Bill No. 249, passed by the 67th General Assembly of Missouri, and effective as of August 29, 1953, which prohibits formation in the future of farmers mutual insurance companies under Sections 380.480 to 380.570, RSMo 1949, but allows such companies already formed to accept the provisions of the new law of incorporation of farmers mutual insurance companies found in House Bill No. 249, mentioned above.

CONCLUSION

It is the opinion of this office that farmers' mutual insurance companies operating under the provisions of Sections 380.480 to 380.570, RSMo 1949, may not write a "full coverage" policy on motor vehicles so as to cover the member's liability for personal injury or property damage to third persons. However, it is our opinion that should these companies elect to comply with the provisions of the new law found in House Bill No. 249 of the 67th General Assembly, they may do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly.

JOHN M. DALTON Attorney General

JLO'M: vlw

INSURANCE:

\$100,000.00 limitation in subparagraph (d) of Section 375.330, RSMo 1949, applicable to insurance company's right to purchase, hold and convey real estate is applicable to mutual companies comprehended in subparagraphs (b) and (c) of said statute.



December 10, 1953

Honorable C. Lawrence Leggett Superintendent, Division of Insurance Jefferson Building Jefferson City, Missouri

Dear Mr. Leggett:

The following opinion is rendered in reply to your recent request reading as follows:

"There has been several instances when the question of the meaning of paragraph C and D under Sub-Section 1 of Section 375.330 has been disputed by mutual insurance companies formed under the laws of this state. Paragraph C limits the amount of money that a mutual company can invest in its home office building to 60% of its surplus, or 5% of its admitted assets as shown by its last annual statement, whichever is lesser. However, paragraph C is qualified by paragraph D and the purpose of this letter is to request an official opinion of your office as to whether or not paragraph D limits the amount of money which a mutual insurance company can invest in its home office building to \$100,000 or does it mean such a company with the approval of the Superintendent can invest \$100,000 over and above the amount in paragraph C."

Ruling of the question depends on the construction to be accorded the following language found in Section 375.330, RSMo 1949:

"1. No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to wit:

Honorable C. Lawrence Leggett:

- "(1) Such as shall be necessary for its accommodation in the transaction of its business; provided, that before the purchase of real estate for any such purpose, the approval of the superintendent of the division of insurance must be first had and obtained and in no event shall the value of such real estate, together with all appurtenances thereto, purchased for such purpose
- "(a) If a stock company, exceed the amount of its capital stock;
- "(b) If a fire or casualty company, but not a stock company, exceed sixty per cent of its surplus or ten per cent of its admitted assets, as shown by its last annual statement preceding the date of acquisition, as filed with the superintendent of the division of insurance, whichever is the lesser; or
- "(c) If any other type or kind of insurance company, exceed sixty per cent of its surplus or five per cent of its admitted assets, as shown by its last annual statement, whichever is the lesser; and provided further, that
- "(d) Any insurance company formed under the laws of this state, except a stock company, may with the approval of the superintendent of the division of insurance purchase such real estate as shall be necessary for its accommodation in the transaction of its business and having a value in excess of the foregoing limitations but not in excess of one hundred thousand dollars; or, * * ."

The above quoted language from Section 375.330, RSMo 1949, was last amended by repeal and re-enactment by the Sixty-Fifth General Assembly, Laws, 1949, p. 303. By such amendment, language now appearing at subparagraphs (a), (b), (c) and (d) was substituted for the following language:

"* * * exceed the amount of capital stock of such company, if a stock company or a

Honorable C. Lawrence Leggett:

stipulated premium company, or one hundred thousand (\$100,000.00) dollars for all other types and kinds of insurance companies; * * *."

The last quoted provision came into the statute in the amendment of 1933 (Laws 1933-34, Extra Session, p. 63) and remained unchanged until the 1949 amendment above referred to. Certainly the language of the statute prior to its amendment by repeal and re-enactment in 1949 was not ambiguous, and companies other than stock and stipulated premium companies were limited to the amount of one hundred thousand (\$100,000.00) dollars when purchasing or holding real estate necessary for their accommodation in the transaction of their business under the portion of the statute being construed.

Subparagraphs (a), (b), (c) and (d) appearing in the latest amendment, descend into more detail than did the language it supercedes. Where the former provision had two classifications of companies, to-wit: (1) stock companies and stipulated premium companies, and (2) all other types of insurance companies, the new language may be broken down as follows:

- (1) Subparagraph (a) puts stock companies generally in a class and limits their maximum expenditure for the purpose to the value of their capital stock.
- (2) Subparagraph (b) puts non-stock fire and casualty companies in a class and limits the maximum expenditure for the purpose to sixty per cent of the companies' surplus or ten per cent of their admitted assets, as shown by their last annual statement preceding the date of acquisition, as filed with the superintendent of the division of insurance, whichever is the lesser;
- (3) Subparagraph (c) puts in a separate class those companies which may not be grouped together under subparagraphs (a) or (b), and limits the maximum expenditure for the purpose to sixty per cent of the companies' surplus or five per cent of their admitted assets, as shown by their last annual statement, whichever is lesser;
- (4) Subparagraph (d) is a qualifying provision affecting each of the three preceding subparagraphs (a), (b) and (c), and must be so construed. We reach this conclusion by reading the words "and provided further, that",

appearing in the last line of subparagraph (c), as a continuation of the subject matter treated in the preceding subparagraphs. This view is justified if we refer to S.B. 115, Laws, 1949, p. 303, where we find the actual bill of enactment, before it had been subdivided and placed in the 1949 Revised Statutes. Subparagraph (d) affects its preceding subparagraphs (a), (b) and (c) in the following manner:

- (1) All stock companies, as comprehended in subparagraph (a), are specifically read out of subparagraph (d);
- (2) Non-stock fire or casualty companies referred to in subparagraph (b), and whose maximum expenditure for the purpose is limited by such subparagraph to sixty per cent of their surplus or ten per cent of their admitted assets, whichever is the lesser, may, with the approval of the superintendent of the division of insurance, exceed such maximum and raise their expenditure to not to exceed one hundred thousand (\$100,000.00) dollars;
- (3) Insurance companies comprehended in the classification shown in subparagraph (c), namely, any companies which may not be grouped under subparagraphs (a) and (b), and whose maximum expenditure for the purpose if limited by subparagraph (c) to sixty per cent of their surplus or five per cent of their admitted assets, whichever is the lesser, may, with the approval of the superintendent of the division of insurance, exceed such maximum and raise their expenditure to not to exceed one hundred thousand (\$100,000.00) dollars.

No technical terms or patent ambiguities appear in the quoted language of the statute being construed and the following rule found in Orthwein vs. Germania Life Insurance Co., 261 Mo. 650, 1.c. 673, is being followed:

> "* * * When a law is plain and unambiguous in terms, we are not allowed to vary, enlarge or reduce it because of speculative theories of our own. * * *."

To contend that subparagraph (d), supra, which allows companies mentioned in subparagraphs (b) and (c) to expend for the purpose one hundred thousand (\$100,000.00) dollars with the approval of the superintendent of the

Honorable C. Lawrence Leggett:

division of insurance, in effect, raises the maximum amount mentioned in subparagraphs (b) and (c) by one hundred thousand (\$100,000.00) dollars is to re-write subparagraphs (b) and (c) and nullify the effect of subparagraph (d) as a limitation on the two preceding subparagraphs.

CONCLUSION

It is the opinion of this office that the one hundred thousand (\$100,000.00) dollar limitation found in subparagraph (d) of Section 375.330, RSMo 1949, applicable to an insurance company's right to purchase, hold and convey real estate for its accommodation in the transaction of its business, is applicable to mutual insurance companies comprehended in subparagraphs (b) and (c) of said statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M:irk

MOTOR VEHICLES:

COUNTY COLLECTORS:

Under Section 301.025, Mo.R.S., Cum. Supp., 1951, the treasurer and ex-officio collector of a town-ship organization county is not required to furnish to an applicant for a motor vehicle registration license, such applicant having paid his state and county tangible personal property taxes for the preceding year, a statement that no such taxes are due, nor is he required orally or informally at the request of the deputy commissioner of motor vehicles to make any statement as to whether an applicant has paid his taxes.



May 13, 1953

Honorable J. S. Lincoln Representative, Harrison County Sixty-Seventh General Assembly Cainsville, Missouri

Dear Sir:

We have received your request for an official opinion dated April 20, 1953, in which you quote a portion of a letter you have received from the treasurer and ex-officio collector of Harrison County, which is as follows:

"Now, I wish you would get a little information for me, if it is possible. I am eternally bothered from the license bureau office, * * *, looking up some one's personal taxes, so that they might issue a license. The way I read the law, is that if the person has a personal tax receipt, it must be produced at the time of the license purchase. Everyone forgets to bring theirs, so in order for the license bureau office to issue all they can, I am forever looking up the books and verifying payment. I am required to do that by the State, then it is O.K., but if I am helping that office issue licenses, I am quitting. If you can, get a ruling on what I am required to do. I issue a slip for nonassessed and service men, and lost or destroyed, but you know how people will take advantage of that."

From a careful reading of the request we believe that the question might be rephrased as follows:

In a township organization county when one applies for a motor vehicle registration license, having paid his taxes and having received a receipt but having forgotten to bring the receipt with him, is the county treasurer and ex-officio collector required upon a telephone request from the deputy commissioner of motor vehicles to whom the license application is made, to consult his books to determine whether tangible personal property taxes are owing to the state or county by the applicant and give an oral telephone statement as to his findings?

This request involves an interpretation of Section 301.025, Mo. R.S., Cum. Supp., 1951. The act provides:

"Personal property taxes to be paid before issuance of license -- tax receipts. -- No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicant's property was assessed showing that the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request.

The director of revenue shall make necessary rules and regulations for the enforcement of this section, and shall design all necessary forms."

A reading of the statute discloses that the applicant must present at the time of his application for motor vehicle registration one of two things: (1) A receipt showing payment of his state and county tangible personal property taxes for the preceding year; or (2) A statement from the collector that no such taxes were due. The statute further provides for the furnishing of such documents by the collector.

We believe the statute contemplates that the certified statement that no such taxes are due is to be furnished only to those persons who never owed any state and county personal property taxes for the preceding year. The treasurer and ex-officio collector of a township organization county is not required to furnish such statement to a person who has paid his taxes. Such a person is required to produce his receipt received at the time such taxes were paid.

It follows that the duty of the treasurer and ex-officio collector does not extend to checking his books at the request of the deputy commissioner of motor vehicles to determine whether the applicant has paid his taxes, nor is he required to make any statement of the payment of taxes under the circumstances set forth in the request as rephrased.

This opinion is based on strict legal principles and not on our concept of public service. Courteous public service often requires a public official to render service beyond the strict and mandatory requirements of the law. The Master said:

"And whosoever shall compel thee to go a mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away. And if a man will sue thee at the law and take away thy coat, let him have thy cloak also." MATT. 5:40-42.

But, these words were not incorporated in the statutes of Missouri, and we are confined to legislative and judicial authority.

CONCLUSION

It is the opinion of this office, based on our interpretation of Section 301.025, Mo. R.S., Gum. Supp., 1951, and not on our concept of courteous public service, that the treasurer and ex-officio collector of a township organization county is not required to furnish to an applicant for a motor vehicle registration license, such applicant having paid his state and county tangible personal property taxes for the preceding year, a statement that no such taxes are due, nor is he required orally or informally at the request of the deputy commissioner of motor vehicles to make any statement as to whether an applicant has paid his taxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

MOTOR VEHICLES: SALES TAX:

The "Retailers! Occupation Tax" levied in Illinois upon motor vehicle retailers is not a "sales tax or use tax" which may be credited to the purchaser of a motor vehicle in Illinois who brings it to Missouri within ninety days after the purchase.

See Chapter 120

See 453.69 FILED

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effective 13

Honor

Current Honor

June 11, 1953

Honorable R. Mason Link Assistant Supervisor Motor Vehicle Registration Department of Revenue Jefferson City, Missouri

Dear Mr. Link:

By your letter of May 27, 1953, you requested an official opinion of this Department as follows:

"For the past several months we have had numerous inquiries and complaints concerning dealer's in the State of Illinois representing the two per cent tax as Sales Tax when we believe it is actually an Occupational Tax.

"When a person purchases a vehicle in the State of Illinois and is required to pay a tax which is represented as Sales Tax and is shown as such on the Bill of Sale, he naturally feels that it should be credited when he applies for Missouri Certificate of Title. The vehicle may or may not be titled in the State of Illinois but in the event he requests Missouri Certificate of Title and the ninety days has not elapsed from the date the vehicle was titled in the State of Illinois, he has no exemption from the Missouri Sales or Use Tax as provided for in Chapter 144.450, only to credit such tax paid the State of Illinois against any tax that might be due in Missouri.

"We respectfully request an opinion from your office, if the Occupational Tax represented as Sales Tax under

Illinois Law could be allowed as referred to in Chapter 144.450."

The tax to which you refer is the "Retailers' Occupation Tax" provided for by Chapter 120, Paragraph 441, Smith-Hurd Illinois Annotated Statutes:

"A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

The Supreme Court of Illinois in People's Drug Shop, Inc., vs. Moysey, 384 Ill. 283, 51 N.E. (2d) 144, affirming 317 Ill. App. 370, 45 N.E. (2d) 978, gave this discussion of the Retailers' Occupation Tax Act, 1.c. 146:

"The purpose of the Retailers' Occupation Tax Act, reflected in its title and throughout the statute, is to impose a tax upon persons engaged in selling tangible goods at retail. The tax exacted is not a sales tax on the consumer and, so far as the statute is concerned, no duty rests upon him to pay the tax imposed upon the retailer. This court has repeatedly and consistently held that the tax imposed is a tax on the retailer measured by his sales to consumers. Reif v. Barrett, 355 Ill. 104, 188 N.E. 889, 896, sustaining the constitutionality of the statute, holds

that the tax is an excise or occupation tax and not a property tax. Referring to retailers, this court said: They pay a tax for the privilege of engaging in the occupation of a retailer of tangible personal property sold for use or consumption by the purchaser. ? In People ex rel. Herlihy Mid-Continent Co. v. Nudelman, 370 Ill. 237, 18 N.E. 2d 225, 227, 121 A.L.R. 1311, we said: *The retailer's occupation tax is a tax on the privilege of engaging in the business of selling tangible personal property to purchasers for use or consumption and is not a tax on the property itself. 'Again, in Ahern'v. Nudelman, 374 Ill. 237, 29 N.E. 2d 268, 269: 'The tax is an occupation tax upon a class of vendors and is measured by the gross receipts from their sales. (Citations) It applies only to sellers and the sale made must be for use or consumption and not resale. Later, in Superior Coal Co. v. Department of Finance, 377 Ill. 282, 36 N.E. 2d 354, 360, we declared: The plain purpose of the Retailers! Occupation Tax Law is to exact a tax from those engaged in the business of making retail sales in this State. In Mahon v. Nudelman, 377 Ill. 331, 36 N.E. 2d 550, 552, we observed: 'The tax is on the occupation and not on the sale, though sales are utilized as a measure of the tax to be assessed. ** * * the tax is imposed upon persons engaged in the business mentioned. They are the persons who are required to pay the tax. They are not made the agents of the state or of the department of finance to collect the tax from purchasers and pay it over to the department, but the tax is imposed on them, and they are the ones who are required to pay it. * * * *."

A sales tax on retail sales in the State of Missouri is provided for by Section 144.020, RSMo 1949, as follows:

- "l. From and after the effective date of this chapter, there shall be and is hereby levied and imposed and shall be collected and paid:
- "(1) Upon every retail sale in this state of tangible personal property a tax equivalent to two per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange; "

The purchaser of a motor vehicle is required to pay either a sales tax or a use tax upon such motor vehicle. By Section 144.070, Paragraph 1, the purchaser is required to pay the amount of the sales tax to the Director of Revenue:

"l. That at the time the owner of any new or used motor vehicle which was acquired in a transaction subject to sales tax under the Missouri sales tax law makes application to the director of revenue for an official certificate of title and the registration of said automobile as otherwise provided by law, he shall present to the director of revenue evidence satisfactory to said director of revenue showing the purchase price paid by or charged to the applicant in the acquisition of said motor vehicle, or that no sales tax was incurred in its acquisition, and if sales tax was incurred in such acquisition, such applicant shall pay or cause to be paid to the director of revenue the sales tax provided by the Missouri sales tax law in addition to the registration fees now or hereafter required according to law, and the director of revenue shall not issue a certificate of title for any new or used motor vehicle subject to sales tax as provided in said Missouri sales tax law until the tax levied for the sale of the same under this chapter has been paid as herein provided."

Under Section 144.440, RSMo 1949, a use tax is levied for the privilege of using the highways:

"l. In addition to all other taxes now or hereafter levied and imposed upon every person for the privilege of using the highways of this state, there is hereby levied and imposed a tax equivalent to two per cent of the purchase price, as defined in section 144.070, which is paid or charged on new and used motor vehicles purchased or acquired for use on the highways of this state which are required to be registered under the laws of the state of Missouri."

Certain exemptions from this use tax are provided by Section 144.450, Vol. 10, V.A.M.S., as follows:

"144.450. Exemptions from use tax

"In order to avoid double taxation under the provisions of this act, any person who purchases a motor vehicle in any other state and seeks to register it in this state shall be credited with the amount of any sales tax or use tax shown to have been previously paid by him on the purchase price of such motor vehicle in such other state. The tax imposed by section 144.440 shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, nor to motor vehicles brought into this state by a person moving any such vehicle into Missouri from another state who shall have registered and in good faith regularly operated said motor vehicle in said other state at least ninety days prior to the time it is registered in this state, * * *."

There is a distinct difference in the type of tax which is required to be paid in Illinois under the Retailers' Occupation Tax Act, and the Sales and Use Tax of Missouri. That distinction is: That in Illinois the purchaser is in no manner liable for the payment of such tax, and that the tax is not on the consumer, but is instead, levied against the retailer for the privilege of doing business. On the

other hand, the sales tax and use tax of Missouri are taxes which are levied upon and must be paid by the retail purchaser.

That this distinction is the turning point in the matter at hand, is obvious from an examination of that portion of Section 144.450, supra, stating that a purchaser of a motor vehicle in another State shall be credited with the amount of sales tax or use tax paid by him in another State. Since a purchaser in Illinois does not himself pay the two per cent Occupational Tax, such amount cannot be credited to him in this State.

CONCLUSION

It is, therefore, the opinion of this office that: The "Retailers' Occupation Tax" levied in Illinois upon motor vehicle retailers is not a "sales tax or use tax" which may be credited to the purchaser of a motor vehicle in Illinois who brings it to Missouri within ninety days after the purchase.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

TOWNSHIPS:

ROADS AND BRIDGES: Township board not required to maintain streets of incorporated town nor to pay part of road taxes into town treasury.



July 9, 1953

Honorable J. S. Lincoln Representative Harrison County Cainesville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 4, 1953, in which you requested an opinion of this department. This opinion request, omitting caption and signature, is as follows:

> "I am asked by the city council of our little town, population 618, to inquire as to the proper distribution of township taxes, collected in our township, as regards their application to the maintainance of streets within the corporate limits of the town. Our county has the township organization form of government.

> "Up until six years ago all of the taxes collected within the corporate limits of the town were paid to the treasury of the town; now the township board take all the money and pay none of it into the town treasury, for the maintainance and upkeep of the streets, nor do they maintain the streets.

"Can the township board be forced to pay the taxes collected within the corporate limits of the town into the town treasury for the maintainance of the town streets and if not can the township board be forced to maintain the town streets, at least those known as through streets?

"I have been checking the statutes and have my opinion but will appreciate your opinion.

"As I see it, a special road district might solve the problem.

"P.S. You understand, of course, in referring to township taxes, I refer to the .35 levy for maintainance of roads and bridges."

In your opinion request you do not definitely state whether your town is incorporated but you do refer to the "corporate limits" thereof. Therefore, for the purposes of this opinion, this department will assume that your town is incorporated.

The authority of your township to levy and collect a tax of 35 cents on the one hundred dollars assessed valuation for road and bridge purposes is conferred upon it by Section 137.585, RSMo 1949, which prescribes the following:

- "1. In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where it shall be known and designated as a special road and bridge fund.
- The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used by said townships only for road and bridge purposes, except that amounts collected within the boundaries of road districts formed in accordance with the provisions of chapter 233, RSMo

1949 shall be paid to the treasurers of such road districts; provided that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury; provided, further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

In the event that your township board levies and collects this road tax, the moneys thus collected must be paid into the county treasury where it is known and designated as a special road and bridge fund. The county court may, in its discretion, order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars assessed valuation out of such special fund and to transfer same to the county special road and bridge fund; the balance is to be paid to the township treasurers from whence the money came and shall be used by the townships only for road and bridge purposes. However, if there has been a special road district formed in a township, then the tax money collected within its boundaries shall be paid to the treasurer of the special road district.

The township board of directors may, in their discretion, use township road funds to improve and repair any street in an incorporated city located therein, if such street shall form a part of a continuous highway of the township running through said city. However, such city has no authority to force the township to return tax funds collected within said city's boundaries nor has it authority to force the township directors to maintain the city's streets.

With reference to your question regarding the special road district, we are enclosing an official opinion of this department, rendered under date of June 25, 1948 to Emmett L. Bartram, which answers your question.

CONCLUSION.

Therefore, it is the opinion of this department that the township board cannot be forced to pay the taxes collected

within the corporate limits of Cainesville into the town treasury for the maintenance of the town streets nor can said township board be forced to maintain the town streets.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John S. Phillips.

Very truly yours,

JOHN M. DALTON Attorney General

JSP:sw

MOTOR VEHICLES: OPERATORS' LICENSES: Operation of overweight, overlength, or overwide vehicle upon the highway is not a nonmoving traffic violation.

XXXXXXXXXX

JOHN M. DALTON



March 5, 1953

XXXXXXX

J. C. Johnsen

Honorable H. M. Long, Assistant Supervisor Department of Revenue State of Missouri Jefferson City, Missouri

Dear Sir:

We are in receipt of a request from you for an opinion of this office. Your request reads as follows:

"We would appreciate your official opinion on question as follows, as relates to the new Drivers' Law enacted by the 62nd General Assembly. Namely, 'Is an over weight, over length or over wide vehicle to be considered a moving traffic violation?!"

Since you refer to the "new Drivers' Law", we will assume for the purpose of this request that you refer to the amended Senate Committee Substitute for House Committee Substitute for House Bills No. 22, 49, 56, and 114 of the 66th General Assembly. Hereafter we will call this bill by its assigned statute numbers. However, they are not to be found in the Revised Statutes of Missouri, 1949.

Reference to nonmoving traffic violations is found to have been made in Section 302.010, in the definition of "Habitual violator of traffic laws", as follows:

"(8) 'Habitual violator of traffic laws', a person who has been adjudged guilty at least five times within one year of violating any traffic laws or ordinances other than nonmoving traffic violations;"

Again, in paragraph (13) of Section 302.010:

"(13) 'Nonmoving traffic violation', that character of traffic violation

Honorable H. M. Long

where at the time of such violation the motor vehicle involved is not in motion;"

In order to determine whether or not the operation upon highways of overweight, overlength, or overwide vehicles constitute nonmoving traffic violations as to come within the exceptions contained in the above quoted Section 302.010, paragraph (8), it is necessary to consult certain parts of the statutes describing the offenses.

Section 304.170, RSMo 1949, contains the following prohibition:

> "1. No motor-drawn or propelled vehicle shall be operated on the highways of this state the width of which, including load, is greater than ninety-six inches, except clearance lights, rear view mirrors, or other accessories required by a federal, state, or city law or regulation; or the height of which, including load, is greater than twelve and one-half feet, or the length of which, including load, is greater than thirty-five feet; and no combination of such vehicles coupled together of a total or combined length, including coupling, in excess of fortyfive feet shall be operated on said highways."

Section 304.180, RSMo 1949, contains the following prohibition:

"1. No motor-drawn or propelled vehicle, or combinations thereof, shall be moved or operated on the highways of this state when the gross weight thereof, in pounds shall exceed the weight * * *."

In addition to the definition of "operator" in the House Bills referred to above, the words "driving" and "operating" are used to designate the same thing; the Legislature in the law itself having treated driving and operating as interchangeable in reference to a motor vehicle.

From the very nature of the statutes referred to above, it may be concluded that although the overweight, overlength

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or overwidth of a vehicle could, under some circumstances, constitute a violation of the law when the vehicle was standing still, there is the essential element to the commission of an offense that the vehicle be operated upon the highways.

In State v. Schwartzmann Service, 40 S.W. (2d) 479, in regard to a similar statute concerning vehicular weight, the Court said, 1.c. 480:

"The purpose of the statute, manifestly, is to protect the highways of the state from the damage that may be done by vehicles of excessive weight. It is inconceivable that the Legislature intended to protect the highways from damage from overloaded trucks and other self-propelled vehicles, while permitting the same mischief to be done by trailers drawn by such self-propelled vehicles."

It is common knowledge that it is necessary for the care and preservation of the highways and for the safety of the public that there should be limits fixed by statute as to what can be moved over public roads.

In Daniel v. State Farm Mutual Insurance Co., 130 S.W. (2d) 244, at 1.c. 249, the Court defines "operate" as follows:

"The word 'operate' according to Webster's dictionary is to 'produce an effect, to cause to effect, to bring about. | * * * *

Absent an express and declared intent within the law itself to the effect that an overweight, overlength or an overwide vehicle is a nonmoving traffic violation, there seems to be no conclusion but that the operation of such a vehicle over the highways of this state in violation of the law in regard thereto is not a nonmoving traffic violation.

CONCLUSION

It is therefore the opinion of this department that the operation of a motor drawn or propelled vehicle on the high-

Honorable H. M. Long

ways of this state over the width, length, or weight as prescribed in Section 304.170, supra, is not a nonmoving traffic violation and therefore does not come within the exception of nonmoving traffic violations of Section 302.010 as enacted in 1951.

The foregoing opinion which I hereby approve was prepared by my Assistant, James W. Faris.

Very truly yours,

JOHN M. DALTON Attorney General

JWF:ab

BANKS:

AGRICULTURE:

"Baled burlap" and "baled cotton" are
"agricultural products or the manufactured
or processed derivatives of agricultural
products" as such language is used in
subparagraph (1) (c) of Section 362.170,
RSMo 1949.

1-23-53

January 21, 1953



Honorable R. B. Mackey
Acting Commissioner of the
Division of Finance
Department of Business and Administration
State Office Building
Jefferson City, Missouri

Dear Mr. Mackey:

The following opinion is rendered in reply to your recent inquiry reading as follows:

"This Division has been asked by a bank located in a city having a population of over 100,000 to advise whether baled burlap and baled cotton could qualify as agricultural derivatives as mentioned in Section 362.170 (1) (c) of the Missouri Revised Statutes, 1949.

"The burlap originally grown is jute and comes into this country from India. It is described as 'semi-processed' by the Customs Office. The cotton is called 'grey' goods, is termed by the railroad as 'cotton bagging' and takes a lower freight rate than regular piece goods. The cotton also is 'semi-processed.'"

Section 362.170, RSMo 1949, applicable to state chartered banks, sets forth restrictions on loans, restrictions on the purchase of securities, and restrictions touching the total liability to a bank of any one person. A reading of the statute just referred to discloses that the reference made therein to cities of certain population have no bearing on the direct question posed in the

opinion request relative to "baled burlap" and "baled cotton" being agricultural products or the manufactured or processed derivatives of agricultural products. So much of Section 362.170, RSMo 1949, as is necessary to a determination of the inquiry at hand is quoted as follows from subparagraph (1) (c) of said section:

"The total liabilities to such bank of any individual, partnership or corporation may equal but not exceed thirty-five per cent of the capital stock actually paid in and surplus fund of such banks; provided, that all of such total liabilities in excess of the legal loan limit of such bank as defined in paragraph (b) of this subdivision is upon paper based upon the collateral security of warehouse receipts covering agricultural products or the manufactured or processed derivatives of agricultural products in public elevators and public warehouses subject to state supervision and regulation in this state or in any other state of the United States, under the following conditions: * * *"

The terms "agricultural products" and "manufactured or processed derivatives of agricultural products" are not defined in Section 362.170, RSMo 1949. However, at Section 265.010 (1) of Chapter 265, RSMo 1949, dealing with "standardization, inspection and marketing of agricultural products," we find agricultural products defined as follows:

"'Agricultural products' shall include horticultural, viticultural, dairy, bee, and any farm product."

In the case of Mixon v. Green, 193 So. 8, 187 Miss. 343, 1.c. 349, the Supreme Court of Mississippi spoke as follows concerning cotton being an agricultural product:

"It is a matter of common knowledge, of which the Court will take judicial notice, that generally 'agricultural products' in this State are understood to mean cotton, corn, potatoes, peas, hay and other usual crops planted and harvested during the calendar year."

Black's Law Dictionary, Deluxe Edition, 1944, p. 85, has the following reference to "agricultural product":

"That which is the direct result of husbandry and the cultivation of the soil. The product in its natural unmanufactured condition. Getty Milling Co. 40 Kan. 281, 19 Pac. 617. It has been held not to include beef cattle; Davis & Co. v. City of Macon, 64 Ga. 128, 37 Am. Rep. 60; but to include forestry products; Northern Cedar Co. v. French, 131 Wash. 394, 230 P. 837, 846."

Webster's New International Dictionary, Second Edition (Unabridged), defines agriculture as follows:

"The art or science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding, and management of livestock, tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc."

Webster's New International Dictionary, Second Edition (Unabridged), defines "burlap" and "jute" as follows:

"Burlap: A coarse, heavy, plain-woven fabric, of jute or hemp, sometimes flax, used for bagging; also, a finer kind of similar material, for curtains, etc."

"Jute: (a) The glossy fiber of either or two East Indian tiliaceous plants (Corchorus olitorius and C. capsularis). Though tenacious, it is injured by moisture, and hence is used chiefly for sacking, burlap, and the cheaper varieties of twine; it is also made into wrapping paper, and is sometimes mixed with wool or silk in fabrics. (b) The plant producing this fiber."

From the foregoing definitions and the cited decision of the Supreme Court of Mississippi, it may reasonably be concluded that "baled burlap" and "baled cotton" referred

to in the request for this opinion are "agricultural products or the manufactured or processed derivatives of agricultural products" as such language is used in subparagraph (1) (c) of Section 362.170, RSMo 1949.

CONCLUSION

It is the opinion of this office that "baled cotton" and "baled burlap" are "agricultural products or the manufactured or processed derivatives of agricultural products" as such language is used in subparagraph (1) (c) of Section 362.170, RSMo 1949.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Respectfully submitted,

JOHN M. DALTON Attorney General

JLO'M: 1w

CREDIT UNIONS:

DISSOLUTION:

A solvent credit union, subject to provisions of Chapter 370, RSMo 1949, but which cannot effect liquidation and dissolution under the provisions of that chapter, may do so under the provisions of Chapter 351, RSMo 1949.

JOHN M. DALTON



May 15, 1953

J.C. JOHNSEN XXXXXXX

Honorable R. B. Mackey Acting Commissioner of Finance Division of Finance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"May a solvent credit union subject to the provisions of Chapter 370 RSMo 1949 effect liquidation and dissolution where it is impossible to dissolve under authority contained in Section 370.350 RSMo 1949?"

Chapter 370, RSMo 1949, to which you refer, is the law designed to apply specifically to the creation, operation, and dissolution of credit unions. Section 370.350 of this chapter provides the method to be followed in the dissolution of credit unions. Certainly Chapter 370, supra, should be followed by credit unions in all of their phases if it is possible for them to do so. However, you state that in the instant situation it is impossible for Section 370.350, supra, to be followed. Since that is the situation we must look to the general law to see whether dissolution could be effected under its provisions.

We note that paragraph four of Section 370.040, RSMo 1949, provides that the organizers of a credit union become and are created a corporation.

We now direct your attention to Chapter 351, RSMo 1949, which is entitled "General and Business Corporations." Section 351.690 of this chapter is entitled "Applicability of this

chapter to existing corporations," and reads as follows:

"The provisions of this chapter shall be applicable to existing corporations as follows:

- "(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;
- "(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;
- "(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and

rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

"(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section."

(Emphasis ours)

It will be noted that the above section holds that the provisions of Chapter 351 are applicable to credit unions if such provisions supplement the existing laws relating to credit unions (which in this instance would be Section 370.350 mentioned above), and if such provisions "are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws," which, again, would be, for our purposes, Section 370.350. We must, therefore, examine the law relating to the dissolution of General and Business Corporations, and determine whether such laws supplement Section 370.350, or whether such law is "inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws," which, as we noted above, is, in this instance, Section 370.350, which section reads:

"1. At any meeting, called for the purpose, notice of the purpose being contained in the call, four-fifths of the entire membership may vote to dissolve the credit union and shall thereupon signify their consent to such dissolution in writing and shall file such consent with the said commissioner, attested by a majority of its officers, with a statement of the names and addresses of the directors and officers; duly verified.

"2. The commissioner, upon receipt of satisfactory proof of the solvency of the credit union, shall execute in duplicate a certificate to the effect that such consent and statement have been filed and

that it appears therefrom that the credit union has complied with this section.

- "3. Such duplicate certificate shall be filed by such credit union in the office of the recorder of deeds of the county in which said credit union has its place of business and thereupon such credit union shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its affairs.
- "4. It shall, by its board of directors, then promptly proceed to adjust and wind up its business, carry out its contracts, collect its accounts receivable, and liquidate its assets, and apply the same in discharge of the obligations of the credit union and, after paying such obligations, each share according to the amount paid in thereon, shall be entitled to its proportion of the balance of the assets.
- "5. Said credit union shall continue in existence for the purpose of discharging its debts and obligations, collecting and distributing its assets, and doing all other acts required in order to wind up its business, and may sue and be sued for the purpose of enforcing such debts and obligations until its affairs are fully adjusted and wound up, for three years.
- "6. The commissioner is authorized to promulgate rules and regulations for the dissolution of credit unions during the time such credit unions are adjusting and winding up their affairs, and, upon the termination of such credit union, the commissioner shall notify the secretary of state of such dissolution."

The law relating to the dissolution of General and Business Corporations is found in Section 351.460 through Section 351.565.

In this regard we direct attention to Section 351.460, RSMo 1949, which is entitled "Voluntary dissolution on consent of shareholders," and which reads, in part:

"A corporation may be voluntarily dissolved by the written consent of the holders of record of all its outstanding shares in the following manner coupled with compliance with the provisions of sections 351.470 to 351.480: Upon the execution of such written consent by all the shareholders of record, articles of dissolution shall be executed in duplicate by the corporation by its president or a vice-president, and verified by him, and the corporate seal shall be thereto affixed, attested by its secretary or assistant secretary, which shall set forth and contain * * *"

(Emphasis ours.)

Section 351.465, RSMo 1949, which is entitled "Voluntary dissolution by resolution of director," reads:

- "A corporation may elect to dissolve voluntarily and wind up its affairs by the act of the corporation, in the following manner, coupled with compliance with the provisions of sections 351.470 to 351.480:
 - "(1) The board of directors shall adopt a resolution recommending that the corporation be dissolved voluntarily, and directing that the question of such dissolution be submitted to a vote at a meeting of the shareholders, which may be either an annual or special meeting;
 - "(2) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of voluntarily dissolving the corporation shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this chapter for the giving of notice of meetings of shareholders. If such meeting be an annual meeting, such

purpose may be included in the notice of such annual meeting;

- "(3) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on a resolution to dissolve voluntarily the corporation, which shall require for its adoption the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting.
- "(4) Upon the adoption of such resolution, articles of dissolution shall be executed in duplicate by the corporation by its president or a vice-president, and verified by him, and the corporate seal shall be thereto affixed, attested by its secretary or an assistant secretary, which shall set forth:
- "(a) The name of the corporation;
- "(b) The names and respective addresses, including street and number, if any, of its officers and directors;
- "(c) A copy of the resolution of the shareholders authorizing the voluntary dissolution of the corporation;
- "(d) The number of shares outstanding entitled to vote for or against such resolution of the shareholders and the number of shares voted for and against the voluntary dissolution of the corporation, respectively."

Section 351.485, RSMo 1949, which is entitled "Jurisdiction of court of equity in liquidation," reads:

- "1. Courts of equity shall have full power to liquidate the assets and business of a corporation:
- "(1) Upon the suit of a shareholder when it is made to appear

Honorable R. B. Mackey

- "(a) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
- "(b) That the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent; or
- "(c) That the corporate assets are being misapplied or wasted:
- "(2) Upon the suit of a creditor whose claim has either been reduced to judgment and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature;
- "(3) Upon application by a corporation which has filed articles of dissolution, as provided in this chapter, to have its liquidation continued under the supervision of the court;
- "(4) Where information has been filed by the attorney general to dissolve a corporation and it is made to appear that liquidation of its business and affairs should precede the entry of a decree of dissolution;
- "(5) When for any reason the certificate of incorporation of a corporation, or the certificate of authority to a foreign corporation, issued by the secretary of state, shall have been forfeited or revoked and such forfeiture or revocation shall not have been rescinded as permitted by this chapter.

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"2. Such proceedings shall be brought in the city or county in which the registered office of the corporation is situated.

"3. It shall not be necessary to make shareholders parties to any such suit or proceeding unless relief is sought against them personally."

In the above we have indicated various methods by which we believe a solvent credit union may be dissolved, since, in our opinion, such methods are not inconsistent with, or in conflict with the purposes of, and are not in derogation or limitation of existing laws specifically applicable to credit unions, but that the above methods of dissolution simply supplement such laws.

CONCLUSION

It is the opinion of this department that a solvent credit union, subject to the provisions of Chapter 370, RSMo 1949, but which cannot effect liquidation and dissolution under the provisions of that chapter, may do so under the provisions of Chapter 351, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm

C LANGE OF VENUE MAGISTRATE COURIS: COSTS:

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JOHN M. DALTON



upon commencement of civil suit shall be paid by said clerk to Dir. of Revenue, or to county treasurer if magistrate court was created by order of circuit court, at end of month, not transferred to court receiving costs by reason of change of venue; (2) circuit clerk may not demand payment of filing fee on change of venue from magistrate court, may not lawfully refuse filing case transferred from magistrate court to circuit court on change of venue; (3) party taking change of venue shall be liable for costs, but magistrate is required to xxxxxxxxx grant change of venue even though costs have accrued.

J.C.JOHNSEN

June 13, 1953

Honorable Douglas Mahnkey Prosecuting Attorney Taney County Forsyth, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"A dispute has arisen or rather a difference of opinion, between our Magistrate Clerk and the Clerk of the Circuit Court on the matter of costs and filing fees in change of venue from Magistrate Court to Circuit Court.

"The Statute provides that change of venue may be taken from a magistrate court and in counties like Taney County the cause is transferred to the Circuit Court. Section 517.560 provides that costs be taxed against the party taking the change of venue.

"First Question: What happens to the \$5.00 filing fee? Does the Magistrate Clerk hold that and pay into the State.

"Second Question: Our Circuit Clerk has demanded a \$10.00 filing fee be paid on a change of venue being filed in his court from the Magistrate Court. That is not the law in my opinion. But the question is, can a filing fee be demanded by

the Circuit Clerk? Or is he required to file and docket the case without a fee?

"Third Question: Upon change of venue (these are all on civil matters) being granted, what is meant by the term 'costs taxed against the party taking the change' as used in Section 517.560 R.S. 1949? Does that mean the costs must be paid up in full before the change is granted? We are all confused on this."

Your first question is: "What happens to the \$5.00 filing fee? Does the Magistrate Clerk hold that and pay it into the State?"

On March 5, 1948, this department rendered an opinion to Honorable W. L. Halbrook, Judge of the Magistrate Court, Salem, Missouri. The Conclusion of that opinion was:

"* * * the five dollar filing fee required to be paid to the clerk of the magistrate court upon commencement of any proceedings shall be paid by said clerk to the Director of Revenue or the county treasurer, as the case may be, at the end of each month and shall not be transferred to the court receiving the cause by reason of a change of venue."

A copy of the above opinion is enclosed. The answer to your first question is, therefore, that the \$5.00 is paid to the Director of Revenue, except where the fee is originally paid into a magistrate court which was created by order of the circuit court, in which case the fee is paid to the county treasurer.

Your second question is: "Our Circuit Clerk has demanded a \$10.00 filing fee be paid on a change of venue being filed in his court from the Magistrate Court. That is not the law in my opinion. But the question is, can a filing fee be demanded by the Circuit Clerk? Or is he required to file and docket the case without a fee?"

The procedure to be followed after filing of an affidavit for a change of venue in a magistrate court in which a cause is pending, is set forth in Sections 517.520 and 517.530, RSMo 1949, which reads:

"1. Upon the filing of the affidavit in due time, requesting change of venue, the magistrate

must allow the change of venue and enter an order accordingly, and immediately transmit all of the original papers and a transcript of all of his orders in the case to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that another magistrate in the county is a material witness for him without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court.

- "2. In which case the receiving court or magistrate shall be notified immediately by the magistrate granting the change of venue, by filing with the clerk of the circuit court or magistrate receiving the case on change of venue a certified copy of the order granting the change of venue, and upon receipt of such notice such magistrate or clerk of the circuit court to whom the change of venue is granted shall reset the case for trial on a day certain.
- "3. If the change be allowed on account of bias or prejudice of the inhabitants of the county, all of the original papers and such transcript immediately shall be sent to a magistrate of some adjoining county for trial as herein provided; provided, that when such affidavit for change of venue shall be filed, the magistrate shall have no further jurisdiction in the cause except to grant such change of venue."

"The court or clerk thereof to which the cause is sent shall, when it becomes possessed of the cause, forthwith proceed with the same in like manner as if it had been originally commenced before it, and it shall set the same for trial and cause the parties to be notified thereof, in writing, which notice shall be served on the parties not less than five nor more than fifteen days before the day fixed for such trial, except as otherwise provided in this act. The

notice may be served in like manner as an original writ of summons. Either party may waive such notice by voluntarily entering his appearance. Notice mailed by the court or clerk thereof, addressed to the parties or their attorneys of record at their respective addresses appearing in the files of the court shall constitute sufficient service of notice under this section."

It will be noted that paragraph 1 of Section 517.520, supra, states that "the case shall be certified to the circuit court for trial as if originally filed in the circuit court." (Emphasis ours).

Also, Section 517.530, supra, states that in instances of change of venue from magistrate court, the circuit court shall "forthwith proceed with the same in like manner as if it had been originally commenced before it . . . "

From the above, we believe that any law regarding security for costs which would apply to a suit originally filed in the circuit court, would apply to change of venue cases from a magistrate court. With this in mind, we now refer to Section 514.010, RSMo 1949, which reads:

"In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators or guardians, qui tam actions, actions on penal statutes when the penalty is given to the informer, and in all civil cases when the plaintiff or person for whose use the action is to be commenced shall not be a resident of this state, the plaintiff or person for whose use the action is to be commenced shall, before he institutes such suit, file with the clerk of the court in which the action is to be commenced the written undertaking of some person, being a resident of this state, whereby he shall acknowledge himself bound to pay all costs which may accrue in such action; and if any such action shall be commenced without filing such undertaking, or depositing with the clerk of the court in which said suit is brought, a sum of money sufficient to pay all costs that may accrue in the case, subject to be increased at any time, whenever the court may deem proper, and by its order of record require, the court, on motion, may dismiss the same, unless

such undertaking be filed or sum of money be deposited before the motion is determined, and the attorney of the plaintiff shall be ruled to pay all costs accruing therein."

Also, to Section 514.020, RSMo 1949, which reads:

"If. at any time after the commencement of any suit by a resident of this state, he shall become nonresident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined.

The above sections, it will be noted, do not vest in the circuit clerk any power to demand the payment of a filing fee, or any authority to refuse the acceptance of a case for filing unless a filing fee shall have been paid.

Your third question is: "Upon change of venue (these are all on civil matters) being granted, what is meant by the term 'costs taxed against the party taking the change' as used in Section 517.560, R.S. 1949? Does that mean the costs must be paid up in full before the change is granted?"

Section 517.560, RSMo 1949, to which you refer, states:

"When a change of venue is taken by the defendant, or by the plaintiff after the defendant has had a change of venue, such plaintiff or defendant shall be taxed with the costs which have accrued for witnesses and service thereof, and witness fees, in preparing for trial at the time and place fixed therefor, and the costs of the magistrate for transferring the cause to the other magistrate or circuit court and when taken by the plaintiff from the magistrate before whom he commenced his suit, he shall be taxed with all the costs which have accrued and shall accrue in the cause until the transcript and papers shall be delivered to the magistrate or circuit clerk, as the case may be, to whom the cause is sent for trial."

It seems to us that three situations are contemplated by the above section. One is that the defendant shall pay the costs which have accrued if he takes a change of venue. A second is that if the defendant takes a change of venue and the plaintiff then takes a change, the plaintiff shall pay the costs of the second change. The third is that the plaintiff shall pay the costs if he takes a change of venue from the magistrate court in which he commenced his suit.

Your final question is whether such costs must be paid before change of venue is granted. We believe not. In the case of Endicot v. Hall, 61 Mo. App. 186, the court stated:

"The plaintiffs sued the defendant upon an account before a justice of the peace. The defendant appeared, and filed an application for a change of venue properly verified, and based on the ground that the justice was prejudiced against him. The justice overruled the application for a change of venue, on the ground that the defendant refused to pay the costs which had accrued in the case up to the date of the application. Thereupon the defendant refused to proceed any further before the justice, and judgment was entered against him by default, which judgment, upon proof of the damages of the plaintiffs was made final. The defendant appealed in due time to the circuit court, and moved

that court to remand the cause to the justice with directions to grant him a change of venue. The court overruled this motion, whereupon the defendant declined to appear in the case any further. The circuit court thereupon affirmed the judgment of the justice, and the defendant, after an ineffectual effort to set such affirmance aside, appealed to this court.

"As no brief is filed by the respondent, we are not advised on what theory this judgment is sought to be upheld. Section 6241 of the Revised Statutes of 1889 provides that, who an affidavit for a change of venue shall be filed, the justice shall have no further juris-diction in the cause. This proviso was presumably added to the section as it formerly stood to obviate the effect of the rulings in Colvin v. Six, 79 Mo. 198, and State ex rel. v. Six, 80 Mo. 61, which were to the effect that a judgment entered by a justice after filing of an application for a change of venue was voidable merely, and not void. We decided in Jones v. Pharis, 59 Mo. App. 254, that the effect of the above proviso is to render a judgment entered by a justice after application made in due form for a change of venue absolutely void. Section 6214 of the statutes provides that, on such application, the justice shall tax costs accrued for subpoenas for witnesses and service thereof, as well as witness fees and costs of transfer, against the party filing the application, if a defendant, and, if a plaintiff, tax against him all the costs. It was also decided in Johnson v. Latta, 84 Mo. 139, that the justice who grants the change of venue may issue a fee bill for these costs. But there is no statutory provision, which makes the granting of the change of venue dependent on the payment of costs. The justice, therefore, was not warranted in imposing such a condition upon the defendant, and his subsequent entry of judgment against the defendant was absolutely void.

The same holding was made in the case of Doniphan v. Transue, 226 SW 635. At 1.c. 636, the court stated:

"It is apparent that Justice Brown did not

comply with the statute when he made the first entry shown supra. While the entry recites that the change of venue was granted, it did not specify to what justice the cause should go. While Justice Brown lost all jurisdiction of the cause except for the purpose of transferring the same, he had not complied with the statute and had not completed the granting of the change of venue until he had transferred it to some other justice, for which purpose he retained jurisdiction. * * *"

In the case of State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, at l.c. 656, the court stated:

"The appellant refused to award a change of venue, except on payment in advance of his costs or feer therefor, which he placed at one dollar. The question now is, was the justice authorized to couple the performance of his official duties with this condition? We think he was not.

"It seems the general rule in the country, as announced by the decisions and text writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. Throop, on Public Officers, sec. 446, 450; Shed v. Railroad, 67 Mo. 687, 690; Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645; Ford v. Railroad, 29 Mo. App. 616. Such statutes, too, must be strictly construed as against the officer. Ford v. Railroad, supra; and Shed v. Railroad, supra.

"Our statutes have definitely provided for justice's fees and how they may be collected, etc. Sections 4980, 5005, 5007, 6244, R. S. 1892. Section 6244 stipulates, that when a change of venue is taken by the defendant (as in this case), "* * Such defendant shall be taxed with * * *

the costs of the justice for transferring the cause to the docket of the other justice,' etc. Then section 5007 provides that 'the justice of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable, or proper officer within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias. And it has been held that the justice may issue and collect this bill of fees chargeable for the transfer of change of venue of a case, regardless of the further disposition thereof. Johnson v. Latta, 84 Mo. 139."

In the case of State v. Watkins, 253 SW 781, the court held that mandamus would lie to compel a justice of the peace to allow a change of venue.

We here note that Section 517.560, RSMo 1949, under which change of venue from magistrate court is allowed, is in substance similar to the section as amended under which aforesaid decisions were rendered so that aforesaid decisions would be applicable since the amendment of the above section and the substitution of magistrate courts for justice of the peace.

CONCLUSION

It is the opinion of this department that: (1) The \$5.00 filing fee required to be paid to the clerk of the magistrate court upon commencement of a civil suit shall be paid by said clerk to the Director of Revenue or to the county treasurer, if the magistrate court was created by order of the circuit court, at the end of each month, and shall not be transferred to the court receiving the costs by reason of a change of venue; (2) It is the further opinion of this department that a circuit clerk may not demand the payment of a filing fee on a change of venue from a magistrate court, and that he may not lawfully refuse to file a case transferred from magistrate court to circuit court on a change of venue unless a filing fee is paid; (3) It is the further opinion of this department that the party taking the change of venue shall be liable for the costs as set forth in Section 517.560, RSMo 1949, but that a magistrate is required to

grant the change of venue even though the costs which have accrued are not paid at the time of the application for a change of venue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

Enclosure HPW:mm

Persentors

COUNTY ATTORNEY'S)
COMMISSION:)

The county attorney's commission need not be recorded or filed in any county office.

1.22-53



January 15, 1953

Mr. J. Paul Markway Chief Clerk Office of Secretary of State Jefferson City, Missouri

Dear Mr. Markway:

We have given careful consideration to your request for an opinion, which request is as follows:

"Enclosed is a copy of a letter received from Mildred L. Briscoe, County Clerk, Marion County, Palmyra, Missouri, in which she states she finds nothing in the law that says where the Prosecuting Attorney's Commission shall be recorded.

"It will be appreciated if you will give us the benefit of your opinion in this matter at your earliest possible convenience."

The prosecuting attorney must be commissioned by the governor, as provided in Section 105.020, RSMo 1949, which is as follows:

"The attorney general, prosecuting attorneys, the circuit attorney, the prosecuting attorney and assistant prosecuting attorney for the city of St. Louis shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified."

The secretary of state must keep a record of all such commissions in his office, as required by Section 28.040, RSMo 1949, which is as follows:

"He shall keep his office at the seat of government; have the safekeeping of the seal of state, and of all public records, including surety bonds except of secretary of state, rolls, documents, acts, resolutions and orders of the general assembly; keep a register of all commissions issued, the official acts of the governor, and, when necessary, attest the same."

We are unable to find any other statute pertaining to the prosecuting attorney's commission, and there seems to be no law requiring his commission to be recorded or filed in any county office.

CONCLUSION

It is the opinion of this office that the prosecuting attorney's commission need not be recorded or filed in any county office.

Respectfully submitted,

B. A. TAYLOR Assistant Attorney General

APPROVED:

JOHN M. DALTON Attorney General

BAT/fh

GENERAL ASSEMBLY: The General Assembly has the power toappropriate money for the refund of taxes collected under an unconstitutional statute.



February 25, 1953

Honorable Frank C. Mazzuca Representative Jackson County, 1st District House Post Office, Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

> "In State ex rel Transport Mfg. and Eqp. Co. vs. Bates, et al., reported 359 Mo. 1002, 224 SW 2nd 996, the Supreme Court of Missouri held invalid and unconstitutional a portion of an act found L. Mo. 1947 Vol. II pp. 431-436 inclusive. It was held that the act contravened section 3 Article X Constitution of Missouri 1945. This act had imposed a 2% tax upon the purchase price of motor vehicles, and prior to having been held invalid in the case mentioned, the State of Mo. had collected many thousands of dollars thereunder. All of such collections were, or have been since, credited to funds of the Missouri State Highway Commission.

"Upon these facts I respectfully request your official opinion as to the power of the current General Assembly to enact legislation authorizing the establishment of claims against the State based upon collections made under this act and further appropriating money for the payment of such claims as may be legally established." The case which you have referred to in your letter of inquiry was decided by the Supreme Court of Missouri, En Banc, on November 14, 1949. The effect of the decision was to hold unconstitutional a statute imposing a use tax upon the acquisition of certain motor vehicles. Previous to the decision the tax had been paid by numerous persons, the proceeds thereof having been deposited in the state treasury.

At the outset we wish to point out that at all times subsequent to such decision a method for the refund of such taxes existed. The appropriate procedure was found in Section 144.190, RSMo 1949, which is still in full force and effect. We quote in part from such section:

"2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person under this chapter, and the balance shall be refunded to the person, but no such credit or rejund shall be allowed unless duplicate copies of a claim for refund are filed within one year from date of overpayment."

(Emphasis ours.)

This statute was under consideration by the Supreme Court of Missouri in Kleban v. Morris, 247 S.W. (2d) 832, decided April 14, 1952. In that case an effort was made to force certain disbursing officials of the State of Missouri to allow and pay to the plaintiffs payments previously made under the statute held unconstitutional in State ex rel. Transport Manufacturing and Equipment Company v. Bates, et al., referred to supra. Recovery was denied upon the ground that the action was in effect one against the state, and that inasmuch as the immunity from suit of the state had not been waived, the action could not be maintained. However, in the course of the opinion the court pointed out that Section 14.190, RSMo 1949, was in effect and did provide a method by which such illegal exactions might be refunded. We direct your attention to the following portion of the opinion appearing at 1.c. 839:

"VI. The Sales Tax Act provides for the refund of taxes illegally collected thereunder when claims therefor are filed within one year from the date of payment. 8 144.190, RSMo 1949, V.A.M.S. The Director of Revenue is in charge of the Department of Revenue of this State and the collection of the revenue, Mo. Const. art. IV, \$ 22, Chs. 32, 136, RSMo 1949, V.A.M.S., including the sales tax, which Sales Tax Act is to be administered by said Director. Ch. 144, Id. The act contemplates the filing of the claim with the Director of Revenue. \$ \$ 144.190, 144.260; State ex rel. St. Louis Shipbuilding & Steel Co. v. Smith, 356 Mo. 25, 201 S.W. 2d 153, 155.

"* * * The instant action is one against the State, and State ex rel. Transport Mfg. & Eq. Co. v. Bates, 359 Mo. 1002, 224 S.W. 2d 996, considered the Legislature had power to enact a use tax but the use tax provisions were unconstitutional on account of a certain exemption. This holding did not affect the provisions of the Sales Tax Act providing a method for the refund of taxes illegally collected. The word voverpayment in \$ 144.190 (quoted under III, supra) includes taxes illegally collected as well as the other payments mentioned in the section."

(Emphasis ours.)

From the foregoing it appears that a method has been provided by which claims for refunds might be filed and allowed. We direct your attention also to Laws of 1949, page 198, and Laws of 1951, page 47, both containing appropriations for the payment of such claims when allowed.

What has been said we believe answers your question with respect to the power of the General Assembly to provide for a method of establishing claims against the

Honorable Frank C. Mazzuca

state under the facts outlined in your letter of inquiry and for the appropriation of money to pay such claims.

One further question presents itself as a corollary to what has been said heretofore. It is possible that the General Assembly might wish to extend the time for filing such claims based upon payments made under the particular statute held unconstitutional in State ex rel. Transport Manufacturing and Equipment Company v. Bates, et al., mentioned supra, beyond the one year period provided in Section 144.190, RSMo 1949. That statute requires such claims to be filed within one year from the date of overpayment as appears from the portion of the statute quoted supra.

Assembly are plenary, and except as such powers may be restricted by constitutional provisions, the General Assembly may exercise them in any manner it sees fit. We, therefore, are of the opinion that if the General Assembly in recognition of a moral obligation to extend the time for presenting claims for the refund of taxes illegally collected, such as those here under consideration, desires to extend the time within which such claims may be filed, it has full power to do so.

CONCLUSION

In the premises we are of the opinion:

(1) That a method for the refund of taxes collected under the use tax statute held unconstitutional in State ex rel. Transport Manufacturing and Equipment Company v. Bates, et al., 224 S.W. (2d) 996, has been provided under Section 144.190, RSMo 1949, subject to the limitation that such claims must have been filed within one year from the date of overpayment;

Honorable Frank C. Mazzuca

- (2) That the General Assembly has the power to extend the time within which such claims may be presented; and
- (3) That the General Assembly has power to appropriate money for the payment of such claims as are comprehended within (1) and (2) of this conclusion.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB, Jr./fh

COSTS:

CHANGE OF VENUE:

The costs incurred in a criminal case on change of venue are payable by the county in which the proceedings originated.

JOHN M. DALTON

March 11, 1953



J. C. JOHNSEN

Mr. Frank W. May Prosecuting Attorney St. Francois County Farmington, Missouri

Dear Sir:

We render herewith our opinion based upon your request of March 5, 1953, which request is stated as follows:

"Although Section 550.260 of the Revised Statutes of Missouri for 1949, Paragraph 2 and 3 seem to me to be too clear for any misunderstanding, some of the County Treasurers of other counties keep returning fee bills to our County Treasurer for payment and recording, when such fee bills originated in the other counties in criminal cases that have come to this county on changes of venue.

* * * * * *

"I would appreciate a formal opinion from your office which our Treasurer can use to guide his future dispositions of these fee bills."

Your letter indicates that you and the county treasurer of St. Francois County conceive Section 550.260, RSMo 1949, to be the statute controlling the payment of costs incurred after a change of venue is granted the defendant in a criminal case.

We believe that Sections 550.120 and 550.130, RSMo

1949, are the controlling statutes. These sections read:

"550.120. Costs in change of venue. -In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the in-dictment was originally found or the proceedings were originally instituted; and in all cases where fines are imposed upon conviction under such indictments or prosecutions, or penalties or forfeitures of penal bonds in criminal cases, are collected, by civil action or otherwise, payable to the county, such fines, penalties and forfeitures shall be paid into the treasury of the county where such indictment was originally found or such prosecution originally instituted, for the benefit of the public school fund of the county."

(Emphasis ours.)

"550.130. Judge and prosecuting attorney to certify cost bill. - The bill of costs in any case, as provided for in section 550.120, shall be certified to by the judge and prosecuting attorney, as now provided by law, and shall be presented to the county court in which the indictment was originally found, or proceedings instituted, and shall thereupon be paid as if the cause had been tried or otherwise disposed of in said county."

(Emphasis ours.)

CONCLUSION

It is the opinion of this office, based upon the fore-

Mr. Frank W. May

going statutes, that the costs incurred in a criminal case on change of venue are payable by the county in which the proceedings originated.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. W. Don Kennedy.

Respectfully submitted,

JOHN M. DALTON Attorney General COUNTY BUDGET LAW: SURPLUSES:



THIRD CLASS COUNTY:) 1. A county of third class, having accumulated a) surplus over a period of years from the balances) of funds of which the objects of their creation are fully satisfied, may use such surplus funds in the building of a county jail. Such expenditure should be specifically budgeted. 2. Use of such funds) for such purpose is within the discretion of the county court, and does not require voter approval. 3. Bonds may be issued to supply any money needed) in addition to such surplus fund.

August 7, 1953

Honorable Edgar Mayfield Prosecuting Attorney Laclede County Lebanon, Missouri

Dear Mr. Mayfield:

We render herewith our opinion based on your request of July 18, 1953, which request reads as follows:

> "I would appreciate an opinion from your office regarding the following matters.

"Laclede County, a county of the third class, has an ancient building for a jail which, over the past few years, has proved to be insecure for the purposes of imprisonment. Several jailbreaks over the past few years, effected by digging through the walls of the structure, have aroused county officials and the citizens of the County, and they are now seriously interested in seeing what can be done to remedy the situation.

"I am informed that our county treasury is now enjoying a surplus of revenue funds, and certain members of the County Court have inquired as to whether these funds might be used for the purposes of constructing a new jail, or whether a bond issue will have to be voted to appropriate funds for that purpose. And, if they can use the surplus funds on hand but such surplus is insufficient

to pay the total cost of construction, are they empowered to use the surplus for that purpose and, in addition, vote a bond issue for the remaining amount required.

"If the County Court is permitted to expend the aforesaid surplus for jail construction, is the decision to so spend this money entirely one within their discretion, or must they have voter approval?

"I have examined the pertinent statutes in the above matters, but will appreciate having my views fortified by an official opinion from your office covering same."

We assume that the Laclede County surplus has been accumulated by leftovers at the end of fiscal years from various funds - as for instance, a certain amount has been set aside for the care of insane pauper patients in state hospitals for a given year, and a less amount actually spent - so that you are within the terms of Sections 50.020 and 50.030, RSMo 1949, and within the decision of the Decker case, hereinafter cited and discussed.

We shall take your questions in this order: 1. Can a surplus of revenue funds of a third class county be used in the construction of a county jail? 2. If so, is voter approval required or is the use of such funds in the construction of a jail in the sole discretion of the County Court? 3. If such funds may be so used, and are not sufficient for the purpose, may bonds be issued to raise the balance required?

The first question confronted the Greene County Court many years ago, and was answered in the affirmative by the Supreme Court in Decker v. Diemer, 229 Mo. 296, 129 S.W. 936. (While Greene County was not of the third class, the statutes upon which the court rested its opinion apply equally to counties of that class.)

The court in that case reached its decision via what are now Sections 49.310, 49.320, 50.020 and 50.030, RSMo 1949, which for convenient reference we here quote in full:

"49.310. County court may erect and maintain courthouse, jail, etc .-- issue bonds .-- The county court in each county in this state shall erect and maintain at the established seat of justice a good and sufficient courthouse, jail and necessary fireproof buildings for the preservation of the records of the county. In pursuance of the authority herein delegated to the county courts, said county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip said courthouse and jail, and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip such building in said place or places. The county court may issue bonds as provided by the general. law covering the issuance of bonds by counties for the purposes set forth in this section. In bond elections for the aforesaid purposes in counties wherein more than one place is provided by law for holding of court, a separate ballot question may be submitted covering proposed expenditures in each separate site described therein, or a single ballot question may be submitted covering proposed expenditures at more than one site, if the amount of said proposed expenditures at each of said sites is specifically set out therein."

"49.320. County court may order buildings erected-superintendent.--Whenever the county court of any county shall think it expedient to erect any of the buildings aforesaid, the building of which shall not be otherwise provided for, and there shall be sufficient funds in the county treasury for that purpose, not otherwise

appropriated, or the circumstances of the county will otherwise permit, they shall make an order for the building thereof, stating in such order the amount to be appropriated for that purpose, and shall appoint some suitable person to superintend the erection of such buildings, who shall take an oath or affirmation faithfully and impartially to discharge the duties enjoined on him by sections 49.280 to 49.500."

"50.020. Transfer of county funds.--Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

"50.030. Section 50.020 construed. -- Nothing in section 50.020 shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Over a period of years the Greene County Court had accumulated, from odds and ends left over from various current expense funds at the end of each fiscal year, a sizable surplus. The court proposed to use this accumulation in the construction of a courthouse. A suit to enjoin such use wound up in the Supreme Court of Missouri, and the court held (Decker v. Diemer, supra), on the basis of the above-quoted statutes, that such use was permissible. Following is a quotation from the opinion, appearing at l.c. 336, in the official report:

"The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county

purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the effirmative. * * * We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

This would be a sufficient answer to the first question, except that in any question of this nature one should examine the County Budget Law, Sections 50.670 to 50.740, inclusive, RSMo 1949, enacted subsequently to the decision in the Decker case. Does the County Budget Law limit the effect of the Decker decision on statutes upon which the Decker case was decided? We conclude that it does not.

This law, enacted in 1933, provides for the preparation by the county court of an annual estimate of receipts and expenditures; for classification of proposed expenditures; and for priority of certain classes of expenditures. This classification and priority shall be "sacredly preserved."

The sixth and last class to be included in the budget, provided in Section 50.170 is placed "amount available for all other expenses after all prior classes have been provided for." Also, Section 50.680 provides that, after having provided for the prior five classes of expenses, the court may expend any balance for "any lawful purpose." There can be no doubt that the building of a county jail is a "lawful purpose" within the meaning of this statute and can be budgeted in this class.

Therefore, we do not discern in the County Budget Law any legislative intent to limit the effect of Sections 49.310, 49.320, 50.020 and 50.030, quoted above. The Budget Law does require, however, that the jail construction be specifically budgeted for the year such expenditure is anticipated.

There is this limitation upon the use of class six funds: That none can be used until all outstanding warrants are paid, and there is actually on hand in cash, funds sufficient to pay all claims in the preceding classes and all expense incurred in class six, Section 50.680. We assume that Laclede County has no outstanding warrants constituting legal obligations, and has sufficient cash on hand to pay all claims.

Having disposed of the first question, we proceed to the second: Is voter approval required for the use of surplus funds in the construction of a jail, or is this within the discretion of the county court?

Our answer is that this is within the discretion of the county court, and voter approval is not required. This we believe to be the obvious meaning of Section 49.320, quoted above, in the use of the language, "Whenever the county court of any county shall think it expedient, etc.," and, in Section 49.310, "In pursuance of the authority herein delegated to the county courts, said county courts may acquire a site * * construct * ** said * * * jail." Voter approval is not required, save to the issuance of bonds for the purpose. Also, see Decker v. Diemer, supra, 1.c. 324, to the effect that the building of a courthouse or jail is within the discretion of the county court.

Now, to the third question: If the surplus funds are not sufficient for the construction of a jail, may bonds be issued to supply the balance? Our opinion is that they may.

Section 49.310, quoted above, provides:

" * * * The county court may issue bonds as provided by the general law covering the issuance of bonds by counties for the purposes set forth in this section. * * *"

Neither this section, nor Chapter 108, RSMo 1949, containing the "general law covering the issuance of bonds by counties,"

indicates that <u>all</u> the money needed, or none at all, shall be raised by a bond issue. There is no rule or reason that bonds cannot be issued to supply a deficiency, or that they should be issued in a sufficient sum to raise the <u>entire</u> cost of construction and equipment when such amount is not required.

CONCLUSION

It is the opinion of this office that:

- 1. A county of the third class, having accumulated a surplus of over a period of years from the balances of funds of which the objects of their creation are fully satisfied, may use such surplus funds in the building of a county jail. Such expenditure should be specifically budgeted.
- 2. The use of such funds for such purpose is within the discretion of the county court, and does not require voter approval.
- 3. Bonds may be issued to supply any money needed in addition to such surplus fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

SCHOOLS: SCHOOL DISTRICTS: County treasurer having state apportioned free textbook money belonging to district located in part in another county to remit such money to treasurer of said district.



October 22, 1953

Honorable Frank W. May Prosecuting Attorney St. Francois County Farmington, Missouri

Attention: Mr. Robert A. Cedarburg

Assistant Prosecuting Attorney

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The County Treasurer of St. Francois County has presented a problem to me which I consider needs an opinion from your office. It concerns apportionment of Free Textbooks money out of State Foreign Insurance tax, which has to be apportioned according to districts.

"What does the County Treasurer do with the tax monies paid to him by the State where a district within the county has elected to consolidate with a district in another county?

"The provisions of 165.190 subsection 4 does not seem to apply."

At the outset we wish to direct your attention to an official opinion of this department delivered under date of May 11, 1953, to the Honorable James E. Curry, Prosecuting

Attorney, Douglas County, Missouri. You will observe that following the procedure outlined in this opinion, a copy of which is attached hereto, the apportionment of the "County Foreign Insurance Tax Fund" will result in separate portions of moneys belonging to a consolidated district situated in more than one county being sent to the county or township treasurers of the several counties affected.

Upon receipt by the respective county or township treasurers of such money so apportioned, we believe that the provisions of Section 165.343, RSMo 1949, become controlling with respect to the disposition to be made thereof. We quote said section in full:

"165.343. Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, the same shall, on the application of the treasurer of said town, city or consolidated school district, be paid over to him by said county or township treasurer, and the receipt of any such school district treasurer for said money shall be a lawful voucher for the disposition of said money by said county or township treasurer, and be accepted as such by the county court or other body or person having authority by law to make settlements with said county or township treasurer." (Emphasis ours.)

You will note that such disbursement of the apportioned money serves to discharge the county or township treasurer disbursing the same from all further liability with respect thereto.

CONCLUSION

In the premises, we are of the opinion that the disposition of money apportioned from the "County Foreign Insurance Tax Fund" to a county treasurer for the benefit of a school district, forming a part of a consolidated school district situated in more than one county, shall be controlled by the provisions of Section 165.343, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly.

JOHN M. DALTON Attorney General SCHOOLS:
PROSECUTING ATTORNEY:

Duty of the Prosecuting Attorn of to prosecute for violation of compulsory school attendance law. (Chapter 164, RSMo 1949).



February 13, 1953

Honorable Leon McAnally Prosecuting Attorney of Dunklin County Kennett, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would like your opinion as to whether Section 164.060 R. S. Mo. 1949 relieves the prosecuting attorney of the duty of prosecuting violations for non-attendance of school."

Section 164.060, RSMo 1949, provides in part as follows:

"2. The county superintendent shall immediately have an investigation made by his county school attendance officer, and any parent or guardian or person who, having charge, control or custody of any child between the ages of seven and sixteen years, violates any provision of sections 164.010 to 164.090, shall be warned by said officer as soon as possible after the beginning of the public school term of the district in which such child resides and also at any time thereafter to place and keep said child in regular attendance at some day school within three days from the service of said written or printed notice.

"3. After the lapse of three days from the date of the service of said notice of warning, unless such child has been placed in school, said parent or guardian or person having charge, control or custody of any such child shall be deemed guilty of a misdemeanor, and said school attendance officer shall make complaint against said parent, guardian or other person in charge of such child before the judge of the juvenile division of the circuit court or before a magistrate in the county where the party resides for refusal or neglect to send such child or children to school; said judge or magistrate shall issue a warrant upon said complaint, returnable forthwith, and upon the appearance of the defendant, shall proceed to hear and determine the same in the same manner as is provided by the statutes for other cases under his jurisdiction, and upon conviction of violation of sections 164.010 to 164.090 said parent, guardian or other person having control or custody of such child shall pay a fine of not less than ten dollars and not more than twentyfive dollars, or to be imprisoned for not less than two days and not more than ten days, or by both such fine and imprisonment; provided, that said sentence of fine or imprisonment, or both, may be suspended and finally remitted by the court, with or without the payment of costs, at the discretion of the court, if the said child be immediately placed and kept in regular attendance in some day school as aforesaid, and if such fact of regular attendance is proven subsequently to the satisfaction of said court by a properly attested certificate of attendance by the superintendent, principal or person in charge of said day school."

Section 164.040, RSMo 1949, provides in part as follows:

The county superintendent of schools in each county shall act as school attendance officer for the county without additional compensation for such services. The county superintendent of schools shall have the power of a deputy sheriff in the performance of the duties of school attendance officer in all school districts of the county except as herein provided; provided, that the board of education in school districts organized under the provisions of sections 165.263 to 165.653, RSMo 1949, may appoint and remove at pleasure one or more school attendance officers and shall pay them from the public school funds; and provided further, that, if any board of education in any school district organized under the provisions of sections 165.263 to 165.653, RSMo 1949, does not appoint a school attendance officer, the county superintendent of schools shall act in such district.

"2. The attendance officer or officers, as aforesaid, * * * shall serve in the cases which they prosecute without further fee or compensation than that paid by the board as aforesaid, and shall carry into effect such other regulations as may lawfully be required by the board appointing them."

Section 164.090, RSMo, 1949, provides as follows:

"It shall be the duty of the state commissioner of education, of superintendents of instruction, of boards of education in this state, of the county superintendents of schools, of the county superintendents of public welfare, and of every school attendance and probation officer, to enforce all laws relating to compulsory school attendance." Section 164.110, RSMo 1949, provides as follows:

"Prosecutions under sections 164.010 to 164.090 shall be brought in the name of the state of Missouri. The circuit court shall have concurrent jurisdiction with the court having general jurisdiction over misdemeanors to try and determine any cases of violation of the provisions of sections 164.010 to 164.090 and shall also have jurisdiction to determine exemptions under section 164.020 and a general supervisory jurisdiction over the enforcement of the provisions of sections 164.010 to 164.090."

Section 56.060, RSMo 1949, provides in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; * * * *"

Refusal to place a child in school after warning, is expressly made a misdemeanor by Section 164.060, supra. Section 17 of Article I, Constitution of Missouri, 1945, provides in part: "That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, * * *."

Section 164.060, RSMo 1949, authorizes the school attendance officer merely to "make complaint". He is not authorized to file an information which, under Section 17 of Article I, is essential in prosecution for a misdemeanor. The courts in numerous cases have drawn the distinction between a complaint and an information. In the case of State v. Kyle 166 Mo. 287, 1.c. 303, the court stated:

"The terms 'information' and 'indictment' as used in the Constitution, are to be understood in their common-law sense.

Honorable Leon McAnally

(Ex Parte Slater, 72 Mo. 102; State v. Kelm, 79 Mo. 515.) In the Kelm case it was held that the term 'information' as used in article 2, of section 12 of the State Constitution of 1875, was to be understood in its common-law sense, that is, a criminal charge which at common law is presented by the Attorney-General, or if that office is vacant, then by the Solicitor-General of England and in this State by the prosecuting attorneys of the respective counties who exercise the same powers as are exercised by the Attorney-General or Solicitor-General of England, that is, the power to present informations under their official oaths."

In the case of City of Richland v. Null, 194 Mo. App. 176, 1.c. 181, the court stated:

"# # # That 'complaint' is a technical term descriptive of proceedings before magistrates was held in Commonwealth v. Davis, 11 Pick. (Mass.) 432,436. In 8 Cyc. 407 we find this definition; 'A form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or crime committed; in the latter case generally under oath In criminal practice, a charge, preferred before a magistrate having jurisdiction, that a person named (or an unknown person) has committed a specific offense, with an offer to prove the fact, to the end that a prosecution may be instituted. (Emphasis ours)

In the case of McNeely v. State, 122 Tex. Cr. R. 173, 54 S.W. (2d) 512, the court stated:

"* * The complaint is the affidavit of some individual setting up facts upon which the charge is based. The informa-

tion is the official charge of crime issued upon the authority of the state.

Our statutes relative to criminal procedure have recognized the distinction between a complaint and an information. Thus Section 543.020, RSMo 1949, provided in part:

" * * * (W)hen any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation. before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief than an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint." (Emphasis ours.)

Section 543.030, RSMo 1949, provided in part:

" * * * (C) omplaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information." (Emphasis ours.)

See Sections 21.03 and 21.04, Supreme Court Rules of Criminal Procedure.

This distinction between a "complaint" and an "information" is deemed significant in answering your question. The school attendance officer is authorized merely to "make complaint." Nowhere is he authorized to file an information, which under our Constitutional provision is essential in prosecution for a misdemeanor. Only the Prosecuting Attorney is authorized to file an information.

We feel therefore, that the requirement of Section 164.060, RSMo 1949, that the judge or magistrate "shall proceed to hear and determine the same, in the same manner as is provided by the statutes for other cases under his jurisdiction" means that he should transmit the complaint to the Prosecuting Attorney, who would then proceed as in any other prosecution, for a misdemeanor. Section 21.04 Supreme Court Rules of Criminal Procedure.

Attention is also called to the fact that upon the adoption of a predecessor to the present Section 164.060, RSMo 1949, the Legislature provided, following the words "in the same manner as provided by the statutes," "except that the county school attendance officer shall act as the prosecuting officer in all such cases." Laws of 1919, page 684. This provision was eliminated in Laws of 1921, page 635. The caption of the section as amended and found in the Laws of 1921, is "Teachers to be furnished lists -county attendance officer to act as prosecuting officer." This caption was used for the first time in the Laws of 1921, despite the fact that the only change made by the act was elimination of the provision that the attendance officer should act as the prosecuting officer. The same caption was carried forward in the 1929 Revision (Section 9436), the 1939 Revision (10591) and in the 1949 Revision (Section 164.060). The caption is not, however, part of the statute. State v. Maurer, 255 Mo. 152, 1.c. 160. We feel that the Legislature's removal of the provision in 1921 is ample evidence that they did not intend for the attendance officer to supersede the Prosecuting Attorney in prosecutions for enforcement of the law.

CONCLUSION

Therefore, it is the opinion of this department that the Prosecuting Attorney is not, under Section 164.060, RSMo 1949, relieved of the duty of prosecuting on violation of the compulsory school attendance law.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

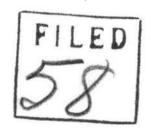
JOHN M. DALTON Attorney General

RRW:1w

Construction of Section 561.440, RSMo 1949.

CRIMINAL LAW:

JOHN M. DALTON



February 19, 1953

XXXXXXX

Honorable Leon McAnally Prosecuting Attorney Dunklin County Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"I would like your opinion as to whether a person can be properly prosecuted under Section 561.440 R.S. Mo. 1949 who writes an ordinary check drawn on a bank and signs fathers' name and underneath fathers signature writes following words 'BY Son'. The check is made 'Pay to the order of Cash' and passed for a valuable consideration. The check is turned down by the bank because of unauthorized signature."

Your request requires a construction of Section 561.440, RSMo 1949, which reads:

"Any person not authorized by law who shall put in circulation as a circulating medium any note, bill, check, ticket or other instrument of writing, purporting or evidencing that any money will be paid to the receiver, bearer or holder thereof or to any person by any name or description whatsoever or that it will be received in payment of debts or be used as a currency or medium of trade, in lieu of money or who shall vend, pass, receive or offer in payment any such note, bill, check, ticket or other such currency shall upon conviction be adjudged guilty of a misdemeanor."

While the foregoing statute is somewhat ambiguous, we cannot believe that it is authority for prosecuting the party referred to in your request for writing such a check. Certainly if such statute was intended to be applicable in this

instance, the Legislature would have been more specific, but by using such language, it left the impression that it applies only to those persons who unlawfully issue and pass or circulate bank notes, checks, currency, exchange, treasury notes, money, etc., that may be used as a currency or medium of trade in lieu of money. We cannot conceive that if it was the legislative intent to include such practice under the circumstances referred to in your request that it would not be more specific as it has in other instances when enacting provisions such as those making it a crime for uttering a forged check, obtaining money by false pretenses, obtaining money by means of a bogus check or checks drawn when funds are insufficient.

The statute in question does not make it a crime for writing a check on another's account, or on an unauthorized signature; but the offense is putting such instruments in circulation as a circulating medium, or to be used as a currency or medium of trade in lieu of money.

In State v. James, 63 Mo. 570, 1.c. 575, the court said, relative to Wagner Statute No. 210, Section 1, which is practically in the same form as the statute in question:

"Under the statutes it is not a question of intention; the offense consists in creating or putting in circulation as a circulating medium."

It would be presumptious and absurd for us to hold that anyone who writes a check may be prosecuted under the foregoing statute. If we are to hold this party has committed an offense punishable under said statute, then the same might be true of anyone else writing checks regardless of their validity.

A well established rule of statutory construction is that penal statutes shall be strictly construed in those parts which are against persons charged with their violations, but liberally construed in those parts which are in their favor. See State v. Taylor, 133 S.W. (2d) 336, 345 Mo. 325. The foregoing decision further holds that no person should be made subject to penalty of a criminal statute by implication, and when doubt arises concerning their interpretation, such doubts are to be weighed only in favor of the accused.

Currency has been defined as not always money, but it is anything that calculates on its own credit as a medium of exchange, such as bank notes, bills of exchange, government security notes issued by or under authority of the Federal government.

The court, in People v. O'Campo, 71 N.E. (2d) 375, 1.c. 377, 330 III. App. 401, defines currency as follows:

" * * * In Webster v. Pierce & Baxter, 35 Ill. 158, our Supreme Court, speaking through Mr. Justice Breese, said (page 163): 'Currency, we have decided, is coin, or such bank notes as pass freely in commercial transactions as money and regarded nearly equivalent to coin. The author of the article on 'Currency' in 25 C.J.S., page 33, states: 'Currency is the circulating medium, and is generally used to indicate the aggregate of coin, bills, notes, etc., in circulation as, a metallic currency, a mixed currency, and paper currency, etc. Aside from extrinsic circumstances or a peculiar and acquired meaning, currency is that which circulates current as money; if gold and silver circulate as money, they are currency; if bank notes circulate as money, they are currency; thus currency may be composed of either coin or paper or both. We take judicial notice of the fact that 80¢ in U. S. currency consisting of 50¢, 25¢ and 5¢ is metallic currency of the United States of America, made up of a 50 cent silver coin, a 25 cent silver coin and a 5 cent nickel coin. Under the authorities the word 'currency' appropriately describes coins as well as 'paper' money. * * * "

CONCLUSION

Therefore, it is the opinion of this department in view of the foregoing under the facts stated in your request, said party committed no offense under Section 561.440, RSMo 1949,

by merely writing a check payable to order of cash on an unauthorized signature.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON

vlb

FEES: OFFICERS:

RECORDER OF DEEDS: Recorder of deeds of 3ra-class counties having a separate circuit clerk and recorder shall make annual report of fees received by him to the county court at end of each calendar year.



March 18, 1953

Honorable Leon McAnally Prosecuting Attorney Dunklin County Kennett. Missouri

Dear Sir:

Your letter of March 13, 1953, requesting an opinion of this office was phrased as follows:

> "I would like your opinion as to when Recorder of Deeds is required to make report to County Court in third class County as required by Section 59.250 R. S. Missouri 1949. If a reasonable time, then what is a reasonable time."

Section 59.250, RSMo 1949, requires that recorders in certain counties of the third class make an annual report to the county court of all fees received by him, as follows:

> "The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court: and all fees received by him, over and above the sum of four thousand dollars except those set out in section 59.490, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

Your problem seems to be the construction of the words "every year."

Section 1.020 (6), RSMo 1949, gives the following definition of the word "year":

" * * * and the word 'year' shall mean a calendar year unless otherwise expressed, and the word 'year' shall be equivalent to the words 'year of our Lord';"

thus indicating that the report shall be made every calendar year.

In determining at what time of each calendar year this report must be made, it is observed that Section 50.010, RSMo 1949, makes the following provision:

"Unless otherwise provided in a charter adopted by a county under the provisions of sections 18 or 31, 32 and 33 of article VI, of the constitution of this state, the fiscal year of the several counties of the state shall commence on January first and terminate on the thirty-first day of December in each year, and the books, accounts and reports of all county officers shall be made to conform thereto."

(Emphasis ours.)

The two above sections indicate clearly that the said report should be made at the close of each calendar year.

The amount of time after the close of a calendar year, allowable to a recorder of deeds in filing such report, is such time as is reasonably necessary considering the circumstances surrounding each case, bearing in mind that the information in this report is required by the county court in preparing their budget of estimated receipts and expenditures which must be prepared by them at the regular February term of said court, as required by Section 50.670, RSMo 1949. Such information is also needed by the county court in publishing on or before the first Monday in March the detailed financial statement of the county, in compliance with Section 50.800, RSMo 1949.

CONCLUSION

It is, therefore, the opinion of this office that recorders of deeds in class three counties having a separate circuit clerk and recorder, and without a charter provision otherwise, shall make to the county court the report of fees required by Section 59.250, RSMo 1949, at the end of each calendar year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:lrt

COUNTY HOSPITALS: TAXATION: County court must levy tax sufficient to provide fund required by board of trustees for annual operation of county hospital.

JOHN M. DALTON

John C. Johnsen

April 14, 1953

Honorable Leon McAnally Prosecuting Attorney Dunklin County Kennett, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would appreciate having an opinion from your office as hereinafter described and based on following facts. On February 19, 1946 voters in third class county approved 2 mill tax for bond issue in amount of \$350,000, for a public hospital and maintenance of same. On March 15, 1949 the voters approved an additional bond issue in amount of \$200,000, for purpose of providing additional funds with which to establish, construct and equip a public hospital. Last year the County Court levied a total tax of 36 cents on the \$100. valuation for hospital purposes, 20 cents of that amount by reason of the first bond issue, and the additional 8 cents divided equally between second bond issue and funds for maintenance of hospital. The County Court doesn't desire to increase the tax levy. The hospital trustees are at this date asking for additional funds for maintenance of hospital. Question?

"Can the Board of Trustees obtain additional funds for maintenance and operation of the hospital and if so, what procedure should they adopt in order to accomplish this purpose."

The county hospital in Dunklin County was established under the provisions of Article IV of Chapter 126, R.S. Mo. 1939. Section 15192 of that article provided for a petition for the establishment of a county hospital. Section 15192 provided that county court should submit to the voters the question of whether or not there should be levied a tax not in excess of two mills on the dollar, for the construction of a hospital, and the maintenance of the same. Section 15197 provided for the issuance of bonds as authorized by the election.

By an act of the Sixty-third General Assembly, approved April 10, 1946, the county hospital statutes were revised to read as they are presently found in Chapter 205, RSMo 1949. This revision was undoubtedly the result of the addition of Section 11(c) of Article X of the Constitution of Missouri, 1945, which provides, in part, as follows:

" * * *(A)ny county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 205.160, RSMo 1949, authorizes the county court to "establish, construct, equip, improve, extend, repair, and maintain public hospitals." (Underscoring ours.) Bonds for such purpose are now authorized to be issued in accordance with the general law relative to incurring of indebtedness by counties. Sections 205.170 and 205.180, RSMo 1949, provide for the appointment and election of a board of trustees for the hospital. Section 205.190, RSMo 1949, provides for the organization of the board of trustees and sets forth their powers and duties. Among the provisions of this section are the following:

"2. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees, and in counties which have no treasurer the county collector shall be the treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the

control of the said board, as ordered by it, but shall receive no compensation from such board.

* * * * * *

"4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.

"5. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital.

* * * * *

"7. One of said trustees shall visit and examine said hospital at least twice each month and the board shall, during the first week in January of each year, file with the county court of said county a report of their proceedings with reference to such hospital and a statement

of all receipts and expenditures during the year; and shall at such time certify the amount necessary to maintain and improve said hospital for the ensuing year."

Section 205.310, RSMo 1949, authorizes the board of trustees to establish a nurses' training school in connection with the hospital. Section 205.320, RSMo 1949, requires the board to provide a suitable room for the detention of persons brought before the probate court for insanity proceedings, if the hospital is located at the county seat. Section 205.330, RSMo 1949, authorizes the board of trustees to determine which patients treated at the hospital are subjects of charity, and to determine the charges to be made other patients. Section 205.280, RSMo 1949, authorizes the board to prescribe rules and regulations for the operation of the hospital.

Section 205.200, RSMo 1949, as amended, 1951 Cum. Supp., RSMo., provides:

"Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall annually levy a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of said public hospital, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

If this section imposes a mandatory duty upon the county court to impose a tax levy, within the limits therein provided, sufficient to raise a sum equal to the amount which the trustees have estimated will be required for annual maintenance, a solution to your question would exist.

From the foregoing statutory provisions relative to the establishment and maintenance of a county hospital, you will observe that control of the operation of the county hospital is left to the board of trustees. They do operate through the county treasurer in the handling of hospital funds, and the county court is required to draw warrants for the expenditure of such funds. In the case of State ex rel. Bell v. Holman, 293 S.W. 93, the Kansas City Court of Appeals held that the duty of the county court in the issuance of such warrants was purely ministerial. The court in that case stated (293 S.W. 1.c. 97):

"As we view the law and the facts presented herein, we must conclude that the duty of the county court was purely ministerial; and it was the duty of the county court to issue the warrant upon the voucher of the board of trustees as presented. * * *"

The decision of the Kansas City Court of Appeals was reviewed by the Supreme Court in the case of State ex rel. Holman v. Trimble, 316 Mo. 1041, 293 S.W. 98. The court refused to quash the opinion of the Court of Appeals and, in the course of its opinion, stated (293 S.W. 1.c. 101):

"The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board.

That seems to leave no doubt that the only judgment exercised by the county court is to determine whether the vouchers presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. * * *

The Supreme Court, in discussing the county hospital statutes, further stated at 293 S.W. l.c. 102:

" * * The insuperable objection to relators' position is that they have cited no case construing any statute similar to the hospital statutes relating to the powers given and the duties imposed upon the hospital board. No case cited construes any statute where the exclusive control of funds, such as are put into the hands of the hospital board, are given to any like body with similar authority and direction as to its management. Whether or not the construction of the Kansas City Court of Appeals is correct, it is not shown to be in conflict with any ruling of this court, in the absence of a case where some similar statute is construed in a different way.

"II. This construction of the hospital statute by the Kansas City Court of Appeals is the first that has occurred in any appellate court, so far as we are advised. It is a new statute, which creates a new function to be discharged by certain public officials. It defines the manner in which the officials charged with the practice under their management shall perform their duties, and we cannot hold that the Court of Appeals was without jurisdiction in construing it as they did.

In these cases the Supreme Court and the Kansas City Court of Appeals recognized that the Legislature had conferred upon the board of trustees for a county hospital complete authority . to expend the funds available for the hospital. Whether or not this authority extends to the point of imposing a mandatory duty upon the county court to levy a tax, within the limits prescribed by Section 205.200, RSMo 1949, sufficient to raise the amount of money which the board determines will be necessary to operate the hospital for the year, has not been passed upon by the courts. In the case of State ex rel. Erwin v. Holman, 301 Mo. 333, 256 S.W. 776, the question was raised as to whether or not the county court had any discretion in levying the rate of tax provided by vote for the county hospital under the law as it formerly stood. (Section 15197, R.S. Mo. 1939.) The respondent in that case contended that unless discretion had been conferred upon the county court in levying such tax, the statute would have violated Section 36 of Article VI of the Constitution of Missouri, 1875 (Section 7. Article VI, Constitution of Missouri, 1945), which imposed upon the county court the duty of transacting the county business. The court, however, did not pass upon the contention.

In determining whether or not the Legislature intended the county court to have any discretion in levying the maintenance tax, the county hospital statutes must be considered as a whole. When so considered, as above pointed out, it is clear that the Legislature has entrusted their operation wholly to the board of trustees. The cases above cited have held that the county court is entirely lacking in authority to control the expenditures approved by the board of trustees for county hospital purposes. No provision is made in the county hospital law for the county court's passing upon the estimate of the board of trustees for the amount necessary to maintain and improve the hospital for the ensuing year. The proceeds of the hospital tax are placed in a separate fund to be used only for the purpose for which the tax is levied (Section 205.200, supra). Reference to the county budget law (Sections 50.670-50.750, RSMo 1949) reveals no provision in that act subjecting the county hospital fund to the regulation by the county court under that act. In view of these circumstances, and in view of the fact that the language used in Section 205.200, RSMo 1949, is that the county court "shall levy," we are of the opinion that the Legislature intended to confer upon the board of trustees the authority to determine the funds necessary for the maintenance of the hospital and to require the county court to levy a tax under said section, sufficient to raise such funds In our opinion, the county court has no discretion in the matter, and therefore they could be required by mandamus to levy a tax within the twenty-cent limit, sufficient to raise the amount which the board estimates will be needed.

We also call attention to Section 205.230, RSMo 1949, which provides:

"In counties exercising the rights conferred by sections 205.160 to 205.340, the county court may appropriate each year, in addition to tax for hospital fund herein provided for, not exceeding five per cent of its general fund for the improvement and maintenance of any public hospital so established."

If the county court should see fit to appropriate under this section an amount from the general fund which would be sufficient, when added to the sum raised by the current levy, to supply the needs for the ensuing year as ascertained by the board of trustees, that would be a solution to your problem.

CONCLUSION

Therefore, it is the opinion of this department that the county court must, under the provisions of Section 205.200, RSMo 1949, as amended, 1951 Cum. Supp., RSMo., in counties where a county hospital has been established, levy a tax, not in excess of twenty cents on the one hundred dollars assessed valuation, sufficient to provide funds equal to the amount required for the maintenance and improvement of such county hospital for the ensuing year as certified to the court by the board of trustees for the county hospital, and that the county court has no discretion in levying a tax sufficient to raise the amount required.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:lw

ROADS: DRAINS: The willfull and knowing depositing of refuse in the side drainage ditches of a public road in sufficient quantities substantially to obstruct the water therein, regardless whether the road is damaged or the traveled portion thereof is obstructed, is a punishable offense under Section 229.150, RSMo 1949.

FILED 58

June 2, 1953

Honorable Leon McAnally Prosecuting Attorney Dunklin County Kennett, Missouri

Dear Mr. McAnally:

We render herewith our opinion based upon your request of May 14, 1953, which request reads as follows:

"I would like your opinion as to whether prosecution is authorized under Section 229.150 R.S. Missouri 1949 where individual by use of cans, bottles, dirt etc. dams up side ditch to public road without obstructing or damaging the public road itself."

The pertinent part of the statute to which you refer, Section 229.150, RSMo 1949, reads as follows:

"2. Any person or persons who shall will-fully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right of way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right of way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed

guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment."

We believe that this statute makes it a punishable offense to obstruct a side drainage ditch of a public road without any proof of damage to the road or obstruction of the traveled portion thereof.

The phrases "by obstructing the side or cross drainage ditches thereof" and "by throwing or depositing * * * any refuse or debris whatsoever * * * in the ditches thereof" modify both the word "damage" and "obstruct" used in the fore part of the quoted portion of the statute. Therefore, the statute defines two offenses, so far as the factual situation in your letter is concerned. They are:

"* * * willfully or knowingly obstruct * * *
any public road by obstructing the side or
cross drainage ditches thereof, * * * or by
throwing or depositing * * * any refuse or
debris whatsoever * * * in the ditches thereof. * * *:

"* * * Willfully or knowingly * * * damage any public road by obstructing the side or cross drainage ditches thereof * * * or by throwing or depositing * * * any refuse or debris whatsoever * * * in the ditches thereof * * *,"

A careful reading of the statute reveals that the word "road" as used in the phrase "obstruct or damage any public road" means something more than the traveled portion of the road, but means all that goes to make up a road, including the traveled portion, the shoulders, the side and cross drainage ditches and all that area within the lines established for the road. We concluded, therefore, that obstructing the road drains, they being a part of the "road" within the meaning of the statute, is prohibited by the statute.

CONCLUSION

It is the opinion of this office that the willful

or knowing depositing of refuse in the side drainage ditches of a public road in sufficient quantities substantially to obstruct the water therein, regardless whether the road is damaged or the traveled portion thereof is obstructed, is a punishable offense under Section 229.150, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK:lw

STATE FEDERAL SOLDIERS' HOME: ADMISSION: WIDOW:

When widow of a veteran remarries she will lose her eligibility as an entrant to the State Federal Soldiers' Home on the basis of being the widow of the aforesaid deceased veteran.

XXXXXXXXX

John M. Dalton

July 7, 1953



John C. Johnsen

Honorable Marvin H. McDaniel Superintendent, State Federal Soldiers' Home of Missouri St. James, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I am writing you relative to the Missouri Revised Statutes, 1949. I wish to make reference to Chapter 212, Section 212.140 Who May Be Admitted.

"Under this section I would like for you to give me an opinion under the following circumstances: If a widow of a wartime veteran re-marries to a non-veteran, will she then be giving up her eligibility for entering the State Federal Soldiers' Home?"

Section 212.140, RSMo 1949, to which you refer, reads as follows:

"212.140. Who may be admitted .-- The soldiers and sailors who shall be entitled to admission into said home shall be citizens of the state of Missouri, who were honorably discharged from the service of the United States, and who are in indigent circumstances, and from any disability, not received in any illegal act, are unable to support themselves by manual labor, and that the aged mother, wife or widow of such soldier or sailor, and army nurses, who served with the armies of the United States or such ex-members of the enrolled Missouri militia, who served ninety days or more in the field during the civil war, shall also be entitled to admission in said home, provided they be in indigent circumstances and unable to support themselves by manual labor."

The matter which we have to decide is whether the "widow" of a deceased veteran, which aforesaid "widow" remarries, remains the "widow" of the deceased veteran aforesaid within the meaning of the term "widow" as it is used in Section 212.140, supra, or whether upon her remarriage she ceases to be the "widow" of the aforesaid deceased veteran within the meaning of the above Section 212.140.

In determining this matter we have numerous guides. While there is not complete unanimity among the authorities, the majority hold that a widow is a woman whose husband is dead and who has not remarried. In the Missouri case of In re Estate of Ryan, 174 Mo. App. 202, at 1. c. 206, the St. Louis Court of Appeals stated:

"There can be no doubt that the word 'widow' signifies 'A woman who has lost her husband by death and is not married again.' It is so defined in Webster's New International Dictionary. Bouvier's Law Dictionary defines a widow as 'An unmarried woman whose husband is dead.' Black's Law Dictionary and also Anderson's Law Dictionary define the word 'widow' as 'A woman whose husband is dead and who is not married again.' The word 'widow' is defined by a standard authority in the law as 'A wife that outlives her husband; one whose husband is dead and who remains unmarried.' (See 40 Cyc. 934.) ***

In the case of In re Crook's Estate, 252 New York 373, the court held that a "widow" is a woman who has lost her husband by death and has not married again. In the case In re McArthur's Estate, 210 California 439, the court held that a "widow" was an un-married woman who previously had been married but whose husband was deceased.

The same holding was made in the case of Inhabitants of Town of Solon vs. Holway, 130 Maine 415; Appeal of Kearns, 120 P. 523; In re Water's Estate, 101 N. E. 2nd 815; State ex rel Moscow vs. Service Recognition Board, 86 N. E. 2nd 357; Alabama Pension Commission vs. Morris, 4 So. 2nd 896.

Numerous other cases could be quoted to the same effect but we do not feel that is is necessary to do so. There is a line of cases which hold that the term "widow" refers to a person rather than to a status. Most of these cases have to do with a widow's rights in regard to the settlement of estates. As we stated above, we believe that the majority holding outside of Missouri is as we stated it to be above, and that the cases decided in Missouri so hold.

We believe, too, that it is well to look to what appears to be the purpose of Section 212.140, supra. The purpose would appear to be to provide for the care of the widows of veterans and the assumption would seem to be that in view of the death of the husband, the widow would have no one to care for her and would consequently be, in some situations, in need of outside assistance. In the case of her remarriage, however, it could be assumed that her second husband would take the place of the deceased first husband and that the probability of her requiring aid would cease to exist.

It is, therefore, the opinion of this department that if the widow of a veteran remarried she will cease to be eligible for entrance to the State Federal Soldiers' Home as the "widow" of the deceased veteran. If by her second marriage she marries a veteran, she could, of course, become eligible for admission to the home as the "widow" of the second husband but not of the first.

CONCLUSION.

It is the opinion of this department that if the widow of a veteran remarries she will lose her eligibility as an entrant to the State Federal Soldiers' Home on the basis of being the widow of the aforesaid deceased veteran.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General COSMETOLOGY:

EMBALMERS:

One who performs work upon the hair of a corpse is not practicing the occupation of hairdressing.



August 28, 1953

Miss Jakaline McBrayer
Executive Secretary
State Board of Cosmetology
Ott Building
Jefferson City, Missouri

Dear Miss McBrayer:

We render herewith our opinion based on your request of August 6, 1953, which request reads as follows:

"I have had several questions asked recently from operators out over the state about undertakers doing hair work on the dead. Does this come under their line of work now? I felt that it did, but did not want to give out the wrong information. A reply from you will be appreciated."

Section 329.020, RSMo 1949, defines a hairdresser as one who "engages for compensation in any one or any combination of the following practices, to-wit: Arranging, dressing, curling, singeing, waving, permanent waving, cleansing, cutting, bleaching, tinting, coloring or similar work upon the hair of any person by any means * * *"

It, therefore, becomes necessary to determine whether a corpse is a "person" as used in Section 329.020, RSMo 1949.

We conclude that a corpse is not a "person," and that, therefore, one who performs work upon the hair of a corpse is not practicing the occupation of a hairdresser.

In Sawyer v. Mackey, 21 N.E. 307, the court said this:

"The natural and obvious meaning of the word 'person' is a living human being."

In Brooks v. Boston and North State Railway Company, 97 N.E. 760, the court said:

Miss Jakaline McBrayer

"It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body of death and that which remains is 'dust and ashes.'"

Chapter 333, RSMo 1949, relating to the practice of embalming contains no definition of the practice of embalming. However, among qualifications of an embalmer is "a knowledge of * * * the care and disposition of the dead * * *." Section 333.020, RSMo 1949. This, in our judgment, could well include the arrangement of the hair on a corpse.

CONCLUSION

It is the opinion of this office that one who performs work upon the hair of a corpse is not practicing the occupation of hairdressing.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

COSMETOLOGY: UNITED STATES: The Missouri law relating to the registration of shops in which the occupation of hairdressers, cosmetologists and manicurists is practices is not applicable to shops located at Camp Crowder nor at Fort Leonard Wood in Missouri.

November 13, 1953



Miss Jakaline McBrayer Executive Secretary Missouri State Board of Cosmetology Ott Building Jefferson City, Missouri

Dear Miss McBrayer:

You have requested an official opinion from this office whether a beauty shop at Camp Crowder, a military reservation owned by the United States, is subject to the shop licensing provisions of Chapter 329, RSMo 1949, Mo. R. S., Cum. Supp. 1951. You have since supplied us the information that the building in which the shop in question is located is owned by the United States, and that the operator of the shop owns all equipment therein and pays his own utilities. It is operated by a private individual under a contract agreement with the Army and Air Force Exchange Service.

It is the opinion of this office that such a shop is not subject to the shop licensing provisions of Chapter 329, RSMo 1949, Mo. R. S., Cum. Supp. 1951.

Missouri has ceded to the United States exclusive jurisdicition over land acquired by the United States as "sites for custom houses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes," which were acquired by the United States prior to July 30, 1943, Among these areas are Fort Leonard Wood and Camp Crowder. Indeed, those two reservations were specifically named in the act by which such exclusive jurisdiction was ceded to the United States. (Laws of Missouri, 1943, page 627, Section 3.)

The statute by which such cession was effected is Section 12.040, RSMo 1949, which reads as follows:

"12.040. Exclusive jurisdiction ceded to the United States -- reserving the right of taxation and the right to serve processes .-- Exclusive jurisdiction in and over any land so acquired, prior to the effective date of sections 12.030 and 12.040, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the state of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the state of Missouri the right to serve thereon any civil or criminal process issued under the authority of the state, in any action on account of rights acquired, obligations incurred, or crimes committed in said state; but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

The acceptance by the United States of this cession is presumed in the absence of evidence to the contrary. (54 Am. Jur., United States, Section 87.)

The effect of a similar statute of the State of California was before the Supreme Court of the United States in Collins v. Yosemite Park and C. Company, 304 U.S. 518, 82 L. Ed. 1502, 58 Sup. Ct. 1009. California by its cession statute had reserved the right of taxation. It was held that the California Liquor Law, requiring the licensing of sellers of intoxicating liquors, was a regulatory measure and not a revenue measure; hence, it was not within the reserved jurisdiction, and did not apply to sellers of liquor within the Yosemite National Park. Said the Court, at 58 Sup. Ct., l.c. 1016:

"Except as to this reserved jurisdiction, California 'put that area beyond the field of operation of her laws.'"

The effect of Section 12.040, RSMo 1949, is to remove from state jurisdiction the power to license beauty shops at Camp Crowder and at Fort Leonard Wood.

You will notice that the State of Missouri in Section 12.040. supra, has reserved the right of taxation. However, the licensing of beauty shops, although the shop or the operator thereof is required to pay a license fee is not a taxing measure. It is instead regulatory in character. That the law relating to the licensing of beauty shops and operators are regulatory and not revenue measures is apparent from the reading of the Act as contained in Chapter 329, RSMo 1949, and Chapter 329, Mo. R. S., Cum. Supp. 1951. License fees received are placed to the credit of the State Board of Cosmetology, and the expenses of administration are paid therefrom; expenses of administration may not exceed the amount collected. Section 329.230, RSMo 1949. fees do not go for the general support of the government. The dominance of the regulatory aspects of the law are further pointed up by Section 329.140, Mo. R. S., Cum. Supp. 1951, and Section 329.210, RSMo 1949. See Collins v. Yosemite Park and C. Company, supra.

CONCLUSION

It is the opinion of this office that the Missouri law relating to the registration of shops in which the occupation of hairdressers, cosmetologists or manicurists is practiced is not applicable to shops located at Camp Crowder nor at Fort Leonard Wood Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General CIVIL DEFENSE: Tort liability of volunteer participants in Civil Defense program.

November 14. 1953



Honorable A. S. McDaniel Director Civil Defense Agency Jefferson City, Missouri

Dear Sir:

This is in response to your request for opinion dated August 19, 1953, which reads, in part, as follows:

"I would appreciate it very much if you would give me an opinion in regard to tort liability for volunteer participants in the Missouri Civil Defense program."

The Civil Defense law of Missouri is found in Senate Bill No. 406, passed by the 67th General Assembly. It is identical with Sections 44.010 through 44.140, RSMo, 1951 Supp.

The original bill, as introduced in the 66th General Assembly, was drafted from the bill proposed by the Council of State Governments. In the original bill, as introduced on the floor of the Senate, there was the following provision:

"Neither the state nor any city, town or village of the state, nor, except in cases of willful misconduct or gross negligence, the employees, agents or representatives of the state or any city, town or village thereof, nor any volunteer or auxilliary civilian defense worker or member of any agency engaged in any civilian activity, complying with or reasonably attempting to comply with this act, or any order, rule or regulation promulgated pursuant to the provisions of this act, or pursuant to any ordinance relating to black-out or other precautionary measures enacted by any city, town or village of the State, shall be liable

for the death of or injuries to persons or damage to property, as a result of any such activity."

If this section had remained, there would be no doubt as to the tort liability of volunteers in the Civil Defense program. However, the bill was referred to Committee and when it came out this section, along with others, had been removed. This aspect of the Missouri Civil Defense law was considered in an article written by Dr. Paul G. Steinbicker in Volume 2, No. 2 of the Fall, 1952, issue of the St. Louis University of Law Journal, where, at page 178, he said:

"It seems clear from these sections of the Missouri law that no immunity is granted any civil defense workers from suit for personal injury or property damage resulting from tests, drills or demonstrations, and that no immunity of any kind is granted civil defense volunteers other than state employees or employees of political subdivisions of the state. This is a very serious gap in the state law which should be filled by adequate statutory amendment as soon as possible."

We have readily available the Civil Defense laws of only three of our sister states, namely Kansas, Illinois and New York. It is significant to note that the above-quoted section from the bill as originally proposed in Missouri was retained in each of those other states. This legislative history can be viewed in one of two ways. Either the Missouri Legislature did not deem it good public policy to limit the liability of volunteer participants in the Civil Defense program or it felt that such a provision was surplusage because their liability would be so limited in the absence of such provision.

To resolve the question of the manner of interpreting the elimination of this section from the original bill and the ultimate question to be resolved herein, it is necessary to determine what the liability of such volunteer participants is in the absence of a specific statute limiting their liability.

The most nearly analogous situation on which we are able to find cases is that of a fireman driving a fire truck to a fire.

Missouri cases on this subject are of no value because we have a statute which specifically exempts ambulances, patrol wagons and fire apparatus owned by a municipality of this state from the provisions of the chapter dealing with the rules of the road, etc., while being operated within the limits of such municipality (Laws of Missouri, 1941, page 446). In the absence of such a statute, however, the law generally seems to be that even though these individuals are in the performance of a highly important public duty they are required to exercise the same degree of care that individuals in private life are.

In Florio et al. v. Mayor and Aldermen of Jersey City, 101 N.J.L. 535, 129 A. 470, 1.c. 471, 40 A.L.R. 1353, the court was considering the liability of a driver of a fire truck for negligence in the operation of the truck. The court said:

"Schmolze, the defendant below, was a servant of the city of Jersey City charged with the performance of a certain public duty or service which was to drive a fire truck through the public streets to go to fires for the protection of property and oftentimes of life. This duty is concededly a highly important and grave function to perform. But it would be a travesty upon both law and justice to hold, that, because of the gravity and importance of the duties cast upon him he has become clothed with the privilege, while in the act of performing such duties, to thrust aside all ordinary prudence in driving along the public streets to the great hazard of life and limb of men, women, and children of all classes and conditions, who may be upon the public highway. He must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. servant of the municipality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby."

See also Ferraro v. Earle, 164 A. 886, Sup. Ct. of Vermont.

In Manwaring v. Geisler, 191 Ky. 532, 230 S.W. 918, 1.c. 920, 18 A.L.R. 192, the Kentucky court said:

"Nor is a peace officer exonerated from liability for an injury inflicted on another while in the discharge of official duties on the ground of public necessity, if the officer failed to exercise reasonable care for the protection of those whom he knew, or by the exercise of reasonable judgment should have expected, to be at the place of the injury, although he may not be criminally liable."

See cases from other jurisdictions holding the same in Rowley v. City of Cedar Rapids, 203 Ia. 1245, 212 N.W. 158.

Therefore, since the only basis for limiting the liability for volunteer participants in the Civil Defense program in the absence of a statute on the subject would be the public necessity of the occasion, and since public necessity has been held not to be sufficient to grant any added protection to firemen driving to a fire, etc., we can only conclude that volunteer participants in the Civil Defense program would have the same liability for negligence and be held to the same standard of care as that of private individuals in the conduct of their everyday affairs. Apparently the Legislature deemed it good policy not to limit this liability and intended for the same rules of negligence to apply to such volunteer participants as are made applicable to private individuals in private life.

Aside from the law of negligence, a further question needs to be determined, i.e., the individual liability, if any, of such volunteers for damage to property in carrying out the lawful orders of some authority constituted by the Civil Defense law to act in time of emergency. For example, what liability, if any, would be imposed upon the individual volunteer participant who, in obedience to an executive order, participated in the destruction of a building in the path of a conflagration in order to prevent its spread.

Section 44.060, Subsection 1, as enacted in Senate Bill No. 406 of the 67th General Assembly, provides for the establishment of mobile support units by local organizations for civil

defense, which are defined as organizations established by the Civil Defense law by any county, city, town or village to perform local civil defense functions. Section 44.060, Subsection 1, reads as follows:

"Mobile support units formed under this law shall be designed to aid and reinforce local organizations for civil defense in areas affected by an enemy attack. Such units when formed by local organizations for civil defense may be composed entirely of officers and employees of one or more political subdivisions or they may be composed of volunteer civilians who obligate themselves to serve in cases of emergency. Units composed wholly of state officers and employees may be formed by the governor. Each mobile support unit shall have a leader, selected by the local organization for civil defense in the area where created, or by the governor in the case of state employees, who shall be responsible for the organization, administration, training and operation of such mobile support unit. Upon the occurrence of an emergency, such mobile support units may be called to duty by the governor and shall perform their functions in any part of the state or in other states."

It is these mobile support units which may be composed of volunteers. In the exercise of the police power it would not only be the protected right but the duty of such units and the individuals composing them to destroy property if necessary to save human life, to protect public health, to preserve property and to safeguard the public safety. The law generally in this regard is thus stated in 43 C. J., Municipal Corporations, Section 272, page 261:

"Under the maxim, Salus populi suprema lex, municipal authorities not only may but must in the exercise of police power destroy private property to save human life, to protect public health, to preserve property, and to safeguard the public safety. And this they may do with impunity, in the face of imminent peril, or in the execution of a valid ordinance. The facts constituting the emergency must be made to appear before the invasion of private rights can be justified. The property itself, not the occupants, must constitute the nuisance to warrant such summary action. Emergency, it seems, may warrant destruction of contents as well as buildings."

It is further stated that if the destruction is necessary for the above purposes, no compensation can be claimed from anyone. 43 C. J., Municipal Corporations, Section 272, page 262:

> "while a municipal corporation may be liable for any needless damage in the destruction of property, at the common law no recovery can be had against anyone for property so injured or destroyed under the police power. * * *"

Therefore, we believe that no liability would be imposed upon volunteer participants in the Civil Defense program who, in the exercise of due care, cause damage to property under a lawful order issued by some authority constituted under the Civil Defense law to act in time of emergency.

CONCLUSION

It is the opinion of this office that the same rules of negligence are applicable to volunteer participants in the Civil Defense program as are applied to private individuals in the conduct of their daily affairs.

It is the further opinion of this office that no liability would be imposed upon such volunteers who, in the exercise of due care, cause damage to property under a lawful order issued by some authority constituted under the Civil Defense law to act in time of emergency.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Very truly yours,

JOHN M. DALTON Attorney General

JWI:ml

LIQUOR CONTROL:

SPECIAL CHARTER COUNTIES: Liquor Control Law.

St. Louis County is not a "municipal corporation" within meaning of



December 29, 1953

Honorable John J. McAtee St. Louis County Counselor Courthouse Clayton, Missouri

Dear Sir:

This is in reply to your letters of recent date requesting the opinion of this department on the question of whether or not St. Louis County, Missouri, is now a "municipal corporation" within the purview and meaning of Chapter 311, RSMo 1949, so that the County Council has the right to authorize and regulate the sale of liquor by the drink in said County.

It is our understanding that St. Louis County is operating under a Charter adopted under the provisions of Article VI, Section 18, et seq, of the 1945 Constitution of Missouri, and has a population of more than five hundred inhabitants outside the limits of the incorporated cities in said County. Paragraph 1 of Section 311.090, RSMo 1949, reads as follows:

"Any person who possesses the qualifications required by this chapter, and who meets the requirements of and complies with the provisions of this chapter, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises described in the application; provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not

in excess of five per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand inhabitants, under the provisions and methods set out in this chapter. The population of said cities to be determined by the last census of the United States completed before the holding of said election; provided further, that for the purpose of this law, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred inhabitants or more; provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities."

The particular question involved here is, of course, whether St. Louis County comes within the meaning of "any municipal corporation" set forth in Section 311.090, supra, and is, therefore, a "city" as used in said section. A county is defined in 11 Am. Jur. "Counties", Section 3, pages 185 and 186, as a subdivision of the state, organized for judicial and political purposes. It is a political organization of certain territory within the state, particularly defined by geographical limits. It is not invested with any of the attributes of sovereignty. A county is a constituent part of the state government, and a wholly subordinate political division or instrumentality, created and existing with a view to the policy of the state at large and serving as an agency of the state for certain specified purposes.

A definition of municipal corporations, as applied to the present question, is found in 37 Am. Jur. "Municipal

Corporations", Section 6, pages 623 and 624:

"All municipal corporations are public bodies created for civil or political purposes; but all civil, political, public corporations are not, in the proper use of language, municipal corporations. A municipal corporation must be distinguished, on the one hand, from other governmental bodies which although municipal are not corporations, and, on the other hand, from corporations which although public are not municipal. While the term 'municipal corporation' is sometimes used, in its broader meaning, to include such public bodies as the state and each of the governmental subdivisions of the state, -- such as counties, parishes, townships, hundreds, etc., -- it ordinarily applies only to cities, villages, and towns which are organized as full-fledged public corporations. The distinction between one of our modern American cities, which is clearly a municipal corporation in the strictest sense, and a section of a state over which a particular public officer holds sway, which is in no sense a municipal corporation, is obvious; but between these two poles there are many forms of territorial subdivisions which it is not always so easy to classify. is only when the community is granted the privilege of self-government from the state, and is created as a separate entity with power to act as such, and to hold property as its own, to levy taxes and expend them, and to select its own officers, and is not merely a geographical name, a territorial subdivision of the state, and the sphere of the authority of a particular public officer, that it is entitled to be called a 'municipal corporation. The power of local government is said to be the distinctive purpose and the distinguishing feature of

municipal corporations proper. Counties, townships, towns (as existing in certain New England states), and other political subdivisions of the state are not strictly corporations but are public quasi corporation, sometimes defined as involuntary, political, or civil subdivisions of the state, created by general laws to aid in the administration of government."

A discussion of counties as corporations is found in 14 Am. Jur. "Counties", Section 4, pages 186 and 187 as follows:

"If a county is a corporation, it is necessarily a municipal or public corporation rather than a private corporation, but according to the weight of modern authority, neither counties no boards of county commissioners are corporations in the strict sense of the term. This modern view is contrary to earlier decisions which placed counties in the category of ordinary municipal corporations. There is a logical basis for drawing a distinction between counties and ordinary municipal corporations. Counties are created by the state in the exercise of its own sovereign power, without the particular solicitation, consent, or concurrence of the people who inhabit them. They owe their creation to statutes which confer upon them all the powers they possess, prescribe their duties, and impose the liabilities to which they are subject. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state and are, in fact, only a branch of the general administration of that policy. Municipal corporations, on the other hand, are more amply endowed with corporate life and functions. They exist under general or special charters conferred at the direct solicitation or by the free consent of the people who compose them and are created chiefly for the interest, advantage, and convenience of their inhabitants. Notwithstanding the foregoing

distinctions, it must be recognized that counties have certain attributes which are found in corporate bodies. * * * *."

It is stated in 20 C.J.S., Counties, Section 3b, page 758, that there are a number of decisions which hold that a county is a municipal corporation equally with cities and towns, but while it is in a sense a municipal corporation, and may sometimes be properly classed as such, together with other public, political, and quasi corporations, to distinguish them from private or business corporations, and is so classed or construed under some constitutional and statutory provisions, yet county and municipal corporations proper, differ largely in their purposes, attributes and mode of creation, and are to be distinguished.

Along this line the case of State vs. Little River Drainage District, 236 S.W. 848, decided by the Supreme Court of Missouri in 1921, holds among other things, that the Constitution of Missouri declares a county to be a municipal corporation. This was a case concerning the definition of drainage districts. The reasoning there was that since Section 6, Article X of the 1875 Constitution of Missouri exempted from taxation the property of "the State, counties and other municipal corporations, and cemeteries, * * *" that the Constitution considered counties as being municipal corporations by the use of the language "and other municipal corporations".

We do not challenge the reasoning in the Little River Drainage District case, supra, but on the contrary, feel that it is helpful in determining the issues in the present question under the circumstances as they now exist. We feel that the declaration that a county is a municipal corporation based on a construction of the language of the Constitution, should be reconsidered in the light of the 1945 Constitution of Missouri. The foregoing language of the 1875 Constitution was omitted from the 1945 Constitution and Section 6, Article X exempting property from taxation now reads in part "the state, counties and other political subdivisions, and non-profit cemeteries, * * *". Thus, the constitutional provisions are not the same as they were when the Little River Drainage District case, supra, was decided, and we feel that under the reasoning

of that case, the only proper construction which can be placed on said section of the Constitution, as it now reads, is that counties of the State of Missouri are now classed only as political subdivisions, and that it was not intended that counties should be considered as municipal corporations.

Further, Section 16, Article VI of the 1945 Constitution is helpful in this regard, in that said section in referring to "Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, * * *" thereby showing a clear intent that a municipality and a political subdivision are considered as two separate and distinct entities.

We believe it logically follows that since a county is declared to be a political subdivision by the 1945 Constitution that it is not a municipal corporation.

We do not believe that the language of Section 311.090. supra, lends itself to a construction that a county is a municipal corporation. The rule that a too literal construction of a section of a statute, which would prevent the enforcement of the whole act according to its intent, should be avoided. Leibson vs. Henry, 356 Mo. 951, 204 S.W. (2d) 310. The liquor control law must be read as a whole, and we feel that a serious conflict would result if the county, as well as the city governments within the county, were all allowed to come within the provisions of Section 311.090, supra, in authorizing and regulating the sale of liquor by the drink. In other words, if the county were allowed, by construction of the applicable statutes and constitutional provisions, to be considered a municipal corporation within the purview of Section 311.090, supra, then the power and authority derived from said section would be general throughout the entire county, and would not be limited only to that portion of the county outside the limits of incorporated cities. It would be on an equal footing with that of the incorporated cities and there would be a duplication of authority.

In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the Legislature. State vs. Ball, 171 S.W. (2d) 787. The power to authorize and regulate the sale of liquor by the drink has always been placed with the various qualified cities of the state, and this has been without regard to county boundaries. A construction which would run counter to the plain and consistent legislative intent should be avoided. vs. Kiburz, 357 Mo. 309, 208 S.W. (2d) 285. Had the Legislature so determined, it would have no doubt expressly empowered certain counties to exercise the authorization of Section 311.090, supra, with regard to the sale of liquor by the drink. On the contrary, the provisions of the 1945 Constitution, with regard to special charter counties, gave such counties the power to legislate in certain fields, to-wit, public health, police and traffic, building and construction, and planning and zoning. By failing to specifically authorize such counties to legislate in the field of intoxicating liquor such counties are in effect denied that right, this on the theory that the expression of one thing is the exclusion of another.

CONCLUSION

Therefore, it is the opinion of this department that St. Louis County, Missouri, operating under a Charter adopted under the provisions of Article VI, Section 18, et seq, of the 1945 Constitution of Missouri, is not a "municipal corporation" within the meaning of Chapter 311, RSMo 1949, and is not authorized to come within the purview of the provisions of said Chapter 311, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. David Donnelly.

Yours very truly,

JOHN M. DALTON Attorney General PUBLIC BUILDINGS:

A contract for public works entered into, through mistake, with a party not the low bidder is void; contract may be let with low bidder notwithstanding.

February 3, 1953

2.3.53



Honorable Ralph McSweeney Director Division of Public Buildings Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"On December 16, 1952 at 10:30 A.M. bids were opened and read aloud in my office for furnishing and installing a New Elevator in the old infirmary building at State Hospital No. 3, Nevada, Missouri.

"Four proposals were received for this project, namely: Sheppard Elevator Company, Cincinnati, Ohio, Montgomery Elevator and Service Company, Kansas City, Missouri, Otis Elevator Company, St. Louis, Missouri and the Montgomery Elevator Company, Moline, Illinois.

"The Montgomery Elevator Company of Moline, Illinois submitted the low bid of \$15,697.00 and the Montgomery Elevator Service Company of Kansas City, Missouri was the next low bidder at \$17,700.00. The intention of this office was to award the Contract to the Montgomery Elevator Company of Moline, Illinois who was the low bidder, but due to a confusion of names, the low bidder and the

next low bidder both being Montgomery Elevator Companies, the Contract was awarded on December 31, 1952 to the Montgomery Elevator Service Company of Kansas City, Missouri. The Contract was signed by all parties to the contract before the error was discovered by this office.

"I will appreciate a written opinion from your office in reference to whether or not the Contract with the Elevator Service Company of Kansas City may be cancelled and the contract awarded to the Montgomery Elevator Company of Moline, Illinois, the low bidder."

We first direct your attention to Section 8.250, RSMo 1949, providing that no contract shall be made by any officer of this state for the erection or construction of any building, improvement, alteration or repair of existing buildings until unrestricted public bids are requested or solicited by proper notice. Said section reads as follows:

"No contract shall be made by any officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds, or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for

same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

The purpose of such a provision is to secure competitive bidding on the part of the intending contractor, and prevent favoritism, collusion and fraud in the letting of such contract to the detriment of the public. Discussing such a statutory requirement, it is stated in 43 Am. Jur., Public Works and Contracts, Section 26, page 767, that:

"The purposes of the provisions so generally found in Constitutions, statutes, city charters, and ordinances requiring that contracts with public authorities be let only after competitive bidding are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies, to protect the public from collusive contracts, to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions, and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers. * * *"

(Emphasis ours.)

Having noted that the purpose of such a provision is predicated upon public economy, we are of the opinion that the officer or agent charged with the duty of letting a public contract, must, after competitive bidding, let the contract to the lowest bidder if such bidder is responsible and the best interests of the public will be served thereby. To hold otherwise would only serve to precipitate the evil which was sought to be eliminated. That such a construction is proper is indicated by the following found in 43 Am. Jur. Public Works and Contracts, Section 26, page 768:

"Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not to be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded, or defeated. Stern insistence upon positive obedience to such provisions is necessary to maintain the policy which they uphold. * * *"

You state that a contract has been signed, through mistake, with one not the low bidder and inquire whether such contract may be cancelled and awarded to the low bidder. It is implied, and we assume, for the purpose of this opinion, that there is no question as to the responsibility of the low bidder or that the best interests of the public will be served if the contract is let to such party.

We are of the opinion that the contract which has been signed, under the facts presented, is void and imposes no obligation or liability upon the state, since it was let in violation of the spirit and purpose of the competitive bidding statute and beyond the authority of the officer signing in behalf of the state. This rule is stated in 43 Am. Jur., Public Works and Contracts, Section 30, page 771, as follows:

"A contract for public work or for a public improvement made in violation or defiance of constitutional or statutory provisions or ordinances requiring such contracts to be awarded to the low bidders only after advertisement and competitive bidding is illegal and void, and imposes no obligation or liability upon the public body. Provisions of this kind are a limitation, so to speak, upon the general power of the municipality to make contracts for such improvements. Contracts let in violation thereof are not merely voidable, but are void, and although the contractor has performed the contract according to its terms, he cannot hold the public authorities either for the contract price, or upon implied contract for the reasonable value of the services performed and materials furnished pursuant to the contract. No rights can be acquired thereunder by the contracting party. 水 本 本村

In the case of People ex rel. Coughlin v. Gleason, 121 N. Y. 631, the Court of Appeals of New York had under consideration a

similar contract. In that case the City of Long Island advertised for bids for certain work and five bids were received. After consideration of the bids, the common council, by resolution directed the mayor to enter into a contract for the work with the second highest bidder. The resolution was vetoed by the mayor on the ground that the contractor's bid was higher than that of another perfectly responsible party. Subsequently, the contract was entered into over the mayor's veto and the case was appealed. Discussing a provision similar to our competitive bidding statute, the court in its opinion stated:

"This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance and improvidence in the procurement of work and supplies for the city, and it should be so administered and construed as fairly and reasonably to accomplish this purpose. If contracts for work and supplies can be arbitrarily let, subject to no inquiry or impeachment, to the highest instead of the lowest bidder, under such a provision as is found in this charter, and substantially in the charters of all the other cities of the state, then the provision can always be nullified and will serve no useful purpose. If there were nothing in this record showing that the relator was not the lowest responsible bidder, it would have to be assumed that he was, and that the members of the common council had discharged their duty and had so determined. But here it appears that the relator's bid was next to the highest, and that there was no question or objection at any time that the lower bids were not formal and regular and made by responsible persons. It appears beyond doubt or cavil that the common council arbitrarily rejected the lower bids and accepted the relator's. That under such circumstances the relator's contract was illegal and void, and that he cannot recover for his work is settled beyond controversy by authorities in this State. (Brady v. Mayor, etc., 20 N.Y. 312; Mc Donald v. Mayor, etc., 68 id. 23; Dickinson v. City of Poughkeepsie, 75 id. 65.)"

(Emphasis ours.)

The Kansas City Court of Appeals adopted this rule and cited the Gleason case in the case of Clapton v. Taylor, 49 Mo. App. 117, 1.c. 123, in the following language:

"* * *If the charter or ordinance of a municipality provide that the contract shall be let to the lowest bidder, a violation of this

command of the law would be against the substantial rights of the taxpayer and would render a contract void which was let to one not the lowest bidder, in any case where such rejection of the lowest bid was an exercise of an arbitrary will on the part of the city authorities, without any showing that such authorities exercised their jurisdiction in that respect, by determining that the rejected bid was not the lowest and best bid. People ex rel. v. Gleason, 121 N.Y. 631. * * *"

CONCLUSION

Therefore, in the premises, it is the opinion of this office that under the foregoing cited cases and authorities, a contract for public work entered into through mistake with a party who is not the low bidder is void and imposes no obligation or liability upon the state.

We are further of the opinion that the state, by its duly authorized representative, lawfully acting, may enter into a contract with the low bidder notwithstanding.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Yours very truly,

JOHN M. DALTON Attorney General

DDG:hr

PUBLIC BUILDINGS:

A contract for public work may be let to a foreign corporation not licensed to transact business in the state, such not coming within the term "Transact business."



February 24, 1953

Honorable Ralph McSweeney Director Division of Public Buildings Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"I will appreciate having your opinion on whether or not the Director of Public Buildings may legally award a contract to a low bidder whose corporations' place of business is in another state and who are not registered with the Secretary of State of Missouri."

Section 8.250, RSMo 1949, relating to the letting of public contracts after a solicitation of bids reads as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing five hundred thousand inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of

which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

This office has previously held, in an opinion directed to you February 3, 1953, that the purpose of this provision is to prevent favoritism, collusion and fraud in the letting of such contracts in the interests of economy to the state and that such contracts shall be let to the lowest bidder if the best interests of the state will be served thereby.

You now inquire whether you may let a contract to a corporation which is not registered with the secretary of state as licensed to do business within the state. The law relating to licensing of foreign corporations to do business in this state is found in Chapter 351, Sections 351.570 to 351,655, RSMo 1949. Section 351.570 declares: "A foreign corporation organized for profit, before it transacts business in this state, shall procure a certificate of authority so to do from the secretary of state." etc. Section 351.635 imposes a penalty for failure to comply with this chapter, a fine of not less than one thousand dollars and disability to maintain a suit in any court of this state.

The precise question to which you inquire is resolved in whether entering into a contract for public works let by your office is doing business as is prohibited by the above noted provisions.

In this regard we direct your attention to the case of Hogan v. City of St. Louis, 176 Mo. 149, decided by the Missouri Supreme Court. In that case the city advertised for bids for a contract to light a part of the city. A bid was submitted, by a corporation

organized under the laws of a foreign state, which was by the city accepted and a contract was entered into. As pointed out in the opinion, it does not appear whether the contract was in fact and in law entered into within this state or without. After the contract was executed and before the corporation entered into its performance, a license to do business was obtained. Plaintiff sought to enjoin the city and the contracting corporation from carrying out the contract on the ground that the contract was void because the corporation had not first procured a license to do business. Reviewing first, statutes substantially similar to those noted above, the court, in its opinion said:

"It does not appear on the face of the petition where the contract was entered into, whether the Kern Company sent an agent to St. Louis and entered into the contract there, or the city sent an agent to New York and entered into the contract there. The contract filed as an exhibit seems to indicate that it was executed, on the part of the Kern Company at least, in New York. If that is the case, then even taking plaintiff's interpretation of the term, the corporation did not 'transact that business' in this State, and if it was a lawful contract where it was made, the statute of Missouri would have no influence upon it, until the party should come to this state to perform it. Then the corporation would be in the act of transacting or attempting to transact business here, and before it could lawfully do so it would have to comply with our laws. But we do not consider it material whether the contract was made in St. Louis or in New York; we refer to the fact merely to illustrate the difference (in relation to the term 'transact business') between entering into a contract to do an act and the performance of the act. The one may be lawful per se and the other lawful only on condition. Of course, a contract can not be lawfully made to do an unlawful act, but a contract may be lawfully made to do an act which the contracting party can lawfully do only when he shall have complied with conditions or satisfied other demands, and his unconditional contract to do it carries with it the obligation to comply with those conditions or satisfy those demands; he assumes the risk of being able to do so. Therefore, when the Kern Company entered into this contract, although it could not lawfully perform it without conforming to the conditions of the Missouri statutes, yet the contract carried by implication

the obligation on the part of the company that it would conform to those conditions, and a neglect to do so, resulting in a failure to perform, would have been a breach of the contract.

"Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this State where books are kept and process may be served, and until it pays its quasi-incorporation tax and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Boes our law mean that when advertisements inviting bids on public or private works in this State are read by foreign corporations they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No, that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts: foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the State; it is not bound to establish itself here before it can obtain such a contract.

"Entering into a contract like the one in question undoubtedly is 'transacting business' within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used it means carrying on the work for which the corporation was organized and in its application to the facts of this case it means performing the work called for by the contract.

"The Kern Company under the conditions stated in the petition had the right to enter into the contract in question and we hold it to be a legal and valid contract."

You will note the distinction drawn by the court between entering into a contract to do an act and the performance of the act

in interpreting the term "transact business." Entering into a contract, said the court, is transacting business within the broadest sense of the term but not within the term as used in our statutes.

Referring to the Hogan case, the Supreme Court of Missouri, in the case of Tri-State Amus. Co. v. Amusement Co., 192 Mo. 404, 1.c. 416, said:

"* * *This court, speaking through VALLIANT, J., drew a distinction between submitting a bid and entering into a contract, and transacting business in this State, * * *. It was further held that entering into a contract to transact business was, in the unlimited meaning of the term, 'transacting business,' but that such was not the meaning of the term 'transacting business,' used in the statute, Accordingly, it was held that the contract entered into by the city with the foreign corporation pursuant to the bid of that corporation, and under which no other business had been transacted by the foreign corporation, was not within the prohibition of the statute."

Under the foregoing cited authority, we are of the opinion that a contract entered into with a foreign corporation is not prohibited by the corporation laws of this state, although as stated in the Hogan case, such a contract once executed carries by implication the obligation on the part of the corporation that it would conform to the conditions imposed by our statutes and a failure to so do prior to entering into performance would result in a breach of the contract. We find no other provision prohibiting the State of Missouri from letting a contract to a foreign corporation not licensed to do business in this state under the facts stated.

CONCLUSION

Therefore, it is the opinion of this office that, the Director of Public Buildings is not prohibited under the laws of this state from awarding a contract to a low bidder which is a corporation organized under the laws of a foreign state and which has not procurred a license to transact business in this state.

The foregoing opinion, which I hereby approved, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General DEFINITIONS: OLD AGE ASSISTANCE: PUBLIC HEALTH AND WELFARE: PUBLIC ASSISTANCE: Mausoleum not "cash or negotiable security" in determining eligibility for public assistance, under Section 208.010, RSMo 1949.



March 25, 1953

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Honorable Wesley McMurry Representative House of Representatives Capitol Building Jefferson City, Missouri

Dear Mr. McMurry:

Your letter of March 19, 1953, requesting an official opinion of this office, was phrased as follows:

"Will you kindly render an opinion on whether a mausoleum costing approximately \$275.00 could possibly be construed to be cash under Subsection 2, Section 208.010, RSMo., 1949, of the Social Security Act?"

Section 208.010, RSMo 1949, limits the amount of cash or negotiable security that a person applying for public assistance may own, as follows:

"In determining the eligibility of an applicant for public assistance under this law, it shall be the duty of the division of welfare to consider and take into account all facts and circumstances surrounding the applicant, including his earning capacity, income and resources, from whatever source received, and if from all the facts and circumstances the applicant is not found to be in need, assistance shall be denied. The amount of benefits when added to all other income, resources, support and maintenance shall provide such

persons with reasonable subsistence compatible with decency and health. Irregular, casual, and unpredictable income received by a claimant from performing odd jobs shall be excluded in calculating income. Benefits shall not be payable to any person who:

* * * * * * * * * *

"(2) Owns or possesses cash or negotiable security in the sum of five hundred dollars or more; * * *."

* * * * * * * * * * *

In determining what words in a particular statute mean, we are guided by Section 1.090, RSMo 1949, which states "Words and phrases shall be taken in their plain or ordinary and usual sense. * * *"

Webster's New International Dictionary, Second Edition, Unabridged, defines "cash" as follows:

"2. Com. (a) Money, especially ready money; strictly, coin or specie, but also, less strictly, bank notes, sight drafts, or demand deposits at a bank.

* * *"

The Kansas City Court of Appeals in Miller v. State Social Security Commission, 151 S.W. (2d) 457, 235 Mo. App. 968, in deciding that life insurance policies are not included in the exclusion clause (2) of Section 208.010, supra, discussed "cash and negotiable security" as follows, 1. c. 458, (S.W.):

"In construing the language 'cash or negotiable' we conclude it to mean, that if the claimant has either cash in a sum of \$500 or more, or has negotiable paper of the value of \$500 or more, or if applicant's cash and negotiable paper when added together amounts to \$500 or more, then the applicant is ineligible. In other words, currency, whether in United States legal tender or negotiable paper, suffices."

Webster's New International Dictionary, Second Edition, Unabridged, defines "mausoleum" as follows:

"l. A magnificent tomb; - so called from the tomb of Mausolus at Halicarnassus."

Thus it is clear that a mausoleum cannot be considered as cash or negotiable security under Section 208.010, subsection (2).

CONCLUSION

It is, therefore, the opinion of this office that mausoleums are not "cash or negotiable security" within the meaning of Section 208.010 (2), RSMo 1949, in determining eligibility for public assistance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

PMcG:hr

PUBLIC BUILDINGS:

Interpretation of provisions of a contract relating to the construction of a new Employment Security Office Building.

May 6, 1953



Honorable Ralph McSweeney Director Division of Public Buildings Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I have received a written request from the Division of Employment Security for a clarification of certain sections of the revised specifications for the construction of a new Employment Security Office Building now under construction.

"I believe their request to me for clarification and interpretation should be a matter for the Attorney General to pass on, therefore I respectfully request your opinion on the subject matter.

The letter attached to your request reads as follows:

"With further reference regarding responsibility for supplying 1,600 fluorescent lamp tubes for our new Central Office, located on Jackson and Dunklin Streets, Jefferson City, Missouri, We would appreciate a clarification and interpretation of the specifications, revised June 18, 1952, in order that we

may know who is to furnish the tubes. Please refer to Division 33, Electrical Work, Section 1, page 33-2, sub-paragraph (f), and Section 32, Electrical Fixtures, page 33-14, sub-paragraph (a) of said specifications, which appear to be contradictory."

The contract entered into on the 14th day of July 1952, for the construction of a new Employment Security Office Building incorporates into its terms by specific reference the specifications for the construction of said building as revised June 18, 1952. Said contract provides in part as follows:

"The contractor shall furnish all labor and materials and perform all work required * * * in accordance with the plans and specifications therefor. The specifications which are made a part thereof are designated as follows:

'Specifications for construction of office building, Division of Employment Security, State of Missouri, prepared by Marcel Boulicault, Architect, dated revised June 18, 1952.

Subpart (f) of Section 1 of Division 33, (Electrical Work) and found in the revised specifications provides as follows:

"(f) The lamps and tubes will be furnished by the Division of Employment Security but installed by this contractor."

Subpart (a) of Section 32 of the same provision provides as follows:

"(a) Furnish and install, connect up ready for use, all electric fixtures as required. All fixtures shall be complete with lamps. This Contractor shall figure on the fixtures indicated and shall make all necessary measurements and verify the dimensions given by actual measurements at the building."

Under these two provisions you inquire as to who must furnish the lamps and tubes. There exists an apparent ambiguity which must be resolved by reference to established rules for the construction of contracts. It is fundamental that in arriving at the intention of the parties to a contract it must be construed as a whole and that a contract in case of ambiguity will be construed liberally and most strongly in favor of the party who is not the author and who is not responsible for the use of the language giving rise to doubt. 17 C.J.S., Contracts, page 751. We note that the original specifications as dated April 25, 1952, did not contain the provisions above noted that all lamps and tubes will be furnished by the Division of Employment Security, but did contain the latter noted provision. It must be presumed that the State in authorizing the change in specifications by adding this provision, was aware of, and took into consideration all of the provisions relating to the same subject matter. Said clause is clear, concise and definite in its provisions and therefore must be held to be controlling.

In view of these facts and the rules of construction noted, we are of the opinion that it is the duty of the State rather than the contractor, under the terms of the contract, to furnish the tubes and lamps referred to.

GONCLUSION

Therefore it is the opinion of this office that under the terms of the contract entered into the 14th day of July 1952, for the construction of an office building for the Division of Employment Security, it is the duty of the State rather than the contractor to furnish tubes and lamps as referred to in Subpart (f) of Section 1, Division 33 of the revised specifications.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

PUBLIC BUILDINGS: Examination of Release.



December 8, 1953

Mr. Ralph W. McSweeney Director, Division of Public Buildings State of Missouri Jefferson City, Missouri

Dear Mr. McSweeney:

This office has examined the release executed by J. Louis Crum, contractor for air conditioning for the Division of Employment Security building, and the releases executed by subcontractors. We are of the opinion that the releases are sufficient as to form and properly discharge the State of Missouri from any and all claims and demands of said contractor and those subcontractors who have executed a release, for and in respect of all labor, materials and things grown out of or connected with the contract.

Since we are informed that all subcontractors working on the job have submitted a release, we are of the opinion that said releases are sufficient to permit final payment to be made to the contractor per the terms of the contract.

This opinion which I hereby approve, was written by my assistant, Mr. D. D. Guffey.

Yours very truly,

JOHN M. DALTON Attorney General

DDG:mw

TOWNSHIP ORGANIZATION: EX OFFICIO COLLECTORS:

The ex officio collector in a county under township organization is entitled to only two percent for collecting delinquent taxes returned by the township collectors.



April 25, 1953

Honorable Joe H. Miller Prosecuting Attorney Carroll County Carrollton, Missouri

Dear Mr. Miller:

We have given careful consideration to your request for an opinion, which request is as follows:

"This is in reply to your letter of March 30th, 1953.

"Section 54.320, RSMo 1949, relating to County Treasurer and Ex Officio collector, in Counties of the 3rd class operating under Township organization, provides that for collecting and paying over taxes that he shall be allowed a commission of 3 per-cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and 2 per-cent on all delinquent taxes, which shall be taxed as costs against such, and collected as other taxes, and etc.

"The question that my Treasurer and Ex Officio collector asks, is he entitled to 3 per-cent for paying over the delinquent taxes as well as the corporation taxes, back taxes, licenses, merchants' tax, and tax on Railroads?"

It is provided in Section 54.280, RSMo 1949, that the county treasurer of a county having adopted township organization shall be ex officio collector with power to collect all delinquent taxes on personal property and real estate, licensés, merchants' taxes, taxes on railroads and other corporations, and his compensation for such services is fixed by Section 54.320, RSMo 1949, as amended by the 66th General Assembly

Honorable Joe H. Miller

Laws of Missouri, 1951, page 378.

Section 54.320, as amended, is as follows:

"The county treasurer in counties of the third and fourthclasses adopting township organization shall be allowed a salary of not less than one hundred dollars per month by the county court to be paid as at present provided by law; the ex officio collector for collecting and paying over the same shall be allowed a commission of three per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes. which shall be taxed as costs against such delinquents and collected as other taxes: he shall receive nothing for paying over money to his successor in office."

The terms "back taxes" and "delinquent taxes" used in this section seem to have the same meaning. The Supreme Court of Missouri, however, defined these terms and construed the section in State vs. St. Louis-San Francisco Ry. Co., 66 S.W. (2d) 149. In the course of that opinion, on page 150, the Court said:

"We think the words 'back taxes' as used in the amended section have reference to delinquent corporation, merchant, license, and railroad taxes and that it was intended by the amendment to allow the ex officio county collectors the same commission for collecting said delinquent taxes as allowed for collecting current corporation, merchant, license, and railroad taxes. In effect, the amendment provided a commission of 2 per cent for collecting either current or delinquent corporation, merchant, license, and railroad taxes. If so, the words 'delinquent taxes' as used have reference to the taxes returned delinquent by the township collectors. * * *."

Honorable Joe H. Miller

The Legislature in 1949 raised the ex officio collector's commission for collecting corporation taxes, back taxes, licenses, merchants' tax and tax on railroads from two percent to three percent. Laws of Missouri, 1949, p. 627. His commission for collecting delinquent taxes, however, was left at two percent, and that is the law today.

CONCLUSION

It is the opinion of this office that ex officio collectors in counties of the third and fourth classes under township organization are entitled to a commission of only two percent for collecting and paying over delinquent taxes returned by the township collectors.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

BAT: A

MEPOTISM:

Relative of Member of County School Board may be employed as school teacher.

PUBLIC OFFICERS:

SCHOOLS:

May 15, 1953



Honorable John H. Mittendorf Prosecuting Attorney Johnson County Warrensburg, Missouri

Dear Mr. Mittendorf:

Your letter of May 1, 1953, requested an official opinion as follows:

> "I have been requested by a member of the County School Board to secure your opinion as to whether or not a relative of a member of the County School Board can be employed as a member of the teaching staff in any of the county schools. Further, if a relative of a teacher were elected to the County School Board, could such elected member of the County Board assume the duties of his office? It appears to me that there is nothing in the statutes to prohibit the relative of a County School Board member from teaching within the county. The only statute which I am able to find dealing with this matter is Section 163.080 RSMo 1949."

A County Board of Education is created in each county of Missouri by Section 165.657, RSMo 1949. The duties of the County Board of Education are set forth in Sections 165.660 through 165.693, RSMo 1949. Such Board does not employ teachers for schools within the county.

Nepotism is prohibited by Article VII, Section 6, Missouri Constitution, 1945, as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office

Honorable John H. Mittendorf:

or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The background and purpose of this particular provision is discussed by the Supreme Court of Missouri in State ex inf McKittrick, Attorney General, vs. Whittle, 63 S.W. (2d) 100, 1.c. 101, as follows:

"It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions. subject to the approval of courts and other functionaries of the state and its political subdivisions.

"It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, * * *."

In that case a School District Board of Education had employed as a teacher a first cousin of a Board member. Three members voted on the issue of whether to employ said teacher. One voted against employment and two, one of whom was kin to the teacher, voted in favor of such employment. The member kin to the teacher was ousted from his office, and the Court made this distinction as to whom the provision applied, l.c. 101-102:

"* * The amendment is directed against officials who shall have (at the time of the selection) the right to name or ap-

Honorable John H. Mittendorf:

point' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

It is thus apparent that the anti-nepotism provision of the Constitution is directed only against those persons who are in a position to cause a relative to be employed or appointed. Since the County Board of Education does not have the power to employ or appoint school teachers, the employment, by a School District Board of Education, of a relative of a member of the County Board of Education would not constitute nepotism. It must follow that a person, related to a teacher, may assume the office of member of the County Board of Education.

CONCLUSION

It is, therefore, the opinion of this office that a school teacher may be employed by a School District Board of Education even though such teacher is related to a member of the County Board of Education. And a person, related to a teacher, may assume the office of member of the County Board of Education.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

PMcG:irk

JOHN M. DALTON Attorney General CRIMINAL LAW: INDICTMENTS:

A plea of former jeopardy may not successfully be interposed in bar to a prosecution for manslaughter where the defendant has previously been acquitted on the charge of careless and reckless driving; it is improper to join two separate and distinct offenses of manslaughter against the same defendant in one indictment.

June 19, 1953

Honorable Joe H. Miller Prosecuting Attorney of Carroll County Carrollton, Missouri FILED 62

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"Some time ago in Carroll County two persons were killed in a highway accident while riding a motorcycle.

"The other party involved in the accident was arrested for careless driving and on a change of venue was acquitted. The parents of the dead boy and girl have appeared before a Grand Jury in Carroll County asking the Grand Jury to indict the driver of the automobile that hit the motorcycle with manslaughter or whatever is the proper charge under the circumstances.

"The question that arises in my mind is whether or not the party has been placed in jeopardy, having been charged with careless driving arising out of the accident.

"If it is proper to indict on a manslaughter charge is there any law to prohibit a charge indicting for each person killed in the accident?" The first question to be determined is whether a person standing trial upon an indictment for manslaughter may successfully interpose a plea of former jeopardy having once been tried on a charge of careless and reckless driving, as a bar to said prosecution. That no one shall be twice put in jeopardy for the same offense is of ancient origin, having appeared early in the common law and being part of the universal law of reason, justice and conscience. 22 C.J.S., Criminal Law, Section 238. The common law rule has been preserved and carried forward at least in part in the Constitution of the United States and of the State of Missouri; while, although we need not refer to the provisions of the United States Constitution, since it does not govern trials in the State courts (Ex parte Dixon, 52 S.W. (2d) 181), we do wish to refer to Section 19 of Article I of the Constitution of Missouri, 1945. Said section provides as follows:

"Self incrimination and double jeopardy .- That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or infomration. or if judgment on a verdict be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."

We are not enlightened by any appellate court decisions of this state bearing upon the precise question at hand, however, the courts have on occasions stated and explained the correct application of a plea of former jeopardy. In the case of State v. Toombs, 34 S.W. (2d) 61, the court said:

"In 16 C.J., Sec. 443, p. 263, the rule is stated to be that 'the prohibition of the common law and of the constitutions is against a second jeopardy for the same "offense," that is, for the identical act and crime; or as expressed in a number of cases,

Honorable Joe H. Miller

to entitle a defendant to plead successfully former jeopardy, the offense charged in the two prosecutions must be the same in law and in fact.' See, also 8 R.C.L. Sec. 128, p. 143, and State v. Gustin, 152 Mo. 108, 53 S.W. 421. But the rule is well settled that the state cannot split up a single crime and prosecute it in parts, and that a prosecution for any part of a single crime bars any further prosecution cased upon the whole or another part of the same crime. 16 C.J., Sec. 448, p. 270; 8 R.C.L., Sec. 130, p. 145. Many cases in support of the texts are cited in the notes in both the above-mentioned authorities."

In the case of State v. Gustin, 152 Mo. 108, cited with approval in the Toombs case it is stated:

"The Constitution of this state guarantees that 'no person after being once acquitted by a jury, shall again be put in jeopardy of life or liberty for the same offense,' and the defendant invokes this provision as a protection against the trial and conviction in this case. It will be observed that the Constitution used the words 'for the same offense.' Such also was the rule of common law. The former acquittal or conviction must have been 'for the same identical act and crime.' (4 Blackstone, Com. 336). Chitty in Vol. I, Criminal Law, 452, says, 'To entitle the defendant to this plea, it is necessary that the crime charged be precisely the same.' In Com. v. Roby, 12 Pick. loc. cit. 504, Chief Justice Shaw says, 'In considering the identity of the offense, it must appear by the plea, that the offense, charged in both cases was the same in law and in fact. "

The rule in this state as appears from the foregoing authorities is that to sustain a plea of former jeopardy the two offenses charged must be the same in law and in fact, and as is noted in the Gustin case, this was the common law rule. 22 C.J.S., Criminal Law, Section 278.

Can it be said that careless and reckless driving and manslaughter are the same in law and in fact? Section 304.010, provides that "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person," Section 304.020 specifies certain so-called rules of the road such as keeping a vehicle as close to the right-hand side of the highway as practicable, etc. The violations of these provisions of Chapter 304 constitute a misdemeanor and punishable within the limits prescribed. Section 304.570, RSMo 1949, State v. Ball, 171 S.W. (2d) 787.

Manslaughter is defined by Section 559.070, to be "Every killing of a human being by an act, procurement or culpable negligence of another, not being declared to be murder or excusable or justifiable homicide." By Section 559.070, manslaughter is made a felony. The culpability necessary to support a manslaughter charge must be so great as to indicate a reckless or utter disregard for human life which exacts a higher degree of proof than that required to sustain a conviction under the provisions of Chapter 304. State v. Ruffin, 126 S.W. (2d) 218. It is sometimes stated in determining whether crimes are identical, that the test is whether the same evidence would sustain a conviction in each case and if the evidence required to convict under the first charge would not be sufficient to convict under the second, but proof of an additional fact would be necessary to constitute the offense charged in the second, then the former conviction or acquittal could not be pleaded as a bar. 22 C.J.S., Criminal Law, Section 279 and 285.

In 15 Am. Jur., Section 380, the rule is stated as follows:

"Offenses are not the same if upon the trial of one proof of an additional fact is required, which is not necessary to be proved in the trial of the other although some of the same acts may be necessary to be proved in the trial of each."

It is of course obvious that additional evidence would be required to show the culpability needed to sustain a charge of manslaughter not required in a careless and reckless driving charge, State v. Ruffin, supra, State v. Midgett, 214 N.C. 107, State v. Bacon, 30 So. (2d) 744, in addition to the fact that in the former, the death of another must be shown. Further, and in the converse, to support a charge of careless and reckelss driving, it is necessary to prove that the defendant operated the

automobile upon the highway, an element not essential to a conviction of manslaughter. See Commonwealth v. Maguire, 313 Mass. 669, 1.c. 672.

The rule to be followed as we understand it, is not whether the elements of the one offense might in a given case support the other, but rather whether the elements of the one are necessarily involved in the other. State v. Midgette, supra, State v. Huffman, 136 Mo. 1.c. 62.

It is our opinion that careless and reckless driving is not a lesser degree of the crime of manslaughter, State v. Bacon and State v. Midgette, supra, and that one could not be convicted of driving an automobile in a reckless and imprudent manner upon trial of an indictment which charged him only with the crime of manslaughter. See State v. England 11 S.W. (2d) 1024. Manslaughter is the wrongful killing of another; whereas the careless and reckless driving statute was enacted to deter and thereby prevent collision and consequent injury to the property or person of others. The latter offense is complete before fatal injury to a person occurs. The mere fact that a death occurs as a result of careless and reckless driving does not make it an element of the offense. The two offenses are separate and distinct. In the case of State v. Wightman, 26 Mo. 515, the Missouri Supreme Court said:

"An acquittal on an indictment for a felonious assault will not bar a prosecution for a common assault and battery before a justice of the peace, because the defendant, under the indictment, could not be convicted of the minor offense. * * *"

There have been several cases of other jurisdictions passing upon substantially the same question as here involved and these authorities have been uniform in holding that the offense of careless and reckless driving is not the same in law or in fact as the offense of manslaughter, even though they may arise from the same occurrence or transaction nor is it a lesser degree of the other. 172 A.L.R. 1058. Illustrative of such is the case of Commonwealth v. Jones, 288 Mass. 150. The defendant was tried in the district court and found not guilty on a charge of operating a motor vehicle negligently so that the lives or safety of the public might be endangered. Subsequently, the defendant was tired for manslaughter and brought to trial in the Superior Court. He interposed a plea of former jeopardy in bar which was overruled and a conviction was had. On appeal the Supreme Court of Massachusetts said:

"The only question involved is whether or not the trial and acquittal of the defendant in the District Court for the statutory misdemeanor operate as a bar to the trial for manslaughter arising out of the same transaction. The defendant relies upon the ancient principle of the common law and the provision of G. L. (Ter.Ed.) v. 263, Sec. 7, to the effect that a person shall not be held to answer on a second indictment or complaint for a crime of which he had been acquitted upon the facts and merits. He also relies upon the rule that, when a person is brought to trial and jeopardy has attached, he cannot be tried thereafter for a greater offence arising out of the same criminal act. It is commonly said that the crimes are the same if the facts necessary to prove the second crime would have warranted a conviction upon the first. Commonwealth v. Roby, 12 Pick. 496, 503. Commonwealth v. Crowley, 257 Moss. 590, 595. This principle is subject to the equally recognized exception that a single act may be legislative fiat be an offence against two statutes or against a single statute and the common law, if the statute or the common law requires proof of an additional act. This rule is also subject to the exception that a conviction or acquittal of a minor statutory offence in a inferior court does not bar prosecution for a higher crime of which the inferior court has no jurisdiction. statement of the reasons of this exception and a collection of cases supporting the proposition in Commonwealth v. McCan, 277 Mass. 199, 205, 206. In the case at bar the offence of which the defendant was acquitted was a misdemeanor. G.L. (Ter. Ed.) c. 900, Sec. 24, as amended by St. 1932, c. 26, Sec. 1. A conviction required proof of specific violation of said Section 24, or proof of negligent operation of a motor vehicle so that the lives or safety of the public might be endangered. The indictment under which the defendant was convicted could be satisfied only by proof that the defendant was guilty of wanton, reckless and wilful misconduct.

The offense charged in the complaint differs in kind and in the proof required to support it from the offence charged in the indictment. Altman v. Aronson, 231 Mass. 588. The inferior court had no jurisdiction to consider the offence charged in the indictment. It follows that the acquittal of the defendant of the offence charged in the complaint was not a bar to the trial ff the defendant on the indictment for relony. The plea was rightly overruled."

To the effect that the same act may be an offense against two statutes, see State v. Taylor, 214 S.W. (2d) 34. Likewise, see State v. Gustin, 152 Mo. 108, where the court, by way of dictum, indicated that a conviction for a misdemaanor in a court having no jurisdiction over felonies, would not constitute a bar to a felony charge based upon the same act.

In summary, we wish to state; the offense of careless and reckless driving and manslaughter are not the same either in law or in fact; nor is the one a lesser degree of the other; they differ both in grade and kind; the one is a misdemeanor made so by statute, the other a felony; and, additional facts must be alleged and proved to establish the greater charge which need not appear on the trial of the lesser offense.

You next inquire whether there is "any law to prohibit a charge indicting for each person killed in the accident?" We assume that you are asking whether the grand jury may file two separate indictments, one for the death of A and another for the death of B, where both deaths are the result of the same transaction. We wish to state that we find no law which would prohibit such action. A person who by a single act, or as a result of the same transaction, kills two human beings which is not declared murder or excusable or justifiable homicide, would be guilty of two offenses. One for the killing of A, and another for the killing of B. Section 559.070, noted supra, with limitation, declares manslaughter to be the killing of a human being. A person could not be convicted of killing B on a charge for the killing of A, and vice versa. The proof required on the one would not support a conviction of the other because in each, the death of a different human being must be shown which would not be required in the other. Not only do we think that it is proper within the discretion of the grand jury to file two separate indictments, but on the contrary, it is our opinion that it would be improper

Honorable Joe H. Miller

to incorporate the two separate charges in the same indictment. See State v. Kurtz, 295 S.W. 747, l.c. 749, in regard to the rule of joinder of offenses.

CONCLUSION

Therefore, it is the opinion of this office that under the provisions of Article I, Section 19, Constitution of Missouri, 1945, an acquittal on the charge of careless and reckless driving, under the provisions of Chapter 304, RSMo 1949, would not constitute a bar to subsequent prosecution for manslaughter where both charges arise out of the same transaction, since the two offenses are separate and distinct, nor is the one a lesser degree of the other.

We are further of the opinion that there is no law to prohibit the grand jury within its discretion from filing two separate indictments for manslaughter, one for the death of A, and another for the death of B, where both deaths are a result of the same unlawful act or transaction.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON

SCHOOLS:

TAXATION:



No obligation on part of either sending or receiving district to provide free transportation for pupils attending high school in another district, but if provided, sending district liable for costs in excess of state aid, provided such obligation can be met out of revenue provided by constitutional levy. School district cannot be forced to increase levy above constitutional maximum.

June 19, 1953

Honorable Harry J. Mitchell Prosecuting Attorney Marion County Palmyra, Missouri

Dear Sir:

This is in response to your request for an opinion, dated April 22, 1953, which omitting caption and signature reads as follows:

"I have been requested by the school board of a Marion County School District to ask for your opinion on a problem, the facts of which are as follows:

"1. The board represents a rural district.

"2. The Palmyra school district and the Monroe City School District have been providing transportation for the high school students of the district.

"3. The rural district has been paying for the transportation of its high school pupils.

"h. The people of the district at a recent meeting voted 19 to 15 to reduce the tax levy to the minimum amount allowed by law, and 19 to 15 to pay for the transportation of its high school students.

"The questions are:

"1. Is the rural district required by law to pay for the transportation of

its high school students?

"2. Under the tax levy voted, sufficient money will not be available to pay for the transportation, can the school district be forced to increase its levy?"

By further correspondence you have clarified the phrase "minimum amount allowed by law" as being the maximum amount specified in Section 11(b) of Article X, Constitution of Missouri, 1945, which becomes the minimum amount for purposes of state aid under Section 161.040, RSMo 1949, more specifically, sixty five cents on each one hundred dollars of the assessed valuation.

The answer to the first question submitted by you turns upon the interpretation of Section 165.143, RSMo 1949, which reads as follows:

"165.143. When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils.

When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils; provided, any cost incurred for transporting such púpils in excess of three dollars per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

At no other place in the school laws are we able to find a requirement that free transportation be furnished pupils attending high school in a district different from that of their residence. Section 165.143, supra, merely says that when the board of directors of the sending district makes provision for transporting such pupils, and conforms with the other requirements of the statute, that district shall be entitled to the specified state aid. It follows, of course, that if the cost of transportation exceeds the amount of state aid, the excess becomes an obligation of the sending district.

On the other hand, if the receiving district provides

for the transportation of such pupils and meets the other requirements of the statute, then the receiving district becomes entitled to the state aid. Any costs in excess of the state aid remain the obligation of the sending district which, as the statute specifically provides, "may be collected from the district of the pupils' residence."

The answer to your first question then is this:

There is no obligation on the part of either the sending or receiving district to provide free transportation for pupils attending high school in a district different from that of their residence, but if such transportation is provided, the sending district is obligated for the costs in excess of the state aid.

The second question submitted is whether the school district can be forced to increase its levy above the constitutional maximum of sixty five cents on each one hundred dollars assessed valuation.

That question was answered in State ex rel. Hufft v. Knight, 121 S.W. 2d 762, 764, (Mo. App. 1938), where the court said:

"Mandamus, of course, cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. However, a court cannot by mandamus proceedings compel a municipal sub-division of the state to levy a tax in excess of the maximum fixed by the Constitution. Bushnell et al. v. Drainage District, Mo. App., 111 S.W. 2d 946. The duty of

a school district to discharge its obligations if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted to the directors. State ex rel. R. E. Funsten Co. v. Becker et al., Judges of St. Louis Court of Appeals, 318 Mo. 516, 1 S.W. 2d 103; State ex rel. Kirkwood School District v. Herpel, Mo. App., 32 S.W. 2d 96."

(Emphasis ours.)

In the case submitted by you, it is apparent that the available funds of the district must first be used in order to provide a public school or schools within the district for a period of eight months in each school year and to pay the tuition of pupils attending high school in a district different from that of their residence. Section 161.040, RSMo 1949, reads, in part, as follows:

"161.040 - 1. The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year. In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this law it is hereby provided that when any district has legally levied for school purposes (teachers' wages and incidental expenses) a tax rate not less than the constitutional limit which the school board without a vote of the people is authorized to levy on each one hundred dollars of the assessed valuation of property therein, such districts shall be allotted out of the public school fund of the state

an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of section 161.020, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of section 161.020, and the amount approved for resident transportation and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items: The computed yield of a tax of twenty cents on each one hundred dollars of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year for school purposes from the railroad, telegraph, utility and all other taxes based on assessments distributed by the state tax commission. * * * "

Section 165.257, Cumulative Supplement, RSMo 1951, reads:

165.257. The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per pupil cost of main-taining the school attended, less a deduction at the rate of fifty dollars

for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota. If the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year, but the attendance of such pupils shall not be counted in determining the teaching units of the school attended. The cost of maintaining the school attended shall be determined by the board of such school district but in no case shall it exceed all amounts spent for teachers! wages, incidental purposes, maintenance and replacements. Per pupil cost of the school attended shall be determined by dividing the cost of maintaining the school by the average daily pupil attendance. In case of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final. Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, or shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as hereinbefore provided. In no case, however, shall the amount collected from a pupil, parent or guardian exceed the difference between fifty dollars and the per pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent, or guardian exceeds the difference

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between fifty dollars and the per pupil amount actually paid by the state, the excess shall be refunded as soon as the fact of an overcharge is ascertained."

The above sections under the 1939 revision were construed in the case of Linn Consolidated High School District No. 1 v. Pointer's Creek Public School District No. 42, 203 S.W. 2d 721, 724. The court said:

"Section 10454, Revised Statutes
Missouri 1939, Mo. R.S.A., requires a
district such as defendant to maintain
an eight months' grade school. Section
10458 requires such a district to pay
the tuition of its children who have
finished the grades and attend high
school in another district. Both statutes are mandatory to the extent that
the district can comply by levying
the rate of taxes permitted by the
constitution."

From your request, we gather that after these obligations have been met, no funds will be available under the sixty five cents tax levy to provide transportation for such high school pupils. In such event, if the sending district should provide the transportation and voluntarily obligate itself beyond the revenue actually provided for the year, the contract would be void because of the provisions of Section 26(a), Article VI, Constitution of Missouri, 1945, which reads as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

The section comparable to this under the 1875 Constitution (Section 12, Article X, Missouri Constitution of 1875), was also construed in Linn Consolidated High School District No. 1 v. Pointer's Creek Public School District No. 42, supra. There the court said, 1.c. 724:

"The difference between a debt incurred by a voluntary contract and one imposed by the mandatory terms of a statute is this: the former is void if beyond the revenue actually provided for the year, the latter is valid if within the revenue which could have been provided. State ex rel. Hufft v. Knight, Mo. App., 121 S.W. 2d 762, 764, though decided on facts differing from those in the instant case, is in point on principle. That opinion says: 'The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district * * *. *"

If the receiving district should provide the transportation and the costs thereof should exceed the amount of the state aid, the obligation in your case, although seemingly mandatory, would still be void because in excess of the revenue which could have been provided within the constitutional limitation of sixty five cents on each one hundred dollars assessed valuation. In any event, the receiving district could not collect the excess from the sending district because under the levy no funds would be available and the district could not be forced by mandamus to increase its levy above the constitutional limits. See State ex rel. Hufft v. Knight, supra.

CONCLUSION

Therefore, it is the opinion of this office that there is no requirement that either the receiving or sending school district provide free transportation for pupils attending high school in a district different from that of their residence, but if such transportation is provided the sending district is obligated to pay the cost of transportation in excess of the specified state aid, provided that such obligation can be met out of available funds and revenue realized through the maximum constitutional levy without voter approval, which in the case of a rural district is sixty five cents on each

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one hundred dollars of the assessed valuation. If the obligation cannot be met out of the revenue provided as above, the obligation is void.

It is the further opinion of this office that a school district cannot be forced to increase its levy above the constitutional maximum of sixty five cents on each one hundred dollars of the assessed valuation.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. John W. Inglish.

Very truly yours,

JOHN M. DALTON Attorney General

JWI:1rt

UNIVERSITY OF MISSOURI: Board of Curators of the University of Missouri authorized to construct married student apartment dormitories under Chapter 176, RSMo 1949.

November 3, 1953



Honorable Frederick A. Middlebush President University of Missouri Columbia, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

> "The University of Missouri would like to have an opinion from your office as to whether or not the Beard of Curators, under the provisions of Missouri Revised Statutes 1949 (Section 176.010 to Section 176.080), could finance the construction of married student apartment dormitories. As you know there is great need for a limited amount of housing of this type and we are interested in beginning the construction of these facilities at the earliest possible date. If there is any additional information that we can give you which would be of assistance to your office in passing on this matter, please do not hesitate to call upon us.

Chapter 176, RSMo 1949, provides a scheme for the construction of certain buildings to be used by state educational institutions and the cost of which is to be paid through surplus operating revenues. Obligations incurred thereunder are not an indebtedness of the State of Missouri, of the educational institution for whom constructed, nor of the governing body or individual members thereof.

Honorable Frederick A. Middlebush

Under Section 176.010, RSMo 1949, the University of the State of Missouri is included within the term "state educational institutions" and the Board of Curators of such institution is defined as the "governing body" thereof. The term "project" as used in other sections of the chapter referred to infra, is defined in the following language:

"(3) 'Project' shall mean one or more dormitory buildings with or without dining room facilities as an integral part thereof, or dining room facilities alone, or any combination of dormitory and dining room facilities, or one or more social and recreational buildings, or any combination of dormitory, dining room, social and recreational facilities."

Your attention is next directed to Paragraph 1 of Section 176.020, RSMo 1949, reading as follows:

"1. Any state educational institution of the state of Missouri, as herein defined, shall have the power, acting through its governing body, to acquire, construct, erect, equip, furnish, operate, control, manage and regulate a project, as herein defined, as in the judgment of such governing body shall be necessary, advisable, and suitable for the use of students attending such educational institution."

We might note at this point that the entire chapter under consideration first appeared as an act of the General Assembly in Laws of 1945, page 1715. It is a matter of common knowledge that at such time the various educational institutions of the State of Missouri were filled to capacity and that a definite shortage of housing facilities then existed.

Judicial recognition of such an emergency situation appears from the opinion of the Supreme Court of Missouri in Northeast Missouri State Teachers College v. Palmer, 204 S.W. 2d 291, 356 Mo. 946, wherein the court, in construing the emergency clause attached to the chapter now under consideration, said:

"Finally it is insisted that the act is invalid or was not in force at the time the proceeding was instituted because the bill was passed with an

Honorable Frederick A. Middlebush

emergency clause 'but no emergency was expressed in the preamble or the bill' as required by Section 29, Article III of the Constitution. The appellants do not develop the point other than to say 'The reference to the emergency in both places is merely a conclusion and no real emergency was set out as existing.' Section 10 of the act expresses the emergency thus: 'Because of the great increase in the number of students enrolled in state educational institutions as a result of conditions existing after World War II, there is an immediate need for the authority granted by this Act, and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency exists within the meaning of the Constitution of the State of Missouri # # #. Certainly it cannot be said that this declaration is such a mere conclusion as to invalidate the act as an improper expression of an emergency. See also the provisions of the Federal Act and its expressed purposes. 42 U.S.C.A. Secs. 1571-1574."

Keeping in mind the history of this legislation and its avowed purpose, it next becomes pertinent to determine whether dormitories designed for the use of married students fall within the definition of "project" heretofore quoted.

The word "dormitory" has been the subject of judicial inquiry in three previous cases decided by the Supreme Court of this state. None of the cases purports to establish the criteria by which the particular usage of a building constitutes such a building to be a "dormitory" but it is noted that the Supreme Court did hold that a seven story non-fireproof building, occupied by a club, which contained kitchen, dining room, library, banquet and dancing hall, and eighty-five bedrooms, was a building included within that category. The cases mentioned are Ranus v. Boatmen's Bank, 214 S.W. 156, 279 Mo. 332; Newell v. Boatmen's Bank, 216 S.W. 918, 279 Mo. 663; and Magill v. Boatmen's Bank, 232 S.W. 448, 288 Mo. 489.

Honorable Frederick A. Middlebush

We do not believe, therefore, that the possible inclusion of kitchen facilities, which apparently is contemplated as you have described the proposed construction to be for married students, would have the effect of depriving buildings primarily designed for sleeping quarters of their characteristics of "dormitories."

We further believe that this construction of the statute is in accord with conditions which were perhaps not within the contemplation of the General Assembly at the time of the enactment of Chapter 165, RSMo 1949. In this regard, we take cognizance of the great influx of married students into state educational institutions, primarily resulting from the opportunity to do so being afforded ex-members of the Armed Forces under the so-called "GI Bill of Rights." We think that a reasonable construction of the statute would authorize the Board of Curators of the University of Missouri to construct such facilities, subject to the limitations and qualifications with respect to the payment of the costs thereof embodied in Chapter 176, RSMo 1949.

CONCLUSION

In the premises, we are of the opinion that the Board of Curators of the University of the State of Missouri is authorized to construct married student apartment dormitories under the provisions of Chapter 176, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly.

JOHN M. DALTON Attorney General

WFB: vlw

CHANGE OF VENUE: FINES:

) Fines imposed in criminal cases on change of) venue shall be paid into the county where the) indictment was found or the prosecution) originally instituted.



November 6, 1953

Honorable Joe H. Miller Prosecuting Attorney Carroll County Carrollton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Two criminal cases came to Carroll County, Missouri, on change of venue from Clay County, Missouri. Each defendant received a fine as a sentence upon a plea of guilty. Should the fine money paid into court stay in Carroll County or should it be sent back to Clay County where the case originated?"

Under Section 550.120 RSMo, 1949, it provides that fines imposed upon conviction in change of venue cases are payable to the county treasury where such indictments were originally found or prosecution originally instituted. Said Section reads:

"In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was found or the proceedings were originally instituted; and in all cases where fines are

imposed upon conviction under such indictments or prosecutions, or penalties or
forfeitures of penal bonds in criminal cases,
are collected, by civil action or otherwise,
payable to the county, such fines, penalties
and forfeitures shall be paid into the
treasury of the county where such indictment
was originally found or such prosecution
originally instituted, for the benefit of the
public school fund of the county.

CONCLUSION

Therefore, the opinion of this department is that fines imposed in criminal cases on a change of venue from Clay County to Carroll County shall be paid into the treasury of Clay County as provided under Section 550.120 RSMo, 1949.

The foregoing opinion which I hereby approve was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

ARH:A

COUNTY COURTS:

A county court speaks only through its record.

County not bound by oral agreements with county judges.

1-22-53

JOHN M. DALTON

January 22, 1953

Honorable Richard D. Moore Prosecuting Attorney Howell County West Plains, Missouri



John C. Johnsen

Dear Sir:

Your request for an opinion of this department has been received. The request is as follows:

"I would like your opinion in regard to the following: In 1950, Paul McGoldrick, who was at the time, treasurer of Howell County, was indicted for embezzlement of State funds. At the same time his brother, Harry McGoldrick, who had been treasurer of Howell County prior to Paul's term, was indicted for embezzlement also.

"The County Court of Howell County instigated an action against the bondsmen of Harry and Paul McGoldrick for the amount the Treasurer's office was short, amounting to approximately \$15,000, I understand. The bondsmen paid this amount of money to the County Court and the Court dismissed the action against them. At the time, the money was paid under protest and the Court made an oral promise to the bondsmen that if the McGoldricks were not subsequently convicted of the charges, they would pay this money back to the bondsmen. The embezzlement charges were subsequently dismissed against the McGoldricks, after several trials had been had, and the State failed to get a conviction.

"The bondsmen are now demanding that the County Court pay them back the sum they paid into the Court in accordance with the Court's oral agreement. The Court, under these circumstances, wants to know if they

Honorable Richard D. Moore

have authority to pay back this money to the bondsmen. I had advised them that under my understanding of the law they do not have this authority and they desired I write the Attorney General and get an opinion from your office."

We assume the records of the County Court of Howell County show that the ex county treasurers, Harry and Paul McGoldrick, were in debt to the county on account of misappropriation of county funds; that suit was ordered filed to recover the deficit, and that Sixteen Thousand (\$16,000) Dollars or approximately that amount was accepted by the court in settlement and disposition of the suit against the bondsmen of said officers.

We first call your attention to Section 432.070, RSMo 1949, which is as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

(Emphasis ours.)

We next call your attention to the case of Arbyrd Compress Co. v. City of Arbyrd, (Mo. App.), 246 S.W. (2d) 104, 109, where the court said:

"The county court is a court of limited jurisdiction and can only exercise such powers as are expressly given it by statute. It had no legal power whatsoever to exercise jurisdiction in matters pertaining to the exclusion of plaintiff's property from the city limits of defendant city and its judgment touching that subject was a nullity."

Honorable Richard D. Moore

In Decker v. Diemer, 229 Mo. 297, 322, Lamm, J., speaking for the Supreme Court In Banc, said:

"So the evidence of Mr. West (delivered on December 3, 1909) to the effect that he was told by the judges of the county court that they had no money to pay his account for services rendered in 1909 is of no probative value. The county court speaks by its record. The talk of a judge outside the record of his court is no evidence of the state of accounts shown by the books. Furthermore, West's services for 1909 were, primarily, chargeable against the revenues of that year."

(Emphasis ours.)

In Boatright v. Saline County, (Mo. Sup.), 169 S.W. (2d) 371, 372, we find the following:

" * * * In the latter case the Court of Appeals said: 'A County Court may speak only through its records, and ex officio, verbal understandings with county judges are not valid and binding.'

"The consent and approval of the county court must be made a matter of record. A county cannot be made liable for sums, as in this case \$3,200, merely upon the oral expressions of the members of the court. * * "

(Emphasis ours.)

From the above-quoted statute and authorities, we are of the opinion that the County of Howell could in no way be held liable for the funds mentioned in your request. A county court may speak only through its records. Verbal agreements made by county judges, not entered of record, are not valid and binding on the county. Your county court has no authority, under the stated facts, to return the funds paid into the county treasury in settlement of the suit against the extreasurers' bondsmen.

Honorable Richard D. Moore

CONCLUSION

It is the opinion of this department that the judges of your county court cannot bind the County of Howell by an oral understanding to return to bondsmen money already paid into the county treasury in settlement of the suit filed against said bondsmen. The county court has no authority, on the above state of facts, to return this money to the bondsmen.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Grover C. Huston.

Respectfully submitted,

JOHN M. DALTON Attorney General

GCH: VLB

CIRCUIT CLERK EX OFFICIO RECORDER:

Circuit clerk and ex officio recorder of a county of the fourth class within a prescribed population and assessed valuation is entitled to salary in the amount of \$3150.

2-3-53



Honorable Garner L. Moody Prosecuting Attorney of Wright County Hartville, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"There has been some question about the salary for the Circuit Clerk and Recorder of this county. I would like for you to give me an opinion on the following question.

February 3, 1953

"What is the salary of a Circuit Clerk and Recorder for a fourth class County?"

For the purpose of this opinion, we note that Wright County is a county of the fourth class with a population as indicated by the 1950 census of population count of at least fifteen thousand and less than seventeen thousand five hundred inhabitants and with an assessed valuation of more than five million dollars.

We now refer you to Section 483.370, RSMo 1949, relating to the compensation of a circuit clerk and recorder in counties of the fourth class, which reads in part as follows:

"1. The circuit Clerk and recorder in counties of the fourth class in this state shall receive annually for his services the following:

"(4) In counties having a population of fifteen thousand and less than seventeen thousand five hundred the sum of one thousand nine hundred dollars; * * *."

Section 483.375, RSMo 1949, provides an additional compensation to that provided in Section 483.370 for services as clerk of the juvenile division of the circuit court and as a member of the board of jury commissioners. Said section reads in part as follows:

> "In addition to the compensation provided for in section 483.370, the circuit clerk and recorder of counties of the fourth class shall receive the following compensation per annum:

"(1) For his services as clerk of the juvenile division of the circuit court, the following:

* * * * * * * * * * * * * *

"(d) In counties having a population of fifteen thousand and less than seventeen thousand five hundred the sum of four hundred dollars; and

* * * * * * * * * * * * * *

"(2) For the performance of his duties as a member of the board of jury commissioners and ex officio clerk thereof, the sum of one hundred fifty dollars."

Section 483.367, Revised Statutes of Missouri Cumulative Supplement 1951, enacted by the Sixty-sixth General Assembly specifies a compensation for the circuit clerk and recorder of a county of the fourth class for his duties as parole commissioner. Said section reads in part as follows:

"For the performance of all duties imposed upon him as parole commissioner, the clerk of the circuit court shall receive, in addition to all other compensation now allowed by law, the following compensation, payable out of the county treasury:

"(2) In fourth class counties where the assessed valuation is more than five million dollars, seven hundred dollars; * * *."

Under the above provisions, we are of the opinion that the salary of the circuit clerk and ex officio recorder of a county of the fourth class is in the amount of \$3150. Of course, since you ask for the salary of said officer, we have not taken into consideration such fees as the officer may, by law, be entitled to retain.

CONCLUSION

Therefore, it is the opinion of this office that the salary of a circuit clerk and ex officio recorder of a county of the fourth class having a population of at least fifteen thousand and less than seventeen thousand five hundred inhabitants and an assessed valuation of more than five million dollars is in the amount of \$3150, exclusive of such fees as the officer may be entitled to by law to retain.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General SHERIFFS: FEES AND SALARIES: OFFICERS: Sheriff not entitled to mileage for arresting a person in the act of committing a criminal offense several miles from county seat and bringing him to jail

February 4, 1953

FILED 63

Mr. Richard D. Moore Prosecuting Attorney Howell County West Plains, Missouri

Dear Sir:

In December your predecessor requested an opinion of this department. We are assuming that you, as Prosecuting Attorney of Howell County, would be interested in receiving the opinion as requested, so we are submitting our opinion on the basis of the letter written to this office by your predecessor. That letter, in part, reads:

"Our sheriff has asked this office for an opinion as to fees in criminal cases on a matter which I am not sure of and I therefore submit the questions to your office and would like an opinion as early as convenient.

- "(1) In case where the sheriff apprehends a subject in the act of committing an offense, say drunken driving or careless and reckless driving say 20 or 25 miles from the county seat, arrests him, brings him to jail that night and files complaint the next day, would he be entitled to a warrant and to charge mileage for bringing the prisoner to jail?
- "(2) Where the Highway Patrol apprehends a subject in the commission of a crime and brings him and puts him in jail and files complaint against him, is it the duty of the Magistrate to issue a warrant in such a case and is the sheriff entitled to service and charge his regular fee for such service?"

As we construe your first question, you have inquired whether or not the sheriff in your county would be entitled to receive mileage for bringing a prisoner to jail where the sheriff apprehends and arrests said prisoner in the act of committing an offense several miles from the county seat.

Regarding the compensation of sheriffs in counties of the third class, Section 57.360, RSMo 1949, in part, provides:

"The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: * * *

Under the above section the sheriffs of third class counties are compensated by salary, as provided in the statute, based on the population of the county.

There are other statutes under which sheriffs are allowed mileage for their services in criminal cases. However, the statutes are specific in stating the purposes for which mileage is allowed. For example, Section 57.300, RSMo 1949, gives sheriffs mileage in serving venire summonses, writ, subpoenas or other orders of court when served more than five miles from the place where court is held.

The statute which touches more closely in covering the situation which you have presented is Section 57.430, Supp., RSMo 1951, which, in part, provides:

"In addition to the salary provided in Sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed seven cents per mile, and actual expenses not to exceed seven cents per mile for each mile traveled, the maximum amount allowable to be seventy-five dollars during any one calendar month in

the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote."

However, under the facts which you have presented in your first question, we do not believe that they would constitute an investigation for which the sheriff could be compensated under the above statute.

The Supreme Court of Missouri has many times held that for a public officer to be compensated for services rendered, such as a fee, salary or mileage, he must point to the statute authorizing such payment, and unless the statute clearly provides for such payment the services rendered by such public officer are deemed to be gratuitous. Thus, in Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. (2d) 857, 860, the rule is stated as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compsation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such stautes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28 149 S.W. 638; King v. Riverland Levee Dist., 218 Mo.App. 490, 493, 279 S.W. 195 196; State ex rel. Wedeking v. McCracken, 60 Mo.App. 650, 656.

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

Since under the rule as stated in the above case the statute must clearly authorize the payment of compensation or mileage and that the statute must be strictly construed against the officer, we must conclude, in answer to your first question, that there is no statute clearly authorizing mileage for the sheriff under the facts which you have presented.

In connection with the second question which you have presented, we are enclosing a copy of an opinion submitted to the Magistrate of Webster County under date of August 13, 1947, which we believe substantially answers your inquiry.

CONCLUSION

In the premises, it is the opinion of this department that a sheriff who arrests a person in the act of committing a criminal offense several miles from the county seat and takes him to jail would not be entitled to receive mileage for bringing such person to jail.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Frank Thompson.

Very truly yours,

JOHN M. DALTON Attorney General

Enc.

(Opinion enc: Hon. Cline C. Herren)

TAXATION: MERCHANTS TAX: COUNTY: Liability for merchants tax of merchant selling business, and liability of purchaser of said business.

IGHN M. DALITON

February 6, 1953



Opinion No. 63

Honorable Garner L. Moody Prosecuting Attorney Wright County Hartville, Missouri

John C. Johnson

Dear Sirt

This will acknowledge receipt of your request for an opinion, which reads:

"The question has come up in our county concerning merchant's tax as follows:

"Is a merchant who was in business on January 1, 1952, who had a stock of goods and filed a statement for tax assessment as required by law, and who later in 1952 sells his business, liable for the full amount of 1952 taxes on such merchandise as assessed?

"What are the liabilities of the second or purchasing merchant as to 1952 taxes?"

The general principle of law is that taxes lawfully assessed when paid cannot be refunded in the absence of statutory authority to refund such taxes. This rule even seems to prevail in cases of taxes illegally exacted. In State ex rel. S. S. Kresge Co. v. Howard, 208 S.W. (2d) 247, l.c. 249, 250, 357 Mo. 302, the Court said:

"We now consider the validity of the claim and the appropriation for its payment. The refund of taxes illegally exacted is ordinarily a matter of governmental grace. On grounds of public policy, the law discourages suits for the refund of taxes illegally levied and collected, and has imposed many restrictions on their recovery. It is generally held that taxes voluntarily paid

Honorable Garner L. Moody

without compulsion, although levied under an unconstitutional statute, cannot be refunded without the aid of a statutory remedy. 51 Am. Jur. Taxation Sec. 1167."

See also State ex rel. Rice v. Powell, 44 Mo. 436; Couch v. Kansas City, 30 S.W. 117, 127 Mo. 436; and Kansas City ex rel. Elliott v. Holmes, 106 S.W. 559, 127 Mo. App. 620.

The assessment of merchants tax is for the calendar year January 1 to December 31, or in case one shall commence business after January 1, then from the date he commences business until December 31 of the same year. Section 150.040, V.A.M.S., reads:

"Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday in January and the first Monday in April in each year; provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Merchandise in this State is not listed for taxation as other personal property, but the merchant must apply for a license, and without it, he cannot operate his business. The merchants tax amounts to and is equivalent to an ad valorem tax levied on real estate, but in this instance, on the highest amount of goods, wares and merchandise in possession at a specified time.

In State ex rel. v. Alt, 224 Mo. 493, l.c. 507, 508, the Court said:

" * * * In this State merchandise is not listed for taxation as other personal property, but instead the merchant must apply for a license to trade as such, and without which he subjects himself to a

Honorable Garner L. Moody

forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. It is, however, provided that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of goods, wares and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a sworn statement of the merchant, that forms the basis upon which the various state, county, school and municipal taxes are levied."

One of the primary rules of statutory construction is to ascertain and give effect to expressed legislative intent. See State ex Inf. Rice ex rel. Allman v. Hawk, 228 S. W. (2d) 785, 360 Mo. 490; also Riley v. Hollard, 243 S.W. (2d) 79.

Section 150.100, V.A.M.S., provides that no person shall deal as a merchant without first obtaining a license, and reads:

"No person, corporation, copartnership or association of persons shall deal as a merchant without a license first obtained according to law; and every applicant for a license shall affirmatively state in a written application whether goods, wares and merchandise are to be sold by applicant at wholesale, at retail, or at both wholesale and retail. Every person or corporation so offending shall upon conviction thereof be deemed guilty of a misdemeanor."

Section 150.160, V.A.M.S., further provides that before any person shall obtain a license to vend merchandise, he shall execute a bond conditioned that he will, before the 31st day of December following, pay all the merchants tax due. Said section reads:

"Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety,

conditioned that he will on or before the thirty-first day of December following, pay to the collector of the proper county all merchants tax due, which bond shall be approved by the collector and his approval endorsed thereon; provided, that said bond shall not be required where any person, corporation or copartnership of persons has obtained and paid a license as required by law for a period of five continuous years immediately preceding an application for a license for the current year, but the actions authorized in sections 150.010 to 150.290 for default of said bonds shall be prosecuted against such person, corporation or copartnership of persons, notwithstanding the fact that no such bond has been given."

In State ex rel. v. Rodecker, 145 Mo. 450, the defendant ceased doing business between the first Monday in March and the first Monday in June and the court held that his bond was forfeited for failing to file a statement of goods on hand between these dates and pay the taxes thereon.

Section 150.180, RSMo 1949, further provides that when any merchant shall commence business after the first Monday in January, he is required to execute a bond that he will furnish the required statement of the largest amount of goods on hand between the first day of the month he commences business and the first day of the next January, upon which statement he shall pay a tax, and reads:

"When any merchant shall commence the business of merchandising in any county in this state after the first Monday in January, in any year, he shall execute a bond as provided for in section 150.160, conditioned that he will furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay a tax based upon the

Honorable Garner L. Moody

same rate as other merchants, to be determined by the number of months in business in any calendar year."

Since this is in the nature of a license tax issued in the name of and to the individual merchant, under the foregoing statutes and in the absence of a statute authorizing a transfer of said license or tax to the purchaser, we believe that it was the legislative intent in enacting said statutes that the purchaser of any such business cannot operate said business upon the license issued to the seller of said business, notwithstanding the fact that the purchase is consummated during the calendar year in which the former owner was duly licensed and prior to the expiration of the license issued to him.

CONCLUSION

Therefore, it is the opinion of this department that the merchant, who was in business on January 1, 1952, and who filed a statement for tax assessment purposes later during the year's business, is liable for the full amount of tax assessed in accordance with the statement filed by said merchant. Furthermore, the purchaser of said business during 1952 is required to make application for a license and is liable for taxes based upon a statement to be filed by him in 1952 as provided by law.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DAITON Attorney General

ARH: VLB

SCHOOLS:

Nomination of a member of a board of directors of a school district by principal of high school under Section 165.657, RSMo 1949, will not invalidate his election if the election is otherwise properly conducted.



May 28, 1953

Honorable Weldon W. (Whitey) Moore Prosecuting Attorney Texas County Houston, Missouri

Dear Mr. Moore:

This will acknowledge receipt of your request for an opinion, which reads:

"Pursuant to the provisions of Section 165.657, Revised Statutes of Missouri, 1949, a meeting of the Boards of Directors of the various School Districts in this County was held for the purpose of electing two Board Members. One of the members elected, received a majority of the votes cast by the Boards of Directors of the various School Districts, but his nomination did not come from a Member of a Board of Directors of any School District. He was nominated by the Principal of a High School in this County. I should like to know whether or not, in your opinion, the Member so elected is legally elected?"

Section 165.657, RSMo 1949, reads:

"1. There is hereby created in each county of Missouri a 'County Board of Education.' Within sixty days after sections 165.657 to 165.707 take effect each county superintendent shall call a meeting of the members of the boards of education and boards of directors of the various school districts in his county in accordance with the provisions of sections 165.033 and 167.110, RSMo 1949. The meeting shall organize by the election of one of its members as chairman. The county superintendent of schools shall serve as secretary of the meeting. Each member of every school board within the county shall be entitled to one vote.

- "2. When organized as above provided the meeting shall proceed to elect a county board of education of six members. Initially two members shall be elected for a term to expire on the second Tuesday of April, 1952, two for a term to expire on the second Tuesday of April, 1951, and two for a term to expire on the second Tuesday of April, 1950. After the expiration of the initial terms, members elected shall serve for terms of three years. Each person so elected shall be a citizen of the United States and of the state of Missouri. a resident householder of the county, and shall be not less than twenty-four years of age. Not more than three members of such board shall reside in any county court district and not more than one member of said board shall be chosen from the same municipal township or school district, except that if there be less than three municipal townships or school districts in any county court district, such district shall have as many members of the board as it may contain municipal townships or school districts and the remainder of such board shall be elected at large but shall reside in said county court district.
- "3. In 1949 and annually thereafter each county superintendent of schools shall call a meeting of the members of the boards of education and boards of directors of the various school districts in his county in accordance with the provisions of sections 165.033 and 167.110, RSMo 1949, to be held at ten o'clock a. m. on the second Tuesday in April, and such meeting shall fill all existing vacancies in the county board of education.
- "h. In the election of the first county board, nominations shall first be made from the floor to fill one of the longest terms, and each office to be filled shall be voted upon separately. Election of each board member shall be by majority vote by ballot."

This meeting was apparently not the first meeting called to elect the members of the first board of directors of said school district since only two members were elected. While the foregoing statute provides for the election of the first county board, in that nominations shall first be made from the floor (see paragraph 4), there is no further guide as to how nominations thereafter shall be made. However, it is apparent that such nominations shall be made by members of the various boards attending said meeting.

You state that the nomination of one member elected and receiving a majority of the votes cast was nominated by a principal of a high school in your county. In the absence of some specific statute designating how you shall nominate members of said board, we doubt if this in itself would prevent said nominee from being elected if said election was otherwise properly conducted.

The general rule as to the validity of elections of public officers in the absence of some particular statutory or constitutional provision providing for nominations is well stated in Section 90, 29 C.J.S. 124, which reads in part:

"In the absence of constitutional or statutory provision to the contrary, prior nomination of a candidate for public office is not essential to the validity of his election, the mere fact that he has not been nominated ordinarily not being regarded as rendering him ineligible to office, or precluding the electors from voting for him, or invalidating votes so cast. This is so notwithstanding the existence of a statute requiring that candidates who wish to have their names placed on the ballots as nominees shall first be nominated. * * *

In Hunt vs. Mann, 101 So. 369, 136 Miss. 590, the court went so far as to say in the absence of a statute declaring that an act is essential to the validity of an election or the omission of said act will render an election void that such statute will be considered as merely directory and not mandatory. In so holding, the court said at So., 1.c.370:

"In determining how far irregularities in party nominations for office will affect the result of the general election, the

fundamental inquiry is whether or not the irregularity complained of has prevented a full, fair, and free expression of the public will. Unless the statute which has been violated in making the nomination expressly declares that the particular act in question is essential to the validity of the election, or that its omission shall render the election void, the statute will be treated as directory, and not mandatory, provided such act of irregularity is not calculated to affect the integrity of the election. * * *"

There are numerous decisions of appellate courts in this and other states holding that certain irregularities and defects in elections should not be ignored prior to the election. However, after the election such irregularities and defects will not as a rule invalidate the election unless they effect the merits thereof. In State ex rel. Rogersville Reorganized School District vs. Holmes, 253 SW (2d) 402, 1.c. 404, the court held that the subject and purpose of the law is to effect a general reorganization of school districts in the state and should liberally construe the law. Especially is this true where no public or private right is impaired or injured. In so holding the court said:

"(2) 'As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them, will be construed as directory rather than mandatory, especially where such regulation pertains to uniformity, order, and convenience, and neither public mr private rights will be injured or impaired thereby. If the statute is negative in form, or if nothing is stated regarding the consequence or effect of non-compliance, the indication is all the stronger that it should not be considered mandatory. Crawford's Statutory Construction, 1st Ed., 1940, 8 266, pp. 529, 530. See also State ex inf. McAllister ex rel. Lincoln v. Bird, 295 Mo. 344, 351-352, 244 S.W. 938, 939.

"(4) The object and purpose of the law is to effect a general reorganization of the school districts of this State. It should be liberally construed to the end that its ultimate objective may be attained. State ex rel. Acom v. Hamlet, supra, 250 S. W. 2d loc.cit. 498. And especially should this be done where no contention is made that any public or private right has been impaired or injured by mere tardiness of action."

In State ex rel. Acom et al. vs. Hamlet, 250 S.W. (2d) 495, l.c. 498, the court said:

"* * * In State ex rel. School Dist. No.
34, Lincoln County v. Begeman, 221 Mo.
App. 257, 2 S.W. 2d 110, loc. cit. 111
(1, 2), the court stated what has been
the rule in considering laws governing
our schools as follows: 'In the first
place, it is the salutary law that our
courts must give a liberal construction
to the working of the school laws.' * * *"

Also in State ex inf. Barrett vs. Foxworthy, 256 S.W. 466, l.c. 468, the court held that the election of directors of the school district was valid notwithstanding it did not strictly follow the statute relative to the election of said members.

In view of the foregoing decisions it is quite apparent that notwithstanding the fact the newly elected board member was nominated by a principal of a high school that the election was otherwise properly conducted and that no public or private rights were impaired or injured and, therefore, the election was valid.

CONCLUSION.

Therefore, it is the opinion of this department that the nomination of a member of the board of directors by a principal of a high school, under Section 165.657, RSMo 1949, does not invalidate the election of said board member providing the election was otherwise properly conducted.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH:sw

SCHOOL DISTRICTS: ELECTIONS:



The school district reorganization law does not permit a county board of education to call an election in only one of the enlarged districts proposed by the reorganization plan, the remainder of the proposed enlarged districts not voting thereon.

September 9, 1953

Honorable Weldon W. Moore Prosecuting Attorney Texas County Houston, Missouri

Dear Mr. Moore:

The following opinion is in answer to your letter of August 11, 1953, in which you state as follows:

"The Texas County Board of Education desires to submit a reorganization plan for the entire county to the State Board of Education and if the State Board of Education approves the plan, the County Board desires to call an election in only one of the proposed enlarged districts. The remainder of the enlarged districts not voting on the plan. The County Board wants your opinion as to whether or not they may proceed in this manner.

"Section 165.680 M.R.S. 1949 '..... The secretary of the County Board of Education shall call an election in each proposed enlarged districts

"It seems to me that the County Board is not submitting a county plan, rather, they are submitting a plan for reorganization of a part of the County."

From the last paragraph of your letter, we take it that the plan of the county board would not affect every existing school district but that some would be left undisturbed; and from the use of the word "districts" rather than "district" in the first paragraph, it appears that the portion of the county that would be affected, would be divided into, not one, but a number of new and enlarged districts. Thus, it seems that the county board desires to reorganize only a portion of the county by taking the existing school districts in such portion of the county, reorganizing them into at least two new and enlarged districts and allow the residents of only one of the proposed enlarged districts to vote on the entire plan.

While it is the opinion of this office that the school district reorganization law does permit a plan which would reorganize only a part, and not all, of the existing school districts of a county, we cannot conceive of the validity of an election that is participated in by the voters of only one of the enlarged districts proposed by the plan so far as the creation of other proposed enlarged districts is concerned.

The applicable law is found in Senate Bill No. 307, Laws of Missouri, 1947, Volume 2, pp. 370-377, which also appears as Sections 165.657 to 165.707, RSMo 1949. This law went into effect July 18, 1948, and effected radical changes pertaining to the enlargement of school districts.

In the consolidated cases of State ex rel. Rogersville Reorganized School District No. R-4, of Webster County vs. Holmes, State Auditor and State ex rel. Reorganized School District No. 5, of Washington County vs. Holmes, State Auditor, 253 S.W. (2d) 402, 1.c. 403, the legislative intent underlying the Act was disclosed in the following words:

"* * Its purpose was to promote the rapid merger of the multitude of small, inadequately equipped and financed school districts of this State into fewer and larger districts with financial resources to provide adequate buildings, teaching staffs and equipment. * * *."

The first four sections of the law, deal with the formation and organization of the county boards of education. The next section (165.670) deals with the expenses of the members of county boards of education; and Section 165.673 provides for a comprehensive study of each school district by the county board of education, specifying what such study shall include and requiring a specific plan of reorganization to be submitted by the county board to the state board of education; then, Section 165.677 provides that upon receipt of the plan of reorganization, the state board shall give its approval or disapproval, and directs that in the event of disapproval, a second plan shall be submitted; and that, should it be disapproved by the state board, then the county board should submit its own plan to the voters. Section 165.680, RSMo 1949, deals with election on proposed enlarged districts and provides as follows:

"Within sixty days after receipt of approval by the state board of education of the reorganization plan, the secretary of the county board of education shall call an election in each proposed enlarged school district that

lies wholly within the county or has been designated by the state board of education as belonging to the county. The notices of such election shall be by written or printed notices, signed by the president and secretary of the county board of educa-Such notices shall be posted in at least three public places within each school district affected by the proposal and shall also be published at least two times in at least one newspaper of general circulation in the county or counties affected by said proposed enlarged district, the last published notice not less than six days prior to the date of election. The county board of education shall select and designate the voting place or places in each proposed enlarged school district and shall, also, select and appoint three judges and two clerks of such elections for each polling place, all such persons to be residents of the proposed enlarged school district. The judges and clerks shall be sworn and the election otherwise shall be conducted in the same manner as elections for state and county officers. Each judge and each clerk shall receive compensation of five dollars per day. The county board of education shall supply ballots, polling books and all other materials required in the election. The cost of election supplies and the compensation of election officials shall be charged to each component district embraced in the proposed enlarged district in proportion to the total assessed valuation and shall be paid from the incidental fund. All qualified voters resident in the proposed enlarged school district shall have the right to cast their ballots for or against the proposal. The ballot shall be in the following form:

 $ar{ar{D}}$ For the proposed enlarged district

Against the proposed enlarged district Check with cross mark (X) in the square desired.

The judges and clerks of the election shall certify to the secretary of the county board

of education the total votes for and the total votes against the proposed enlarged district. A majority affirmative vote of the total votes cast shall be required for adoption of the proposed enlarged district."

(Emphasis ours.)

In view of the plain and unambiguous language we have underlined in the above-quoted statute, the conclusions appear inescapable that every qualified voter residing in each proposed enlarged district must be given a chance to express his approval or disapproval as to the plan effecting the geographical area in which he resides; that there is no authority whatsoever for a voter of another proposed district to speak for him; that each voter must cast his ballot at a polling place located within the proposed district where he resides; that there must, in other words, be an election in each proposed enlarged district; and that no legal effect can be given to the desire of the Texas County Board "to call an election in only one of the proposed enlarged districts, the remainder of the enlarged districts not voting on the plan."

"* * * Now every person having the qualifications prescribed by the Constitution has the right to vote, * * *."

(State vs. Brown, 33 S.W. (2d) 104, 1.c. 107.);

and certainly, a resident of one proposed enlarged district is as much concerned with a redistricting plan as a resident of another proposed enlarged district--one's right of suffrage can be no greater than that of the other.

In ruling upon the constitutionality of the school district reorganization law, the Supreme Court in State ex rel. Reorganized School Dist. No. 4 of Jackson County vs. Holmes, 231 S.W.(2d) 185, 1.c. 192, recognized the voting right of a resident of a proposed enlarged school district, in the following language:

"Under this act, a resident of a proposed reorganized school district who has resided in the county of his residence for the period of time prescribed by the Constitution is entitled to vote on the formation of the reorganized school district whether the voting place is located in the county of his residence or in an adjoining county. * * *."

(Emphasis ours.)

The following language from the same case is also pertinent, wherein the Court said at 1.c. 191:

"The Legislature has always, as a matter of policy, left to the resident voters the settlement of all questions involving the organization of school districts. The local voters act to determine such questions either through the mode of petitioned elections or by petitions to the appropriate public official or officials clothed by law with the power to annex or detach territory. The resident voters of the particular terri-tory are the delegated agents of the Legislature to administer the enabling legislation, thereby implementing the legislative intent to obey the constitutional mandate of insuring the establishment and maintenance of free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years. People v. Deatherage, 401 Ill. 25, 81 N.E. 2d 581.

(Emphasis ours.)

Not only do the voters of each proposed enlarged district have a right to participate in the election, but the ultimate decision of whether or not a particular proposed enlarged district shall be formed, rests with them and is independent of the outcome of elections in other proposed enlarged districts. In support of this proposition, attention is invited to the form of ballot set out in Section 165.680. The voters do not adopt or reject the entire county plan but only that part pertaining to the proposed enlarged district wherein they reside, and

"Not later than three days after the election as provided for in section 165.680, the secretary of the county board of education shall certify to the state board of education the results of the election in each proposed enlarged school district."

Section 165.683, RSMo 1949. (Emphasis ours.)

For further support of the above proposition, see Section 165.687, RSMo 1949, pertaining to the election of six directors in the newly created districts, which section reads as follows:

"If the proposal to form such enlarged district has received a majority of the votes cast on such proposition the county board of education shall order an election in such enlarged district, * * * * * * * for the purposes of electing six directors * * * *

(Emphasis ours.)

Thus, one proposed enlarged district may be created while another fails. Section 165.693, RSMo 1949, states the following:

"In the event that any proposed enlarged district has not received the required majority affirmative vote, the school districts constituting the proposed new school district (not districts) shall remain as they were prior to the election, but in all such cases the county board of education shall prepare another plan in the same manner as provided for the first plan and the second plan shall be submitted to a vote * * *."

(Emphasis and parenthesis ours.)

While an election must be called in each of the proposed enlarged districts, the question may arise as to the number of voting places required therein. In this regard, Section 165.680 vests authority in the county board of education to designate only one voting place in a particular enlarged district, if it so desires. See: Op. Atty. Gen. 37-51, July 13, 1951, and Armantrout vs. Bohon, 162 S.W. (2d) 867, 871.

As stated earlier, we believe that the statutes in question do permit a plan which would reorganize only a part, and not all, of the existing school districts of a county. While Section 165.673 requires the county board of education to make a comprehensive study of each school district in the county, the reorganization plan is not required to change the boundaries of every district. It seems that in Willard Reorganized School District No. 2 of Greene County vs. Springfield Reorganized School District No. 12 of Greene County, 248 S.W. (2d) 435, the plan finally submitted to the voters of Ritter School District and Springfield School District, which they approved and which resulted in a reorganized

school district known as Springfield School District No. 12, it (as distinguished from earlier plans), did not propose reorganization of any other districts. As a matter of fact, since enactment of the statutes above referred to and pursuant thereto, many old districts in numerous counties have been consolidated into enlarged districts while other districts of such counties have remained untouched. We see no objection to this if the statutory procedure is adhered to; and in this regard, we invite attention to State ex inf. Mayse, Pros. Atty. et al. vs. Goodwin et al., 243 S.W. (2d) 353, where, in a quo warranto proceeding, the Supreme Court said, l.c. 354:

"The first point made is that the plan submitted to the voters did not include a plan for the entire county. The agreed statement of facts shows that the voters of Consolidated Districts R-4 and R-5 did not vote in the election; that these districts are now and were in 1949 consolidated school districts. The law, Sections 165.673, 165.677, supra, relied upon by relators, did not require the county authorities to submit a plan of reorganization which would disturb the boundaries of every school district in the county. The agreed statement of facts shows that the entire county was considered and changes deemed necessary were made and submitted to the voters. We rule the point against the relators."

(Emphasis ours.)

In view of the foregoing, it would seem that if only a part of a county can be organized into a number of enlarged school districts, then-by the same token-only a part of a county can be organized into a single enlarged school district.

"* * * A reorganized school district may be formed anywhere in the state if the terms and conditions prescribed by this act are followed. * * *."

(State ex rel. Reorganized School Dist. No. 4 of Jackson County vs. Holmes, 231 S.W. (2d) 185, 1.c. 191.)

The act did not contemplate one plan and one plan only, the effect of which would solve all the problems and permanently reorganize every district in the county. The following language from the consolidated cases of State ex rel. Rogersville Reorganized School District No. R-4 of Webster County vs. Holmes and State ex rel. Recorganized School District No. 5 of Washington County vs. Holmes, 253 S.W. (2d) 402, l.c. 405, is pertinent in this regard:

"Furthermore, we think the act itself evinces an intention on the part of the Legislature that schools may be reorganized under the provisions of this law throughout the years to come regardless of the fact that the calendar schedule therein provided has expired. In Par. (3) of \$ 165.673, it is expressly provided that the county boards of education shall 'Continue to study the school system of the county and propose subsequent reorganization plans as conditions warrant.' * * *."

Thus, while conditions may or may not warrant the proposal of only one reorganized or enlarged district in Texas County at the present time (in which case only the residents of the proposed district would vote on the plan), so long as more than one enlarged district is proposed, there must be an election "in each proposed enlarged school district", under the mandate of Section 165.680.

CONCLUSION

Under the school district reorganization law, it is not permissible for the county board of education to call an election in only one of the enlarged districts proposed by the reorganization plan, the remainder of the proposed enlarged districts not voting on the plan.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James A. Vickrey.

Yours very truly,

JOHN M. DALTON Attorney General TAXATION:
MERCHANTS' TAX:
COUNTY AND TOWNSHIP ASSESSORS:

Circumstances under which township assessor in Fourth Class county, entitled to compensation for taking merchants' statements.



November 24, 1953

Honorable Garner L. Moody Prosecuting Attorney Wright County Hartville, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I would like an opinion from your office on the following question:

"'Is a township assessor entitled to fees for taking merchant's assessment statement after June 1st, in any taxable year?'"

In your letter of inquiry you have drawn no distinction between statements taken from merchants who were operating an established business on the first Monday in January of the calendar year to which such statements relate, and businesses established subsequent to such date. For reasons which will appear infra, we will discuss each of these categories of merchants separately.

The provisions relative to the taking of statements from merchants appear in Section 150.050, RSMo 1949, from which we quote:

"150.050. Annual statement - merchants' tax book - township organization counties. - 1. On the first Monday in May, 1946, and on the same date each year thereafter, it shall be the duty of each person, corporation or copartner-

ship or persons, as provided by sections 150.010 to 150.290, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares, and merchandise, which he or they may have had on hand at any one time between the first Monday in January and the first Monday in April next preceding; said statement shall include goods, wares, and merchandise owned by such merchant, and consigned to him or them for sale by other parties.

* * * * * * * * * *

"h. Provided, that in counties under township organization the statements herein provided for shall be made by the township assessor who shall deliver the same to the clerk of the county court, who shall return the book to the county board of equalization on the second Monday in July, and thereafter the same proceedings shall be had thereon as in other counties."

(Emphasis ours.)

We have emphasized a portion of the above statute inasmuch as the same relates to township assessors in counties of the fourth class. We note that Wright County is a county within such a class as established by an act of the General Assembly.

It is observed from the foregoing that the duty of making the statement mentioned in the statute is placed upon the merchant to be done on the first Monday in May of each calendar year. It is also observed that such statement, as finally incorporated in the book prepared by the Clerk of the County Court, is to be returned to the County Board of Equalization not later than the second Monday in July of the same calendar year. It is also observed that Section 150.240, RSMo 1949, provides that the failure to file

such statement at the time and in the manner required, shall amount to a forfeiture of the merchant's bond which is required under another statute.

In your letter of inquiry you have referred to the date of "June 1st". Apparently, none of the statutes relating to the taxation of merchants gives any materiality to this particular calendar date. It is our thought that a reasonable interpretation of the statutes is one which will permit the township assessor to receive such statements at any time prior to the time in which he is required to transmit the same to the Clerk of the County Court, provided that the failure to file the statement on the exact date provided in the statute, to-wit, the first Monday in May, has been occasioned through inadvertence or mere oversight. We think that under such circumstances the township assessor is entitled to receipt of the fee for taking such statement as provided in Section 150.070, RSMo 1949.

We think the foregoing adequately disposes of your opinion request with respect to businesses which were established and in actual operation on the first Monday in January in any calendar year. However, a different procedure is provided by statute with respect to businesses established in any calendar year subsequent to such date. We direct your attention to Section 150.180, RSMo 1949, which reads as follows:

"150.180. New business -- bond of merchant -- inventory statement as tax basis . -- When any merchant shall commence the business of merchandising in any county in this state after the first Monday in January, in any year, he shall execute a bond as provided for in section 150.160, conditioned that he will furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when

Honorable Garner L. Moody:

he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay a tax based upon the same rate as other merchants, to be determined by the number of months in business in any calendar year."

You observe that under this statute the township assessor has been relieved of any duties with respect to the taking of statements. Such duty has, in effect, been transferred to the collector of the county wherein the business has been duly established. Therefore, since the township assessor has been relieved of any duties imposed upon him with respect to such statements relating to businesses becoming established subsequent to the first Monday in January in any calendar year, we believe that he is not entitled to any compensation for taking any such statements relating to such businesses, nor should such be delivered to him.

CONCLUSION

In the premises, we are of the opinion:

- 1) That the township assessor in a county of the Fourth Class is entitled to his statutory fees for taking merchants' statements subsequent to June 1st in any calendar year, only when such statements relate to a business in existence prior to the first Monday in January of such year, and that such statement properly should have been filed on the first Monday in May in such calendar year; provided, that such statement is actually delivered to the assessor in such time as to comply with the requirement that the same be incorporated in the merchant's book and returned to the County Board of Equalization on the second Monday of July in such calendar year; and,
- 2) That such township assessor is not entitled to any fee for, nor should any such statement be delivered to, such township assessor with respect to any new business established subsequent to the first Monday in January in any calendar year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General SALES TAX ON

An apartment house is subject to the ELECTRICITY AND GAS: Missouri Sales Tax on the purchase of electricity and gas for the use of its tenants.



May 1, 1953

Honorable M. E. Morris Director of Revenue Jefferson Building Jefferson City, Missouri

Dear Mr. Morris:

We have given careful consideration to your request for an opinion, which request is as follows:

> "Will you please furnish this Department an official opinion as to whether or not the St. Louis Housing Authority would be subject to the Missouri State Sales Tax on the purchase of:

- "(1) Electricity, which is furnished to tenants.
- "(2) Gas, which is furnished to tenants.

"It is understood that this electricity and gas are furnished to apartment dwellers and the sales price is included in the rental paid on the apartment by the apartment dwellers.

The St. Louis Housing Authority was organized under the Housing Authorities Law and is governed by the provisions of that Act, which is contained in Chapter 99, RSMo 1949.

This opinion passes only on the question of whether or not the St. Louis Housing Authority is exempt from the Missouri Sales Tax Act under the provisions of subsection (10) of Section 39, Article III, Constitution of Missouri. Such subsection provides as follows:

> "To impose a use or sales tax upon the use, purchase or acquisition of property paid for out of the funds of any county or other political subdivision.

This office in an opinion written for Mr. G. H. Bates, State Collector of Revenue, under date of August 9, 1946, held that the proper definition of the term "other political subdivision" herein mentioned was that which is found in Section 15, Article X, Constitution of Missouri, which is as follows:

"The term 'other political subdvision' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax."

An organization established under the Housing Authorities Law may have certain earmarks of a political subdivision, but there is nothing in the act to give any such organization the power to tax. It is, therefore, not exempt from the sales tax under subsection (10) of Section 39, Article III, Constitution of Missouri.

The Sales Tax Law, incorporated in Chapter 144, RSMo 1949, provides for certain exemptions in Sections 144.030 and 144.040, but by no stretch of the imagination can any of these exemptions apply to an authority organized under the Housing Authorities Law.

Sales of electricity and gas are definitely included in the Sales Tax Law in subsection (8) of Section 144.010. Any such sale is defined as a "Sale at retail," and the consumer must pay the tax. But in this case who is the consumer? Is it the housing authority who purchases the services from the utility company, or is it the tenant who rents an apartment from the authority with the services included in the rental?

The Supreme Court of Missouri in 1937 handed down a decision on a similar question in City of St. Louis v. Smith, 342 Mo. 317. In this case certain contractors agreed with the City of St. Louis to make certain improvements and to furnish all labor and material necessary for such construction. The court held that the contractors, not the city, were the consumers of the material within the meaning of the Sales Tax Law. In the course of that opinion, on page 321, the court said:

"In our judgment the contractors in this case did not buy the materials in question for the purpose of reselling such materials to the city. They were under contract to deliver to the city a finished product. It was the inseparable commingling of labor and material that produced the finished product. Our conclusion is that the contractors used and consumed the material in order to produce the finished product in compliance with their contract. Since the contractors used and consumed the material, they and not the city are primarily liable for the one per cent sales tax. The sale of the materials by the dealer to the contractors was the taxable transaction, and it was the duty of the dealer to collect the tax from the contractors at the time the sale was made."

The transactions herein are the same as those contained in the case of the housing authority in the purchase of electricity and gas for supply to its tenants under their rental contracts. The housing authority agrees to deliver to its tenants a separate and definite unit, consisting of an apartment, with or without furnishings, and including electricity and gas. By this line of reasoning the housing authority is held to be the consumer.

CONCLUSION

It is the opinion of this office that the St. Louis housing Authority is subject to the Missouri Sales Tax on the purchase of electricity and gas for use of its tenants.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL DIRECTOR OF REVENUE: MOTOR VEHICLE REGISTRATION:

(1) Registration plates and signs DIVISION OF PENAL INSTITUTIONS: to be supplied Director of Revenue at cost of manufacture or not to exceed open market cost, whichever is greater. (2) No accounting method for recoupment of interdepartmental overcharges.



May 1, 1953

Honorable M. E. Morris Director of Revenue State of Missouri Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

> "I am informed by the Motor Vehicle Division that license plates are billed to our department at \$0.18 and \$0.20 each. I have data from each of the states and I believe the most glaring example is our neighboring state of Arkansas, which purchases its tags from a Missouri firm, the S. G. Adams Stamp & Seal Company, Saint Louis, Missouri, at a price of \$0.1148 each, which price includes delivery of the tags to each of the seventy-five counties in the state of Arkansas.

"The Arkansas plates are made of 26guage steel, which is the same weight used locally.

"I am informed that the cost of the manufacture of the plates furnished this department by the Missouri Penitentiary is \$0.12 plus. No doubt, the same percentage of profit is now added to stickers and tabs.

"I would appreciate your opinion as to whether or not it is the duty of the Division of Penal Institutions, in

view of the above figures, to sell tags to our department on the basis of their cost. Also, should not a credit be entered in our favor on their books for an amount equal to the difference between the amount paid to them and the price at which an outside firm would have sold these tags to the state? If such a credit should be allowable, for how many years could it be computed?"

Your inquiry resolves itself into these three questions:

- (1) At what price is the Division of Penal Institutions required to furnish the Director of Revenue motor vehicle registration plates and signs;
- (2) If an overcharge has resulted in prior years arising from an improper method of computing such price, is the Department of Revenue entitled to a refund or credit with respect to such overcharge from the Division of Penal Institutions; and,
- (3) For how many prior years should such refund or credit be computed after discovery of such overcharge.

We shall discuss your questions in the order set forth.

With respect to (1) above, we direct your attention to Section 301.290, RSMo 1949, reading in part as follows:

"301.290. * * * 2. The Director of revenue shall procure all plates issued by him * * * from the division of penal institutions * * * .

"3. The division of penal institutions shall furnish such plates and signs at such a price as will not exceed the price at which such plates and signs may be obtained upon the open market, but in no event shall such price be less than the cost of manufacture, including labor and materials. * * * "

Our construction of paragraph three of Section 301.290,

RSMo 1949, quoted supra, is this. The Director of Revenue should periodically ascertain the price at which registration plates may be procured in the open market. Upon determining such price it is the duty of the Division of Penal Institutions to manufacture and furnish to the Director of Revenue such plates as may be needed by him in connection with motor vehicle registration, at such predetermined price, unless the actual cost of manufacturing such plates by the Division of Penal Institutions, including labor and materials, is in excess of such predetermined price in the open market. In the latter event, the Division of Penal Institutions shall receive for such plates the actual cost of manufacture, taking into account the cost of labor and materials necessarily employed in such manufacturing operations.

In your letter of inquiry you have indicated that the present charges made by the Division of Penal Institutions are \$0.18 and \$0.20 each for plates. It also appears that such plates might be procured in the open market at a price of approximately \$0.11\frac{1}{2} each. You have further indicated that the actual cost of manufacture to the Division of Penal Institutions is approximately \$0.12 each.

Of course, the mere fact that plates are being supplied to another state at one price does not necessarily indicate that a similar figure would represent the cost in the open market if supplied to Missouri. However, assuming that it be determined that the open price market in Missouri is less than the actual cost of manufacture by the Division of Penal Institutions, then it is our thought that it is incumbent upon the Division of Penal Institutions to supply such plates to the Director of Revenue at a price representing the actual cost of manufacture.

We have examined the various statutes relating to the funds and bookkeeping methods with regard to interdepartmental transactions. We do not find that any method has been provided for the adjustment of overcharges which might arise as a result of such transactions.

What has been said heretofore disposes of the third question presented in your letter of inquiry.

CONCLUSION

In the premises, we are of the opinion that:

- (1) It is the duty of the Division of Penal Institutions to furnish the Director of Revenue such motor vehicle registration plates and signs as may be needed by such official at a price not to exceed the cost of such plates in the open market, unless the actual cost of manufacture of such plates, including the cost of materials and labor, is greater than such open market cost. In the latter event, the Division of Penal Institutions shall charge for such plates the actual cost of manufacture, including the cost of labor and materials.
- (2) We are further of the opinion that no method exists by which overcharges arising from interdepartmental business dealings may be adjusted.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General GONSULAR OFFICIALS:

msular officials and employees of the British Consulate are entitled to motor vehicle license and drivers' license without paying the tax or fee required therefor by statute.

JOHN M. DALTON



June 19, 1953

XXXXXXXX

J. C. Johnsen

Honorable M. E. Morris Director, Department of Revenue Jefferson City, Missouri

Dear Mr. Morris:

This office is in receipt of your request for an official opinion which reads as follows:

"Occasionally we have requests from attaches of foreign branches of government who are stationed at consular offices in Missouri for drivers' licenses and automobile license tags to be issued by the Motor Vehicle Division of the Department of Revenue without charge, as a courtesy to the consulate.

"A request of this type was received recently from the Attache to the British Consulate in Kansas City. It is further requested that the Vice Consul be extended the courtesy of a free driver's license and automobile license tag.

"We would appreciate having a written opinion as to whether or not there is a provision of the law whereby the State of Missouri could furnish to persons representing foreign governmental offices as a Consul or Vice Consul free license plates and drivers' licenses."

Since the above request deals with application for automobile license tags and state drivers' license to be issued to officials and employees of the British Consul, the provisions of the United States Constitution concerning treaties with foreign nations becomes applicable.

Paragraph 2, Article VI of said United States Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

By the terms of this provision of the United States Constitution treaties entered into by the Federal Government have the effect of overriding any provision of state constitutional law in conflict therewith. The Missouri Supreme Court in the case of Meyer v. Arnold (Division No. 1, 1941) 147 S.W. (2d) 644, 347 Mo. 413, in considering this subject stated:

"State laws, of course must yield to valid treaties where there is conflict between them. Article VI, Clause 2, of the Federal Constitution declares that all treaties made under the authority of the United States shall be the supreme law of the land. Even laws governing essentially local matters must bow when treaty provisions override them. * * *"

Further, the court set out as a guide in considering the provisions of treaties the following statement:

"In determining this case we must adhere to the principle that generally treaties are to be liberally construed and their words are to be taken in their ordinary meaning and not in any special or restricted sense. * * *

The Government of the United States has in fact concluded a treaty with the United Kingdom of Great Britain and Northern Ireland concerning the rights and privileges of consular officials and employees. See Treaties and Other International Acts Series 2494 concerning Consular Officers being a Convention with Protocol of Signature between the United States of America and the United Kingdom of great Britain and Northern Ireland proclaimed by the President of the United States of America September 8, 1952. This treaty provides in Article XIII (4) an exemption for consular officers and employees under certain conditions from all "taxes or

other similar charges of any kind."

The complete provision of this treaty on this matter reads as follows:

- "(4) Without prejudice to the preceding paragraphs of this Article, a consular officer or employee who is
 - "(a) not a national of the receiving state,
 "(b) not engaged in private occupation for
 gain in the territory, and
 - "(c) a permanent employee of the sending state or, if not a permanent employee thereof, was not resident in the territory at the commencement of his employment in the consulate,

shall, except as provided in paragraph (5) of this Article, be exempt in the territory from all taxes or other similar charges of any kind which are or may be imposed or collected by the receiving state, or by any state, province, municipality, or other local subdivision thereof."

The exceptions referred to in paragraph No. 5 do not apply to questions here under consideration.

It appears from the decision of the Missouri Supreme Court in State ex rel. McClung v. Becker, 288 Mo. 607, that the so-called license tax on automobiles is in fact a revenue or tax measure and therefore it would seem to come squarely within the provision of this treaty as above quoted. It is not so clear whether or not the fee required to be paid on procuring a drivers' license is in fact a tax or revenue measure. However, the provision of the treaty as quoted above which mentions "taxes or other similar charges of any kind" would be broad enough to include the payment required in connection with a drivers' license.

Thus it is concluded that under the provisions of this treaty the State of Missouri may not require payment by the qualified consular officials or employees for a Missouri automobile license tag or a Missouri drivers' license. It would seem that the provision of this treaty would have the effect of eliminating from the statutes the requirement of the payment of a tax in order to secure an automobile license tag and of the \$1.00 fee in order to secure a drivers' license and thus the statute concerning drivers' license, Section 302.177 and concerning automobile license tags, Section 301.130 would require that the automobile license tags or drivers' license be issued by the proper state officials when proper application is made therefor since the statutes are mandatory as to their

issuance when the statute has been complied with and consular officials and employees may comply with the statute without paying the tax or the fee.

Likewise the requirement of Section 301.025 that the applicant shall prove payment of personal property tax before securing an automobile license tag would have no application to said consular officials or employees since the personal property tax would clearly come within the above quoted provision of the treaty.

The above discussion presupposes that the consular officials and employees meet all of the requirements set out in Article XIII, Section 4 of the above quoted treaty and it is suggested that a specific certification as to the facts necessary to qualify under said provision should be required.

CONCLUSION

For the reasons set out hereinabove it is the conclusion of this office that consular officials and employees qualifying under the provisions of Article XIII, Section 4 of the Convention with Protocol Signature, between the United States of America and the United Kingdom of Great Britain and Northern Ireland, are not required to pay the tax or fee for an automobile license tag or a drivers' license and that upon complying with the other provisions of the statute the Director of Revenue is authorized and required to issue such license tag or drivers' license without charge and that proof of payment of personal property tax as a prerequisite of the issuance of an automobile license tag should not be required.

This opinion which I hereby approve was written by my assistant, Mr. Fred L. Howard.

Yours very truly,

JOHN M. DALTON Attorney General

FLH:mw

SCHOOL BUS: USE OF: TYPE OF LICENSE:

A school bus license is not a proper license to be used on a bus which is used to transport children to Sunday School. A school bus license is not the proper license for the use of the bus in transportation of teen-age scouts to summer camps and recreational areas.



June 23, 1953

Motor Vehicles: Boy Scouts:

Honorable M. E. Morris Director of Revenue Jefferson City, Missouri

Dear Sir:

This is in further reply to your request for an official opinion from my office. Your request reads as follows:

"Senator Jasper Smith of Springfield is interested in a situation wherein some of his constitutents desire to use school busses to transport teen-age scouts to summer camps and recreational areas.

"Senator Smith's question is whether or not the legal definition of school bus as a vehicle to transport young people for educational purposes is broad enough to include this type of transportation during the summer months."

In further regard to your request for an official opinion, which reads as follows:

"It is my information that you have a pending request relative to whether or not a school bus can be used to transport students to Sunday School.

"Will you please expand this opinion, if possible, to cover the question as to whether or not Section 301.010, House Bill 283, 1952, Definition 22, is broad enough to include the transportation of teen-age scouts to summer camps and recreational areas.

"If the two questions cannot be considered together, we would appreciate having an opinion on the latter one."

As there are two types of school bus licenses provided for under Chapter 301, RSMo. 1949, and Laws Mo. 1951, page 695, in regard to the registration of motor vehicles both such types of licenses should be considered.

The first type of registration license mentioned above surely cannot be construed as permitting a "school bus" owned and operated by a school district to be used for the purpose of transporting students to or from Sunday School. The language of the section which we consider as providing for a free license is contained in Section 301.260, RSMo. 1949, quoted in pertinent part as follows:

" * * Provided, further that when any motor vehicle is owned and operated exclusively by any school district and used solely for transportation of school children, the commissioner shall assign to each such motor vehicle two plates bearing the words 'School Bus, State of Missouri, car no. (with the number inserted thereon), which plates shall be displayed on such motor vehicles when they are being used on the highways. No officers, or employee of the municipality, county, or subdivision, or any other person shall operate such a motor vehicle unless the same is marked as herein provided, and no officer, employee or other person shall use such a motor vehicle for other than official purposes."

The language of this section prohibits any one from using a school bus to transport students to Sunday School as that is for other than an official purpose. In the recent Supreme Court case of McVay v. Hawkins, No. 42,903, not yet published, it is decided that the public school funds cannot be used for any but public school busses. Certainly under the terms as set forth in that case the use of the political subdivision's own bus would be unlawful.

The language of that case contained in the last paragraph on page 12 reads as follows:

"* * *In this particular case, we would have to say that the money spent to transport the parochial school children part way to and from the St. Denis Catholic School, a private school in Benton, aids in the maintenance of and helps to support the

free public schools of the Commerce District.
We cannot do so. We must and do hold that the public school funds used to transport the pupils part way to and from the St. Dennis Catholic School at Benton are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful. It necessarily follows that such transportation of said students at the expense of the district is unlawful and must be enjoined. * * * * "
(Underscoring ours.)

School busses "not owned and operated exclusively" by a school district may be licensed under the provision of Section 301.060, Laws Mo. 1951, page 695, in accordance with subparagraph 9 which reads simply as follows:

"9. For each school bus \$25.00."

This type of license is considered in subparagraph 22 under the definition section of Chapter 301. That definition section with the above quotation is the only other statutory consideration of school busses not owned by a municipality or political subdivision in Chapter 301. Section 301.010, Laws Mo. 1951, p. 697, subsection 22, is as follows:

"'School bus,' any motor vehicle used solely to transport students to or from school or to transport students to or from any place for educational purposes;"

This school bus definition is of primary concern in this the second type of school bus license.

In regard to whether or not the definition section quoted supra, is broad enough to include the transportation of teen-age scouts to summer camps and recreational areas, it is believed that as an exemption clause of a licensing statute the above definition should be strictly construed and in regard to the construction, Section 1.090 RSMo. 1949, in regard to laws in force and construction of statutes, is as follows:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

It is not believed that the authority exists to enlarge upon this definition or amend it in any regard to cause this exemption to extend beyond the express words of the statute. It is construed as an exemption inasmuch as a school bus is permitted to operate under the same conditions that would ordinarily cost a passenger bus from \$100. minimum fee to \$450. maximum fee, for a license to haul passengers over the same route or distance.

In the consideration of the foregoing premises it must be concluded that for the purposes of this definition for an entitlement to the \$25. license fee we cannot enlarge upon the statute by calling a teen-age scout a student or a recreational area a place where he is to be taken for educational purposes.

CONCLUSION

Therefore, it is the opinion of this office that a school bus license is not a proper license for a bus used to transport students to Sunday School. This is either in the case of a school bus owned and operated by a political subdivision under provisions of Section 301.260, RSMo. 1949, or a bus licensed under the provisions of Section 301.060, Laws Mo. 1951, page 700.

It is the further opinion that a school bus license is not a proper license for a bus used in the transportation of teen-age scouts to summer camps and recreational areas, or for any other purposes than those within the terms of the definition as given.

This opinion which I hereby approve was written by my assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General

JWF:mw

FUND COMMISSIONERS: APPROPRIATION: CONSTITUTION: Procedure for payment of coupons detached from state road bonds in absence of an appropriation by the Legislature. Fund under Section 30, Article IV, Constitution of Missouri, 1949, for payment of principal and interest of any outstanding state road bonds stands appropriated without legislative action.

XXXXXXX

John M. Dalton

August 17, 1953



XXXXXXXX

John C. Johnsen

Mr. M. E. Morris, Secretary Board of Fund Commissioners Jefferson City, Missouri

Attention: Mr. Alvin Papin

Dear Sir:

This will acknowledge receipt of your recent request which reads:

"The Board of Fund Commissioners at a special meeting held on July 17, 1953, instructed me to submit the following proposition to your office for solution:

"The Central Missouri Trust Company has for collection coupons detached from State of Missouri Road Bonds, Series P, Numbers 2001 to 2050, due February 1, 1932 and each succeeding due date through August 1, 1938 totaling \$12,396.00.

"There is a balance in the 1951-53 appropriation for this purpose of \$9,915.00. The 1953-55 appropriation provides only enough for current payments of principal and interest for that period.

"Sufficient funds were placed in the Chase National Bank, New York, for the payment of these coupons at maturity and after remaining unclaimed for a period of more than 10 years the money was returned by the bank and placed in the State Road Bond Interest and Sinking Fund.

"For provision concerning this matter, we refer you to Article IV, Sections 28 and 30, Constitution of Missouri, RSMo. 1949, pages 58 and 59, also Section 33.460, page 213 R.S.Mo. 1949.

"We desire to know how to make proper payment of these coupons at this time."

Your request boils down to whether available funds in the State Road Bond Interest and Sinking Fund which is the particular fund referred to in Section 30, Article IV, Constitution of Missouri, 1945, as a special fund, can be used for the payment of principal and interest on any outstanding state road bonds without first being appropriated by the Legislature.

There can be no question that the coupons now presented by the Central Missouri Trust Company for collection referred to in paragraph two of your request constitutes valid and binding obligations of the state. Section 34, Article IV, Constitution of Missouri, 1945, reaffirms this conclusion and reads in part:

> "* * *All bonds issued under or recognized by section 44a of article IV of the previous Constitution, which remain unpaid shall be valid obligations of the state and shall be paid according to the tenor thereof. * * *"

Section 44a, Article IV, herein above referred to, was a part of the Constitution of 1875 and authorized a bond issued for highway purposes and in part provided that said motor vehicle registration fees and licenses and taxes on motor vehicles and certain other taxes, after the paying of certain specified expenditures and so long as any said bonds therein authorized remained unpaid, shall be and stand appropriated without legislative action and to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law.

Section 30, Article IV, Constitution of Missouri, 1949, contains a very similar provision and reads in part:

"* * *For the purpose of constructing and maintaining ad adequate system of connected state highways all state

revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) less the cost, (1) of collection thereof. (2) of maintaining the commission, (3) of maintaining the highway department, (4) of any workmen's compensation. (5) of the share of the highway department in any retirement program for state employees as may be provided by law. (6) and of administering and enforcing any state motor vehicle laws or traffic regulations, shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and not other:

"First, to the payment of the principal and interest on any outstanding state road bonds.

"Second, any balance in excess of the amount necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months shall be credited to the state road fund and shall be expended under the supervision and direction of the commission for the following purposes: * * **

The General Assembly of this state has continually, in the past, appropriated from said fund moneys to meet such payment. However, this of itself is not conclusive that such fund must first be appropriated before the payments can be made. A well established rule of statutory construction is that actual construction given in a statute or constitutional provision over a long period of time by those charged with its administration, acquiesced in the courts and legislature, is strong evidence of its true meaning.

However, this is not conclusive. See State ex rel. Chick v. Davis, 201 S.W. 529, 273 Mo. 660. However, this is true only when the language of the statute is ambiguous and doubtful. See State ex rel. National Life Insurance Company v. Hyde, 241 S.W. 396, 292 Mo. 342.

The foregoing constitutional provision provided that the money in said special fund, namely the State Road Bond Interest and Sinking Fund, should be credited to a apecial fund and stand appropriated without legislation for the payment of principal and interest on any outstanding state road bonds, certainly is not ambiguous. Therefore, the mere fact that the General Assembly has always, heretofore, appropriated such moneys for such payment is no criterion that it is absolutely necessary in order to make such payments.

In the case of State ex rel. Publishing Company v. Hackmann, 314 Mo. 33, 1.c. 51, the Supreme Court, in fact held that the moneys in the fund in question stand appropriated without any legislative action and reads:

"VIII. Relator contends that Section 44a of Article IV of the Constitution appropriates, without further legislative action, money from the motor vehicle license taxes, for the payment of the maintenance of the State Highway Commission.

"The language thus sought to be construed by relator is as follows:

"'Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost and expense of collection and the cost of maintaining any State Highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized and unpaid, be and stand appropriated without legislative action for and to the payment of the principal and interest of said bonds, and shall be credited to a sinking fund to be provided for by law.' (See Sec. 44a, Mo. Const.; Laws 1921, 1st Ex. Sess., p. 196.)

"This provision makes no attempt to appropriate, without legislative action, the money to pay the maintenance expenses of the Highway Commission. It does appropriate without further legislative action that portion of the money received from

automobile license fees which remains after deducting the cost of collecting the tax and maintaining the Highway Commission, and it appropriates the remainder to the payment of the principal and interest of certain bonds. It makes no attempt whatever to appropriate without legislative sanction the amount needed for the expenses of the Commission. Who, therefore, is to determine the amount required to maintain the Highway Commission? Is this to be determined by the Highway Commission, unhampered by legislative permission, or by the Legislature in the regular way by an appropriation act?

"Section 19, Article 10, of the Constitution of Missouri, expressly provides that no money shall be paid out of the State Treasury except in pursuance of an appropriation by law. This section controls unless modified by a later constitutional provision. It is true that Section 44a, supra, does modify it as to that portion of the automobile license tax to be paid upon the principal and interest of said bonds, but that is the only modification and there is nothing in Section 44a which in any manner conflicts with or prevents the provisions of Section 19, supra, from controlling with reference to all moneys paid out of the State Treasury for the support and maintenance of the Highway Commission. It thus clearly appears that that portion of the license tax which is to be paid out of the State Treasury for the expenses of maintaining the Highway Commission must under the express provisions of the Constitution (sec. 19, supra) be first appropriated by act of the Legislature."

Sections 28 and 30 of Article IV, Constitution of Missouri, 1945, were both adopted by the people of this state at the same time. Both sections, to a great extent, follow the language of the old Constitution of 1875. Section

28, supra, follows Section 19, Article X, Constitution of 1875, and Section 30 follows that of 44a, Article IV, same Constitution.

One of the cardinal rules of statutory construction likewise applicable in construing provisions of the constitution (see State ex rel. Buchanan County v. Imel, 146 S.W. 783, 242 Mo. 293, 1.c. 301) is a different section dealing with features of the same general subject matter must be construed together and harmonized, if possible. See Consolidated School District No. 4, Greene County, v. Day; Johnson v. Cruckmeyer, 29 S. W. (2d) 730, 224 Mo. App., 351.

Another equally well established rule is that where the language of a statute is plain and unambiguous, it may not be construed, but must be given effect as written. See State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S.W. (2d) 785, l.c. 789 (8,9), also State ex rel. Bell v. Phillips Patroleum Co., 56 S.W. (2d) 764, 349 Mo. 360.

The language used in Section 30, Article IV, supra, relative to said fund standing appropriated without legislative action, is in no manner ambiguous and therefore, under the foregoing rule of construction, we believe no construction is required, likewise, the other rule of statutory construction can be applied with the same result and, that is, that said provision relative to the special fund standing appropriated without any legislative action, can be considered as an exception to the provisions of Section 28, supra.

Section 33.460, Vernon's Annotated Missouri Statutes, provides procedure for Fund Commissioners to follow in such payment and reads:

"33.460. Duty of fund commissioners to make requisition for amount of interest

"It shall be the duty of the fund commissioners at least ten days before the interest on the bonded indebtedness of the state falls due, on or before the maturity of any state bonds, or the date when option bonds of the state are to be paid, to draw their requisition for the amount necessary to pay such interest on bonds, and the necessary expenses to be incurred in transmitting such moneys; whereupon the comptroller shall certify the amount to the state auditor, and the state auditor shall issue his warrant upon

the state treasury therefor in favor of the president of the board of fund commissioners, payable out of the current appropriation made by the general assembly for the state interest fund or state sinking fund, as the case may be; and if there is not sufficient money in the treasury belonging to such funds to pay such warrant, then the deficiency shall be paid out of any other moneys in the treasury belonging to the general revenue fund. The warrant, so drawn, shall be delivered to the state treasurer, who shall transmit the amount of money therein specified to the state's fiscal agent, with instructions to place such money to the credit of the board of fund commissioners for payment of interest, or principal, of the bonded indebtedness of the state."

Therefore, since an appropriation of such funds is unnecessary for payment of the coupons in question, such payment may be made by the Fund Commissioners by drawing their requisition for the necessary amount and following the general procedure presented under Section 33.460, supra.

CONCLUSION.

It is the opinion of this department that the money in the State Road Bond Interest and Sinking Fund does not have to be appropriated by the Legislature prior to the payment of the principal and interest on any outstanding state road bonds and Fund Commissioners should follow the procedure set forth under Section 33.460, Vernon's Annotated Missouri Statutes, in the payment of said coupons.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General FEES:
BOUNTIES:
COUNTY CLERK:
COMPENSATION:

County Clerk not entitled to retain in addition to his compensation the twenty-five cent fee for the taking of affidavits relating to bounties on wild animals.



September 3, 1953

Honorable Richard D. Moss Assistant Prosecuting Attorney of Jasper County Carthage, Missouri

Dear Mr. Moss:

This is in reply to your letter of recent date requesting the opinion of this department concerning the following matter:

"Section 279.050 R.S. Mo., 1949, states,
"The Clerk of the County shall be allowed twenty-five cents for each affidavit taken under Section 279.020 to be paid out of the County Treasury."

"This refers to the bounty paid on wildcats, wolves and coyotes. Is the County Clerk of Jasper County entitled to this bounty, in addition to his salary?"

Section 279.050, RSMo 1949, reads as follows:

"The clerk of the county shall be allowed twenty-five cents for each affidavit taken under section 279.020, to be paid out of the county treasury."

Section 279.050, RSMo 1949, is a general section applying to all classes of counties in Missouri, and according to its language it would at first seem that since the twenty-five cent

fee for affidavits is to be paid to the county clerk out of the county treasury that such amount should be retained by the clerk. However, Jasper County is a county of the second class and we must look to the statutes relating to second class counties with regard to compensation.

The general compensation statute for county clerks in all counties of the second class is Section 51.290, RSMo 1949, which reads:

"The county clerk, in all counties of the second class, shall receive the sum of four thousand dollars as annual compensation for his services, to be paid by the county, in twelve equal monthly installments, by warrants drawn on the county treasury. He may also retain, for his compensation, any fees to which he may be entitled for services performed in the issuance of fish and game licenses or permits."

Thus, county clerks receive as annual compensation the sum of four thousand dollars, together with any fees to which they may be entitled for services performed in the issuance of fish and game licenses or permits. In other words, there is a set compensation with one exception which concerns fees for the issuance of fish and game licenses or permits. It is a well established rule of statutory construction that the expression of one thing implies the exclusion of another. We find this rule set forth in the case of City of Hannibal v. Minor, 224 S.W. 2nd 598 at page 605:

"* * There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another. The application of this principle to the question before us merely serves to emphasize the fact that the City in this case was without authority to include in its ordinance 'automobile repair shops.'"

Honorable Richard D. Moss

See also Kroger Grocery and Baking Company v. City of St. Louis, 106 S.W. 2nd 435, 1.c. 439; and State v. Smith, 111 S.W. 2nd 513, 1.c. 514.

Another statute relating to this subject is Section 51.400, RSMo 1949, which provides certain fees and compensation to be allowed to, and to be retained by the clerk of the county court for various services performed, but specifically provides that in all counties of the first and second class, and the City of St. Louis. all fees and compensation allowed by said section shall be paid into the county or city treasury as provided by law, by the clerk of the county court, who shall have received any such fees and compensation. Both Sections 51.290 and 51.400 were passed by the legislature in 1945. Therefore, the applicable rule is "that where two acts are passed at the same session of the Lucislature, relating to the same subject, type and matter, as here, they are in pari materia, and, to arrive at the true legislative intent, they must be construed together." Hull v. Baumann, 131 S.W. 2nd 721, 1.c. 725. The only conclusion to be reached by the application of the foregoing rule in connection with said statutes is that since no further exceptions were made in the case of counties of the second class, and that even though certain fees and compensation can be retained by the county clerks of counties of the third and fourth classes in addition to their set compensation, that such was not the intent of the Legislature in connection with counties of the first and second class and the City of St. Louis.

Of course, Sections 279.050 and 51.290 relate to the same subject matter, and we feel that they must be harmonized if at all possible. The rule is found in the case of State v. Mitchel, 181 S.W. 2nd 496, 1.c. 499:

"Statutes are in 'pari materia' when they are upon the same matter or subject. 31 C.J., p. 358; and the rule of construction in such instances proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions."

This rule holds true even though the acts relating to the same subject were passed at different times. In the construction of statutes all statutes relating to the same subject are construed together as though they constituted one act. Bredeck v. Board

of Education of the City of St. Louis, 213 S.W. 2nd 889, 1.c. 892. Sections 51.290 and 51.400 were both passed by the legislature in 1945. However, Section 279.050, RSMo 1949, has been in force in the same form for many years. "The settled rule, of course, is that in case of inconsistency the later act controls * * *." State v. Smith, 182 S.W. 2nd 571, 1.c. 574. This rule is further set forth in the case of State v. American Insurance Company, 200 S.W. 2nd 1, at page 14, as follows:

"'Moreover, where there are two acts on one subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as to repeal the first. Meriwether v. Love, 167 Mo. 514, 67 S.W. 250."

We feel, in view of the foregoing, that it was clearly the intent of the Legislature, having knowledge of the statutes existing at the time Section 51.290, RSMo 1949, was enacted, to restrict the county clerks of counties of the second class to the fees and compensation provided in said section. "It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed." Ward v. Christian County, 111 S.W. 2nd 182, 1.c. 183.

CONCLUSION

Therefore, it is the opinion of this department that the County Clerk of Jasper County, Missouri, is not entitled to retain in addition to his compensation the twenty-five cent fee for the taking of affidavits under Section 279.020, RSMo 1949, relating to bounties on wild animals.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. David Donnelly.

Yours very truly,

JOHN M. DALTON Attorney General ASSESSORS: CLERICAL HELP: DEPUTIES: The Six Hundred Dollars provided the County Assessor in Counties of Classes 3 and 4, provided in Section 53.095, Mo. R. S., Cum. Supp. 1951, may be distributed over the year in the discretion of the County Assessor.



October 9, 1953

Mr. J. Hal Moore Prosecuting Attorney Lawrence County Mt. Vernon, Missouri

Dear Sir:

We render herewith our opinion based upon your request of September 5, 1953, which reads in part as follows:

"I would like to have the opinion of your department in regard to Statutes No. 33.-095, which has to do with the salaries for clerical help for the County Assessor. Is it necessary that the \$600.00 for Class Three Counties be paid \$50.00 each month, or can it be distributed over a period of a year as decided by the County Assessor."

In answering your request we consider Section 53.095, Mo. R. S., Cum. Supp., 1951, which reads as follows:

"53.095. Appointment of deputies in class three and four counties--salaries.--The county assessor in each county of classes three and four may appoint and fix the compensation of such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office. The compensation of such clerical or stenographic assistants shall be paid from the county treasury and shall not exceed six hundred dollars per annum in counties of class three nor six hundred dollars per annum in counties of class four."

The above-quoted Section 53.095 does not provide any particular salary or any particular number of clerical or stenographic assistants which the County Assessor is permitted to pay or employ. It simply provides in effect that the County Assessor shall have available to him Six Hundred Dollars to be used for the payment of "such clerical or stenographic assistants as may be necessary for the efficient performance of the duties of his office."

This, we believe, permits the assessor to distribute the money through the year in his discretion. It would be impracticable to distribute this sum equally over the twelve months of the year, since the greatest volume of the assessor's work is concentrated in the first few months of the year and it is unlikely that the Legislature intended such a result.

CONCLUSION

It is the opinion of this office that the Six Hundred Dollars provided the County Assessor in counties of classes 3 and 4, provided in Section 53.095, Mo. R. S., Cum. Supp., 1951, may be distributed over the year in the discretion of the County Assessor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh/lw

MOTOR VEHICLE OPERATORS' LICENSES:

Director of Revenue does not have authority to set aside revocation or suspension of motor vehicle operator's licenses.

XXXXXXXX

John M. Dalton

November 3, 1953

XXXXXXXX

John C. Johnsen

Filed No. 64



Honorable M. E. Morris Director of Revenue State of Missouri Jefferson Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"In accordance with the provisions of Chapter 302, R. S. Mo. 1949, this Department revokes Motor Vehicle Operators' licenses for various periods of time.

"The form now in use states that the action is 'for not less than one year', etc. The question we wish to present is whether or not we have authority to reinstate the licenses so suspended or revoked prior to the time stated in the original order.

"A copy of the blank now in use is enclosed.

"For your information, in some instances, we have the recommendation from the judge in whose court the conviction was obtained and, in others, we have the recommendation of the Prosecuting Attorney and arresting officer."

This inquiry squarely presents the question of the authority of an administrative officer to set aside or

modify action previously lawfully taken pursuant to a statute imposing duties both of a discretionary and non-discretionary nature upon such officers.

The general rule with respect to the power of administrative officers to reconsider or to modify an official action previously taken is stated thus in Sections 287.290 and 292, Vol. 46, C. J., "Officers";

"In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no powers will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."

further, in Section 290, page 1033, it is said:

"Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity."

and in Section 292, page 1033, it is said:

"In the absence of statutory authority, an officer in performing a statutory duty which does not involve the exercise of discretion is without the power of amendment; and when the judgement or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall,

although the statute conferring authority expressly makes his determination discretionary."

This law clearly discloses that having once exercised the duties and authority conferred upon an administrative officer by law, such officer may not, thereafter, reconsider, modify, or set aside official action so taken. We are further persuaded to this view by virtue of the enactment of the Administrative Review Act by the General Assembly providing for the judicial review of actions taken by administrative officers, commissioners and other agencies exercising similar functions. This statutory provision for review has been enacted pursuant to the mandate contained in Section 22, Article V., Constitution of Missouri, 1945, and reads as follows:

"All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

Having, thereby, provided a scheme for the judicial review of administrative acts, it is our thought that such method is exclusive and the only method by which such act may be modified or set aside.

What has been said heretofore, is, we believe, equally applicable to both officials acts of a discretionary and of a non-discretionary nature.

We note that accompanying your letter of inquiry there was included a form of "Order Of Suspension Or Revocation Of Privileges To Operate Motor Vehicle In The State Of Missouri". It is our thought that any order to suspend should not be for an indeterminate period, but, on the contrary, should be for some definite fixed period within the maximum limits applicable.

CONCLUSION

In the premises, we are of the opinion that the Director of Revenue is without authority to reconsider, modify, or set aside a valid order of suspension or revocation of a motor vehicle operator's license after having duly entered the same.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General SCHOOLS: SCHOOL DISTRICTS:



The school board may allot to the building fund such percentage of tax moneys received from direct taxation as its judgment dictates, and that, voter approval is not necessary before such moneys are placed into the building fund.

November 6, 1953

Honorable J. P. Morgan Prosecuting Attorney Livingston County Chillicothe, Missouri

Dear Mr. Morgan:

In your letter of September 15th, 1953, you requested an opinion of this office as follows:

"A reorganized school district in Livingston County, Missouri, submitted a bond issue to the voters at two special elections. The bond issue for the purpose of construction of new buildings was defeated both times. The school is of such classification that the Board may levy a tax of \$1.00 on each \$100.00 assessed valuation without the vote of the people. During the year 1952 the School Board allotted 80¢ of this \$1.00 levy to a building fund and left the remaining 20¢ in the teachers' fund. During the year 1953 the Board allotted 25% to the building fund. 50% to the teachers' fund and the remaining 25% to the incidental fund. During this time they have constructed a new gymnasium annexed to the school building which would certainly be called more than repairs and maintenance.

"Many of the patrons of the district are questioning the right of the Board to apportion any part of the automatic \$1.00 levy to the building fund. * * *

"I would appreciate your answers to the following questions:

Honorable J. P. Morgan

"1. May a School Board apportion any part of the original school levy to the building fund without a vote of the people?

"2. In the event the School Board can not do this, does the County Court or the Prosecuting Attorney have any responsibility in correcting the same?"

The limit to which a school district can tax in support of schools is set forth by the Constitution of Missouri, 1945, Article X, Section 11(b):

" * * * For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eightynine cents on the hundred dollars assessed valuation;

"For all other school districts--sixtyfive cents on the hundred dollars assessed valuation."

According to your letter your district is one in which the assessment may be \$1.00 on the \$100.00 assessed valuation.

The Constitution of Missouri makes provision for enlargement of the above limitation on taxation for school purposes. This provision is made by Section 11(c) of Article X:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in

school districts in cities of 75,000 inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor: Provided, that the rates herein fixed. and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes.

It should be here noted that the Constitution does not make any specific provision for the distribution of funds accumulated through taxation in school districts. Therefore, any limitation on the purposes for which such funds may be expended must be found elsewhere.

In order to provide funds for the operation of schools through the school year, provision is made by Section 165.077, whereby an estimate of the amount of money needed to be raised by taxation shall be forwarded to the county superintendent of schools, with the rate required to produce such amount, specifying the funds for which the money is to be used:

"The board of directors of each school district shall, on or before the fifteenth day of May of each year, forward to the county superintendent of schools an estimate of the amount of money to be raised by taxation for the ensuing school year, and the rate required to produce said amount, specifying by funds the amount and rate necessary to sustain the school or schools of the district for the time required by law or authorized by the qualified voters of the district, to meet principal and interest payments on the bonded debt of the district, and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate

district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

Section 165.110 states the purposes for which school moneys may be spent, and sets up certain types of funds into which moneys received shall go:

"1. All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There are hereby created the following funds for the accounting of all school moneys: Teachers' fund, incidental fund, free textbook fund, building fund, sinking fund, and interest fund. School district moneys shall be disbursed only through warrants drawn by order of the board of education. Each warrant shall show the legal identification of the district by name or by number as provided by law; shall specify the amount to be paid; to whom payment is made; from what fund; for what purpose, the date of the board order, and the number of the warrant. Each warrant must be signed by the president and the secretary or clerk. No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness.

45 45 46

"3. The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the teachers' fund, except as herein provided.

Money apportioned by the state for transportation and money derived from taxation for incidental expenses shall be credited to the incidental fund. Money apportioned for free textbooks shall be credited to the free textbooks fund. All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse

or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the building fund. Money derived from taxation for the retirement of bonds shall be credited to the sinking fund. Money derived from taxation for the payment of interest on bonded indebtedness shall be credited to the interest fund. Receipts from delinquent taxes shall be allocated to the several funds on the same basis as receipts from current taxes, except that where the previous years' obligations of the district would be affected by such distribution, the delinquent taxes shall be distributed according to the tax levies made for the years in which the obligations were incurred. All refunds received shall be placed in the credit of the fund from which the original expenditures were made. Money donated to the school district shall be placed to the credit of the fund where it can be expended to meet the purpose for which it was donated and accepted. Money received from any other source whatsoever shall be placed to the credit of the fund or funds designated by the board.

"4. * * * provided further, that the board of directors shall have the power to transfer from the incidental to the building fund such sum as may be necessary for the ordinary repairs of school property; provided further, that after all incidental obligations are paid, the board of directors shall have the power to transfer such portion of the balance remaining in the incidental fund to the teachers' fund as may be necessary for the total payment of all contracted obligations to teachers; provided further, that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund; provided further, that when any school district has lapsed as a corporate body, has become disincorporated, or has been abandoned for more than one year and does not have

a functioning governing body within the district, the county treasurer, when directed by the county superintendent of schools or the county court, shall use the balances of moneys remaining in any or all funds to pay outstanding obligations of said district and shall transfer the unencumbered balance to the county interest school moneys for distribution as provided in section 161.030, RSMo 1949. * * *

It is necessary to examine the two above-quoted sections to determine whether any part of the \$1.00 assessment may be used or allotted to the building fund. Section 165.077 merely requires an estimate by funds of the amount of money necessary to sustain the schools for the time required by law. That, of course, would be no prohibition against the allotment of some portion of the tax money to the building fund. However, the last clause of the above section reading:

"* * and to provide such funds as may have been ordered by the qualified voters of the district for other legitimate district purposes, including the purchase of school building sites, buying or erecting school buildings, repairing and furnishing such buildings, and providing foot bridges across running streams."

might lead one to believe that only such funds as have been ordered by the voters may be allotted to the building fund. However, it is believed that the proper interpretation of that particular clause is to make provision for raising moneys that have been allotted by the voters in excess of the Constitutional limitation (this excess to be approved in the manner specified in Article X, Section 11(c), Constitution of Missouri, 1945), and that the enumeration of the purposes for which these excess funds may be spent are not exclusive, but are merely illustrative of the purposes for which voters of any particular school district might be willing to increase the rate of taxation.

In further substantiation of our belief that money raised by taxation of a school district which has not been specifically authorized by approval of the voters may be allotted to the building fund is had in Paragraph 3, Section 165.110 which reads, in part, as follows: "* * * All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the building fund. * * *"

The above quotation speaks of taxation generally and does not restrict such taxes that may be allotted to the building fund to those taxes which have previously been approved by the voters.

In further substantiation, Sub-section 4 of Section 165.110 provides that a balance of the sinking or interest fund may under some circumstances be transferred to the building fund: "provided further, that in the event of a balance remaining in the sinking or interest funds, after the total outstanding indebtedness for which said funds were levied is paid, the said board shall have the power to transfer such unexpended balances to the building fund."

In recapitulation, we find that the Constitution makes provision for taxation for school purposes, that the Legislature has made statutory provision for raising of taxes, and that the Legislature has provided for the placement of tax moneys into certain funds. There is no provision in either the Constitution or the statutes that require a certain percentage of tax moneys to be placed into any particular fund. Apparently, it was intended to leave that to the discretion of the school board. Since there is provision for a building fund, and there is no limitation upon the amount of the tax moneys raised that may be placed in the building fund, we must conclude that the discretion of the school board must be the determining factor.

In view of the answer to your first question it is unnecessary to answer the second question. However, you are referred to State vs. Powell, 221 S.W. (2d) 508 for a discussion of the powers of Prosecuting Attorneys in recovering school moneys illegally expended.

CONCLUSION

It is, therefore, the opinion of this office that a school board may allot to the building fund such percentage of tax moneys

Honorable J. P. Morgan

received which is not allocated to a specific fund by vote of the people, as its judgment dictates, and that voter approval is not necessary before such moneys are placed into the building fund.

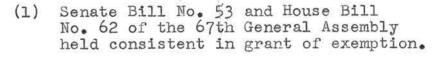
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG: vlw

TAXES: INHERITANCE TAX: SENATE BILL No. 53: House Bill No. 62:



(2) Qualification in Senate Bill No. 53 construed to relate only to deaths occurring subsequent to effective date of act.



December 31, 1953

Honorable M. E. Morris Department of Revenue Jefferson City, Missouri

Attention: Mr. C. L. Gillilan, Inheritance Tax Division.

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"I am enclosing a copy of Senate Bill No. 53 amending Section 145.090 Revised Statutes of Missouri 1949, and copy of House Bill No. 62 amending Section 145.100 Revised Statutes of Missouri 1949, both of which pertain to exemptions of bequests or transfers to religious, educational or charitable organizations to be used outside of the State of Missouri, and both are reciprocal.

"You will note, however, that Senate Bill No. 53 appears to be retroactive since it exempts bequests going to states 'which at the time of decedent's death' had a like reciprocal law in effect. House Bill No. 62 contains no such retreactive provision which indicates it does not apply when death occurred prior to the effective date of the amendment, which was August 29, 1953.

"There are at present, some thirty-six states that have similar reciprocity laws in effect and we will appreciate either an official opinion or legal advice as to the proper construction and application of these two amendments."

Honorable M. E. Morris

Both of the amendatory acts which have been referred to in your letter of inquiry relate to exemptions granted under Missouri inheritance tax laws.

The pertinent portion of Senate Bill No. 53, 67th General Assembly reads as follows:

"145.090. The following shall be exempt from taxes imposed in this chapter:

* * * * * * * *

"(2) All transfers, direct and indirect, including transfers from a trustee or trustees to another trustee or trustees, of any property or beneficial interest therein to be used solely for county, municipal, religious, charitable or educational purposes in any other state or territory of the United States, foreign state or nation, which at the time of the death of the decedent, imposed no legacy, succession or death tax of any character in respect to property transferred for similar uses in this state, or which by law exempts transfers made for similar uses in this state from all such tax on condition that this state shall exempt transfers made for such uses in such other state, territory or nation from any such taxes imposed by this state." (Emphasis ours.)

Similarly, House Bill No. 62 of the same General Assembly contains the following provisions:

"145.100. 1. When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members.

"2. The exemption herein granted shall extend to persons, organizations, associations, and corporations organized under the laws of other states and resident therein, provided the law of the other state grants to persons, organizations, associations, and corporations organized under the law of Missouri and resident therein, a like and equal exemption."

We are further advised by the office of the Governor of Missouri that both of the acts were signed by the Governor on May 15, 1953, and became effective on August 29, 1953. We therefore are confronted by a situation in which two apparently inconsistent acts relating to the same subject matter have been passed by the same General Assembly, approved by the Governor at the same time, and became effective upon the same date. If such inconsistency in fact inheres in the acts them, of course, they nullify each other and neither is of any efficacy. To this effect see State ex rel. Attorney General vs. Heidorn, 74 Mo. 410.

It is the duty, however, both of this office and of the Courts to construe acts of the General Assembly in such manner as to harmonize their apparently inconsistent provisions, if at all possible. To effectuate such harmony it is necessary to follow established rules for the construction of statutes, keeping in mind at all times that the intent of the General Assembly shall be the final determinative factor if in accord with provisions of the organic law.

Adverting to the acts it is noted that Senate Bill No. 53 relates to exemptions granted transfers of property or beneficial interest therein, which are to be used solely for county, municipal, religious, charitable or educational purposes, whereas House Bill No. 62 is limited in its application to property, benefit or income transferred for the purpose of being used and actually held in use exclusively, for religious, educational and charitable uses. The possible conflict between the application of the two acts arises from the inclusion in Senate Bill No. 53 of the qualification that the exemption granted thereof shall extend only to county, municipal, religious, charitable or educational purposes, to be exercised in any other state or territory of the United States, foreign state or nation, which at the time of the death imposed no similar taxes with respect to transfers made for similar purposes in the State of Missouri.

We do not consider that such proviso creates a conflict. It is fundamental that in the construction of statutes they must be considered to apply prospectively only, particularly in the absence

Honorable M. E. Morris

of a clear and unambiguous expression of legislative intent to the contrary. See Clark Estate Company vs. Gentry, 240 S.W. 2d. 124, 362 Mo. 80, Certiorari Denied, 72 Supreme Court 109, 342 U.S. 868.

The exemption could not be construed to be effective with respect to property transferred by decedents dying prior to the effective date of the act, to-wit, August 29th, 1953, as to so construe the act would amount to holding it to be retroactive in nature. This the General Assembly may not do, particularly with respect to the release or establishment of public debts or claims. Your attention is directed to Subsection 5, Section 39, Article III, Constitution of Missouri, 1945, which reads as follows:

"Sec. 39. Limitation on power of Assembly. -The general assembly shall not have power:

* * * * *

"(5) Release of public debts and claims.—
To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due this state or any county or municipal corporation; (Sec. 51, Art. IV, Const. of 1875) * *." (Emphasis theirs)

This constitutional provision is of importance in view of the fact that under Missouri inheritance tax law liability for the payment of the tax becomes fixed as of the date of the death of the decedent. See Section 145.110, RSMo. 1949, which reads, in part as follows:

"All taxes imposed by this chapter, unless otherwise herein provided for, shall be due and payable at the death of the decedent, * * *."

Therefore, the proviso contained in Senate Bill No. 53 must be construed to relate only to transfers resulting from the death of decedents subsequent to the effective date of the act. To construe the act otherwise would render the proviso unconstitutional in the light of the decision reached in Graham Paper Co. vs. Gehner, 59 S.W. 2d. 49. In that case the General Assembly purported to change the basis of income taxes to be paid by corporations. The effect of the amendatory act was to release certain corporate tax-

payers from income tax liability, which resulted from the provisions of the then existing law. The contention was made that since only the state was adversely affected by the extinguishment of the liability no valid objection thereto could be made by the state. The Supreme Court of Missouri agreed that the General Assembly could pass retrospective laws which would impair the rights of the state and could impose new liabilities with respect to transactions already passed on the state itself, or on the governmental subdivisions thereof, but further held that in no event could such action be taken in view of the Constitutional provision cited supra, with respect to obligations due and owing the state which had become fixed prior to the passage of the new law. In commenting upon what was then Section 51, Article IV, of the Constitution of 1875, which is substantially the same as the portion of Section 39, Article III, Constitution of 1945, quoted supra, the Court said:

"* * *The language of this constitutional provision is very broad and comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind. It will be noticed that this constitutional provision is couched in the language and uses the same terms as are used with reference to retrospective laws. In determining what transactions or considerations are within the purview of retrospective laws, the courts use the same terms as are used in this constitutional provision, to wit, liabilities or obligations, as well as debts. In contending in the Dirckx and Bell Telephone Cases, supra, that income taxes not due or capable of ascertainment till the end of the year could not be the subject of a retrospective law, the same argument was used as is now used to exclude same from the constitutional provision just quoted, to wit, that the income tax for the entire year is a unit and does not come into existence even as an obligation or liability till the end of the year, when for the first time it was capable of ascertainment. That would be true as to being an indebtedness, but, as there pointed out, it is not true as to being an obligation or liability. This argument was rejected as not sound in the Dirckx and Bell Telephone Cases, as it must be here. It was there held that an

Honorable M. E. Morris

inchoate tax, though not due or yet payable, is such an obligation or liability as to be within the protection of the restriction against retrospective laws, and for the same reason we must hold that such inchoate tax is an obligation or liability within the meaning of the constitutional provision now being considered. In other words, if an unmatured tax has sufficient vitality to be protected in favor of the citizens against retrospective laws, it has sufficient vitality to be protected in favor of the state against being extinguished or released by legislative enactment."

We therefore arrive at the conclusion that there is no inconsistency between Senate Bill No. 53 and House Bill No. 62, each passed by the 67th General Assembly, and becoming effective on the same date.

CONCLUSION

In the premises we are of the opinion that no inconsistency exists between the exemption provisions contained in Senate Bill No. 53 and House Bill No. 62, both passed by the 67th General Assembly, and both becoming effective upon the same date, to-wit, August 29th, 1953.

We are further of the opinion that the qualification expressed in Senate Bill No. 53 in the following language "which at the time of the death of the decedent" must be construed to include only deaths occurring subsequent to the effective date of the acts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB: vlw; mw.

SPECIAL ROAD DISTRICTS:

A special road district newly organized is entitled to its portion of the funds collected and unexpended at the time the district came into existence.

FILED

JOHN M. DALTON

February 24, 1953

65

John C. Johnsen xxxxxx

Mr. Charles E. Murrell, Jr. Prosecuting Attorney Knox County Edina, Missouri



Dear Mr. Murrell:

We have given careful consideration to your request for an opinion, which request is as follows:

"There was organized in Knox County, Missouri, a special road district under the provisions of Section 233:010 to 233:165 R.S.M.O., 1949 effective January 5th of this year, 1953.

"I would like an opinion from your office as to what funds are to be turned over to the special road district by the County Treasurer. Would taxes collected during the year 1952 be turned to the new special road district or would only the tax collected after the effective date, January 5, 1953, of the organization of the district be turned to the new district?

"We are particularly interested in the disposition of the tax collected in December 1952, and would like to have your opinion on this matter as soon as possible in order that the County Treasurer can make immediate disposition of the tax collections."

The question contained in your request is governed for the most part by Sections 233.125 and 137.555, RSMo 1949. Section 233.125 provides that in any county where

a special road district has been organized under Sections 233.010 to 233.165, and where money shall be collected for road and bridge purposes under Section 137.555 upon property within such special road district, the county court shall apportion and set aside to the credit of such special road district four-fifths of such portion of said road and bridge tax collected and paid upon any property lying and being within such special road district. This section also provides that the county court shall apportion and set aside to the credit of the special road district one-half of the amount collected as licenses on pool and billiard tables from such business carried on within the limits of such special road district.

Section 137.555 authorizes the county court to levy a tax, not to exceed thirty-five cents on each one hundred dollars assessed valuations, on the property of the county to be used for road and bridge purposes. It is provided, however, that four-fifths of said tax collected and paid upon any property lying and being within any special road district shall be placed to the credit of such special road district and paid over to such district upon warrants of the county court. This is the same mandate as that contained in Section 233.125.

The law, as described above, is perfectly clear as to what funds must be turned over by the county court to a special road district already established at the time the taxes are collected. But there is nothing in the statutes to indicate just what funds are available for a newly organized special road district. Neither can we find any Missouri court decisions to assist us in coming to an answer to this question. We must, therefore, undertake to determine the intent of the legislature and apply the rule of reason in an effort to construe the statutes above mentioned.

Evidently the law contemplates the functioning of a special road district as soon as it shall come into existence. It does not stand to reason to conclude that the district must withhold its operations until the revenues for the coming year can be collected. The district starts off with a board of commissioners, and it is provided in Section 233.070, RSMo 1949, that the "board shall have sole, exclusive and entire control and jurisdiction" over the construction, improvement and repair of the public highways in the district. This means that the county court cannot expend any portion of the road and bridge fund on the highways of the district.

Mr. Charles E. Murrell, Jr.

This money, which by rights belongs to the district, can be made available for the district only by turning it over to the board of commissioners.

This conclusion is in accord with the decision of the Supreme Court of California in Signal Hill v. County of Los Angeles, 196 Cal. 161. In that case the statute construed by the court was more definite than the Missouri law is, but the same question was under consideration. In the course of that opinion, on page 168, the court said:

" * * * In the determination of that question as applied to the present case, we find no difficulty in concluding that it was, and is, the duty of the respondents to ascertain without delay the amount of general road tax moneys derived from the property and persons in the territory in question and unexpended at the time of the incorporation of the new city, and the amount of highway taxes then levied and in course of collection and so derived and to pay the same to the proper officer of the petitioner as soon as practicable. * * * "

CONCLUSION.

It is the opinion of this office that a special road district organized under Sections 233.010 to 233.165, RSMo 1949, effective January 5, 1953, is entitled to its portion of the revenues provided in Sections 233.125 and 137.555, RSMo 1949, collected in 1952 and unexpended at the time the said district came into existence.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Very truly yours,

JOHN M. DALTON Attorney General PROSECUTING ATTORNEYS: HOUSE BILL NO. 160:

XXXXXXXXX

JOHN M. DALTON

Effective date of H.B. 160 is August 29, 1953; Prosecuting Attorneys of 3rd and 4th class counties to be paid proportionately on basis of period of time remaining in 1953 after effective date; Prosecuting Attorneys entitled to be paid for three days in month of August, 1953.

XXXXXXXX

J.C.JOHNSEN

No 65



June 5, 1953

Honorable Charles E. Murrell, Jr. Prosecuting Attorney Knox County Edina, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I would like to know when House Bill #160, as amended by the Senate, will become effective. I would also like to know if the \$600.00 per annum means \$600.00 for the year 1953 or if only a proportional part of the \$600.00 is to be paid according to months remaining in the year of 1953. If only part of the \$600.00 is payable in 1953, how will the amount be calculated for the month in which the bill becomes effective if it is only a part month."

We note that House Bill No. 160 of the 67th General Assembly provides that prosecuting attorneys in counties of the third and fourth class are required to attend at all hearings and applications for judicial paroles, and to investigate all applicants for judicial paroles, to make a complete investigation of all the facts and circumstances surrounding such applicant, his home life, family, and business, and to make a report of their findings to the circuit judge, and to make recommendations thereon. By this said House Bill, prosecuting attorneys are to receive as compensation for these additional services and duties, in addition to the salaries and fees now allowed prosecuting attorneys, an amount equal to \$600.00 per annum, to be paid in equal monthly installments.

Honorable Charles E. Murrell, Jr.

Your first question is in regard to the effective date of House Bill No. 160. Article III, Section 29, of the Constitution of Missouri, 1945, states:

"Effective date of laws-exeptions--procedure in emergencies and upon recess.--No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Section 1.130, RSMo 1949, states:

"A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted; provided, however, if the general assembly recesses for thirty days or more, it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of the recess, subject to the following exceptions:

"(1) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be

Honorable Charles E. Murrell, Jr.

endorsed by the governor on the bill at the time of its approval;

- "(2) In case the general assembly, as to a law not of the character herein specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days herein mentioned, said law shall take effect on the date thus fixed by the general assembly;
- "(3) In case the general assembly shall provide that any law shall take effect as provided in subsection (1) of this section, the general assembly may provide in such law that the operative date of the law or parts of the law shall take effect on a date subsequent to the effective date of the law."

House Bill No. 160 was passed without an emergency clause and it was not an appropriation act. Therefore, it becomes effective 90 days after the final adjournment of the Legislature, which occurred on May 31, 1953.

Section 1.040, RSMo 1949, states:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day be Sunday it shall be excluded."

Following this method of computing the 90 day period referred to above, we find that 90 days after May 31, 1953, would be August 29, 1953, which would be the effective date of House Bill No. 160.

Your second question is whether the \$600.00 per annum means \$600.00 for the year 1953, or only a proportional part of the \$600.00 is to be paid on the basis of the months remaining in the year 1953.

In this regard, House Bill No. 160 states that this payment of \$600.00 per annum is to be "in equal monthly installments," which, for a 12 month period, would be \$50.00 per month. It is our opinion that the meaning of the bill is that payment under it is to be proportional to the months remaining in the year

Honorable Charles E. Murrell, Jr.

1953, after the effective date of the bill, which would be approximately 4 months, meaning that under House Bill No. 160, prosecuting attorneys would receive approximately \$200.00 for the year 1953. Since the additional duties for which this \$600.00 per annum is compensation are not to be performed by prosecuting attorneys until the effective date of the bill, it certainly was not the intent of the Legislature to compensate prosecuting attorneys for those months in the year 1953 when they are not performing the additional duties for which this \$600.00 per annum is compensation.

Your third question is: If only part of the \$600.00 is payable in 1953, how will the amount be calculated for the month in which the bill becomes effective if it is only a part month. Paragraph 6, Section 1.020, RSMo 1949, states that the word "month" shall mean a calendar month unless otherwise expressed. Since August has 31 days, and since House Bill No. 160 becomes effective on August 29, 1953, prosecuting attorneys would be entitled to three days pay in August, which would amount, for three days, to approximately \$4.80.

CONCLUSION

It is the opinion of this department: That the effective date of House Bill No. 160 of the 67th General Assembly is August 29, 1953; that prosecuting attorneys of third and fourth class counties are to be paid proportionately and on the basis of the period of time remaining in the year 1953 after the effective date of House Bill No. 160, and not the full \$600.00; that prosecuting attorneys in third and fourth class counties are entitled to be paid for three days in the month of August under House Bill No. 160, which would be approximately \$4.80.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly

JOHN M. DALTON Attorney General

HPW:mm

STATE PURCHASING AGENT: PUBLIC RECORDS: State Purchasing Agent may not sell the right to inspect and copy public records.

March 17, 1953



Honorable Edgar C. Nelson State Purchasing Agent Division of Procurement State Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office including a letter directed to your office and a contract the nature of which we will hereinafter discuss.

You inquire whether the matter called up by these documents relate to the duties of your office.

The contract as drawn and submitted with your request, if executed, proportedly would bind the State of Missouri by and through the Director of Revenue and certain private companies who wish to obtain registration information from the records of the motor vehicle division. The contract provides that the company shall pay to the State of Missouri _______ ¢ per name of persons obtained from the records. A further provision of the contract binds the company to pay to the state \$50.00 per month for each employee furnished by the company in the extraction of records of registration from the department. These provisions are as follows:

"That the Company pay to the Director of Revenue of The State of Missouri the sum of Fifty (\$50.00) Dollars per month for each employee required or furnished by the Company in the extraction of records of registration from the Department.

"There shall be a fee paid of per name of persons obtained from the records."

We note also the following provision found in the contract:

"Provided further that it is agreed that the charges, fees and requirements herein set forth are for the purpose of indemnifying the Revenue Department for the inconveniences caused."

There are other provisions relating to allocation of space, furnishing equipment, termination of the contract, etc., which we do not deem pertinent to this inquiry.

It appears that this matter was referred to your office for the purpose of selling the privilege of allowing companies to secure this information under the terms of the contract.

The law relating to the division of procurement is found in Chapter 34, RSMo 1949. In regard to the duties of the State Purchasing Agent to make sales, we direct your attention to Section 34.140, which provides in part as follows:

"* * *He shall also have power, subject to the same provisions as for bids for purchases, to sell any surplus or unneeded supplies or property, in his hands or owned by the state or any department thereof. * * *"

Even assuming that the sale of the right to copy records would fall within the unlimited definition of the terms supplies or property, a question which admits of grave doubt, we do not believe that such can lawfully be done.

Section 301.350, Missouri Revised Statutes, Cumulative Supplement 1951, relating to the books and records of the motor vehicle division provides as follows:

"1. Upon receipt of an application for registration of a motor vehicle, trailer, chauffeur, registered operator, manufacturer or dealer, as provided in sections 301.010 to 301.440, the director of revenue shall file such application and register such motor vehicle, trailer, chauffeur, registered operator, manufacturer or dealer, together with the facts

Honorable Edgar C. Nelson

stated in the application in a book to be kept for that purpose, under a distinctive number assigned to such motor vehicle, trailer, chauffeur, registered operator, manufacturer or dealer. Separate books shall be kept as follows:

- (1) Motor vehicles registered by owners, except commercial motor vehicles;
- (2) Commercial motor vehicles;
- (3) Trailers;
- (4) Motorcycles and motor tricycles;
- (5) Manufacturers and dealers;
- (6) Chauffeurs;
- (7) Registered operators;
- (8) Official motor vehicles.
- "2. The director of revenue shall also keep an index, by cards or otherwise, according to motor number or other manufacturer's identification numbers, of vehicles registered and also by manufacturer's names.
- "3. The director of revenue may keep such other classification and records as he may deem necessary.
- "4. All of such books and records shall be kept open to public inspection during reasonable business hours.
- "5. The governor may cause the books and accounts of the commissioner to be audited by the state auditor; or otherwise, at any time."

(Underscoring ours.)

You will note that this section provides that all such books and records shall be open to public inspection during reasonable business hours. Speaking of a provision substantially the same as the one above noted, the Supreme Court, in the case of State v. Brown, Honorable Edgar C. Nelson

134 S. W. (2d) 28, 1. c. 31, said:

"* * *If so, such records are 'official'
records or public records because the
statute requires them to be kept open to
public inspection."

It is fundamental law that persons interested in public records have the right to inspect the same which right also includes the right to make copies and memoranda thereof. No fee can be charged for the exercise of this right of inspection unless expressly provided by statute. We find no such provision. This rule is stated in 76 C.J.S., Records, page 146, as follows:

"In the absence of a statute, authorizing the recording officer to charge fees for inspection of records in his office or requiring payment of such fees, persons entitled to inspection of such records may inspect them, and may make memoranda or copies thereof without paying a fee for the privilege, * * *."

Whether the contract could be construed as a lease of space for the purpose of copying the records and the fees and charges noted from the provisions of the contract, supra, consideration, therefore, we do not undertake to determine, since such would not involve the duties of the State Purchasing Agent.

CONCLUSION

Therefore it is the opinion of this office that the State Purchasing Agent has no authority to contract for sale or sell the right or privilege of allowing private individuals to secure registration information from the records of the motor vehicle division since such records are public records open to inspection and for which no fee may be charged for the right thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General STATE PURCHASING AGENT:

Duty of the State Purchasing Agent to approve departmental direct purchase orders.

May 26, 1953



Honorable Edgar C. Nelson State Purchasing Agent Division of Procurement Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"I would like your department to give me an opinion on the following: * * * The Business Manager of the Missouri State Penitentiary, has sent to this office twenty-two 'Departmental Direct Orders' totalling \$8011.66.

"I have been advised that these orders originated in the office of * * * * Penitentiary Engineer, who says that he was given oral permission to write such orders by * * *, my predecessor in this department. All of these orders are marked 'emergency orders.' A cursory examination of the individual orders would not indicate to me that many of them fall within that definition.

"Please advise me whether or not I should approve these orders. In no case has the total amount of the order been encumbered by the Comptroller.

"More specifically, please advise me if I should approve only these orders which appear clearly to be emergency orders, and should not approve other orders which do not fall within that classification."

The provisions relating to the purchase of supplies for all departments of the State and the duties of the State Purchasing Agent in this regard are contained in Chapter 34, RSMo 1949. Section 34.030 provides that all purchases shall be made by the State Purchasing Agent except as otherwise provided in this chapter and reads as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

The exception to the above noted provision is contained in Section 34.100, RSMo 1949, and relates to purchases of an emergency or technical nature. This section specifically provides:

"The purchasing agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the purchasing agent together with all bids received and prices paid."

Under this provision the purchasing agent is empowered to authorize any department of the State to purchase direct supplies of a technical nature. Likewise, he is empowered and may authorize emergency purchases direct by any department. Such authority may be conferred in these instances as in the sound discretion and judgment of the State Purchasing Agent will promote the interests of efficiency, economy, the preservation of life and property and the welfare of the State in general. This section further provides that the Purchasing Agent shall prescribe rules under which such direct ourchases shall be made. Under this mandate certain rules

have been prescribed which we here make reference. Rules 13, 14, 15 and 16 as formulated by the Division of Procurement provide as follows:

"Rule 13. Purchases amounting to \$50.00 or less shall be construed to be emergency purchases, and the securing of competitive bids, although recommended in cases wherever possible, will not be required. Such purchases shall be made only upon authorization of the departmental head. Departmental Direct Orders are to be sent immediately direct to the Comptroller for an encumbrance on the appropriation. If immediate delivery has been made, departments are to write on the order: 'This merely confirms a purchase previously made.'

"Rule 14. If in the opinion of the Purchasing Agent it is advantageous to the state for a department to purchase supplies of a technical nature direct, the department, after obtaining permission to make such a purchase, shall secure at least three competitive bids, writing up an order on the lowest and best bidder, using departmental direct order blank, checking this order in the upper left-hand corner in the space designated for such an order and attach all bids thereto. If approved, copy No. 1 will be mailed to vendor, copy 2 and the bid submitted will be retained in the office of the State Purchasing Agent and copies 3, 4 and 5 returned to the department, and the last copy will be retained by the Comptroller. The departmental direct order shall also be used for purchases or supplies or services obtainable only from one source of supply and which amounts to over \$50.00. These orders, too, must have the approval of the Purchasing Agent before being placed.

"Rule 15. In cases where human life or state property is in immediate jeopardy, emergency orders or any orders amounting to more than \$50.00 will be permitted without first securing special authorization from the State Purchasing Agent. "Rule 16. Departments may make purchases of emergency or technical nature, where immediate delivery is necessary, with the verbal permission of the Purchasing Agent. Vendors can be notified of such approval and make immediate delivery, and instructed not to make billing until departmental order is received. Departmental orders are to be made up at once and sent to Purchasing Agent for approval and encumbrance on the appropriation. Departments are to write on such order: 'This merely confirms a purchase previously made' (to avoid duplication)."

The import of these rules as we are here concerned seems to be that in cases where human life or state property is in immediate jeopardy, emergency orders or any order amounting to more than \$50.00 will be permitted without prior authorization from the State Purchasing Agent, Rule 15, and where the need is not so imperative, yet immediate delivery is necessary, a department may make purchases of emergency or technical nature on verbal permission of the Purchasing Agent, Rule 16. That these provisions are mandatory, there can be no doubt, for Section 34.150, provides that if supplies are purchased contrary thereto, the department head shall be personally liable. This section provides:

"Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this chapter or the rules and regulations made thereunder, such order or contract shall be void and of no effect. The head of such department or agency shall be personally liable for the costs of such order or contract and, if already paid for out of state funds, the amount thereof may be recovered in the name of the state in an appropriate action instituted therefor."

As we view the statutory provisions noted and the regulations adopted thereunder, we believe that it is mandatory that all purchases of supplies must be negotiated by the State Purchasing Agent except purchases of emergency or technical nature or the purchase of supplies obtainable from only one source which may be made by the department under the procedure prescribed. It appears to be clear that the State Purchasing Agent has no duty to approve

purchase orders negotiated by any department which does not fall within the exceptions provided. Whether or not a purchase amounting to more than \$50.00 is an emergency purchase, is of course, a question of fact depending upon the circumstances, while by Departmental Regulation 13, supra, all purchases amounting to \$50.00 and less shall be construed to be emergency purchases.

We note from your request that it is contended that the purchase orders to which you refer were placed after securing verbal permission of the purchasing agent then in office. If, in fact, verbal permission was given, then we are of the opinion that your office should approve those orders of \$50.00 or less, and likewise, approve those orders of more than \$50.00 which were of an emergency or technical nature and that purchases not meeting these requirements need not be approved. More specifically in regard to your duty to approve orders placed on the verbal permission of your predecessor in office, we wish to call your attention to the fact that it is presumed that a public official discharges his duties or performs an act in accordance with the law, and the authority conferred upon him. This rule is stated in 31 C. J. S., Evidence, Section 146, Page 800, as follows:

"Stated in another way, it is, as a general rule, presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him, and that he will not do any act contrary to his official duty or omit to do anything which such duty may require.

"In accordance with the general rule, it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done, * * *."

See also Woolridge v. LaCrosse Lumber Company, 236 S.W. 294.

With this rule in mind it is our opinion that your office should approve those direct purchase orders placed upon the verbal permission of your predecessor, absent illegality appearing on the face thereof, since there exists a presumption that they were properly authorized and placed in accordance and compliance with the law.

CONCLUSION

Therefore in the premises, it is the opinion of this office that the State Purchasing Agent now in office is required to approve departmental direct purchase orders placed upon the verbal permission of his predecessor in office and involving purchases of an emergency or technical nature where immediate delivery was necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General TAXATION: CORPORATIONS: Columbia Broadcasting System, Inc., liable for franchise tax provided by Section 147.010, RSMo 1949.



June 26, 1953

Mr. Charles C. Nance, Chairman State Tax Commission of Missouri Jefferson Building Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

"The Columbia Broadcasting System Inc., operating Station KMOX, with studies in the City of St. Louis, has questioned their liability for the Missouri State franchise tax on the ground that their operations are wholly interstate and therefore not subject to taxation.

"We are enclosing a letter and memorandum submitted to the State Tax Commission by said corporation and request an opinion from your office as to whether or not a corporation operating, as its only activity in this State, a broadcasting station, in the manner stated, is required to pay a Missouri franchise tax."

Records in the office of the Secretary of State for Missouri disclose that Columbia Broadcasting System, Inc., a foreign corporation organized under the laws of the State of New York, made application in April, 1952, for a certificate of authority to transact its corporate business in Missouri as a foreign business corporation, and such certificate was duly issued. Documents supporting such application for

authority disclose the purpose or purposes for which said corporation was organized and which it proposes to pursue in the transaction of business in Missouri as "radio broadcasting and activities related thereto, and perhaps at a later date television broadcasting and activities related thereto"; that an estimate of the total value of all the property of the corporation for the following year (1953) that will be located in Missouri is \$200,000.00; that the estimated gross amount of business of the corporation to be transacted by it at or from places of business in the State of Missouri during such year (1953) is \$1,000,000.00; and that the proportion of stated capital and surplus represented by the corporation's property and business in Missouri for the following year (1953) is \$216,112.00.

The Missouri franchise tax which Columbia Broadcasting System, Inc., seeks to evade is provided for in the following language found in Section 147.010, RSMo 1949.

"

"2. Every foreign corporation engaged in business in this state whether under a certificate of authority issued under chapter 351, RSMo 1949 or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of five dollars per share, unless the actual value of such shares should exceed five dollars per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this chapter such corporation shall be deemed to have employed in this state that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located.

" * * * * * * *."

In your opinion request this office is directed to a letter and memorandum submitted to the Tax Commission by attorneys for Columbia Broadcasting System, Inc., and an opinion is sought to determine whether or not, in view of the facts stated in said memorandum, the corporation is liable for the franchise tax. It is contended, on behalf of the corporation, that all of its operations in the State of Missouri partake of an interstate character so as to exempt it under the Federal Constitution from such a State tax.

In the case of State v. Phillips Pipe Line Company, 97 S.W. (2d) 109, 339 Mo. 459, the Supreme Court of Missouri, en bane, in 1936, was construing Section 4641 R. S. Mo. 1929, which remains virtually unchanged in Section 147.010, RSMo 1949, quoted above. The Court spoke as follows at 339 Mo. 459, 1.c. 466:

" * * * It is true that in the Ozark Pipe Line case it is stated that the Corporation Franchise Tax Law of Missouri levies a tax 'upon the privilege or right to do business, ' citing State ex rel. v. State Tax Commission, 282 Mo. 213, 221 S.W. 721, and that such a tax may not be imposed upon a corporation transacting only interstate business here, but we have construed the Corporation Franchise Tax Law as one imposing a tax upon the privilege or right to do business as a corporation (State v. Pierce Pet. Corp., 318 Mo. 1020, 1.c. 1027, 28 S.W. (2d) 790; Mo. Athletic Assn. v. Inv. Corp., 323 Mo. 765, 1.c. 773, 20 S.W. (2d) 51), and it has been frequently held that such a tax is not one which inevitably results in burdening interstate commerce although the business of the corporation taxed may be interstate. * * *"

In State v. Shell Pipe Line Corporation, 345 Mo. 1222, 139 S.W. (2d) 510, the Supreme Court of Missouri, Division No. 2, had before it for construction, in 1940, Section 4641 R. S. Mo. 1929, referred to above. The Court reviewed the Phillips Pipe Line Company case, alluded to above, and spoke as follows at 139 S.W. (2d) 1.c. 519:

"In the Phillips Pipe Line Company case the validity of the franchise tax was upheld, but because the court considered the activities there shown to be the transaction of intrastate business and not necessarily incident to and therefore not a part of interstate transportation. * * *

"It seems to be conceded, as we think it must be, that the state cannot lay a tax on purely interstate commerce or upon the privilege of engaging therein. * * *"

No decision of the Supreme Court of Missouri has been found which deals with the application of Missouri's corporation franchise tax law as applied to corporations engaged in radio broadcasting. For the present status of the law on this question we feel that the following summary found in 11 A.L.R. 2d, 1.c. 989, is not to be overlooked:

"It appears that the present status of the law on the subject under consideration is that a tax measured by the gross receipts of a radio broadcasting business, without regard to whether such business is interstate or intrastate commerce, will be considered as imposing an unconstitutional burden on interstate commerce, in view of the decision of the United States Supreme Court, in Fisher's Blend Station v. State Tax Com. (1936) 297 US 650, 80 L ed 956, 56 S Ct 608, set out supra.

"And a similar view would be taken as to an occupational tax on persons engaged in the business of radio broadcasting if such tax makes no distinction as to interstate and intrastate business. See Whitehurst v. Grimes (1929, DC Ky) 21 F2d 787, and Atlanta v. Southern Broadcasting Co. (1937) 184 Ga 9, 190 SE 594, set out supra.

"However, a local tax on the gross receipts of a radio broadcasting business, based solely on the intrastate activities of such a business may be regarded as not imposing an unconstitutional burden and may be regarded as valid if the amount of the intrastate busi-

ness is capable of ascertainment. See Albuquerque Broadcasting Co. v. Bureau of Revenue (1947) 51 NM 332, 184 P2d 416, 11 ALR2d 966, and WDOD Broadcasting Corp. v. Stokes (1941) 180 Tenn 677, 177 SW2d 837, set out supra.

"The difficulty of separating interstate and intrastate activities of a radio broadcasting station for the purposes of taxation may be avoided by a statute imposing a flat tax on the occupation of radio broadcasting with an exemption as to interstate broadcasts. See Beard v. Vinsonhaler (1949)

Ark

221 SW2d 3, app dismd 338 US 863, 94 L ed

70 S Ct 146, reh den 338 US 896, 94 L ed

70 S Ct 239, set out supra."

A note appended to the above quoted summary discloses that in the Albuquerque Broadcasting Company case the New Mexico Supreme Court remanded the case to the trial court with directions to determine the amount of taxes paid on intrastate commerce, and the district court on remand directed refund of all amounts collected from the broadcasting company because of the impossibility of an apportionment of the tax between interstate and intrastate business. It stands admitted that the New Mexico tax was directed to gross receipts.

In the case of Memphis Natural Gas Company v. Stone, 335 U.S. 80, 92 L. Ed. 1832, 68 S. Ct. 1475, decided June 21, 1948. the Supreme Court of the United States was reviewing the State franchise tax of Mississippi as applied to a foreign corporation and measured by the value of capital used, invested or employed in Mississippi. The foreign corporation involved was a pipe line company, a part of whose pipe line passed through Mississippi but which did no intrastate business in such state and had never qualified therefor under the laws of Mississippi. The Mississippi franchise tax statute imposed a "franchise or excise tax" upon all corporations "doing business" within the state equal to \$1.50 for each \$1,000.00 or fraction thereof, of the value of capital used, invested or employed within the state. Aside from the fact that the Mississippi statute defined the term "doing business", the tax statute is not dissimilar to that found at Section 147.010, RSMo 1949. In sustaining the tax the Supreme Court of the United States spoke as follows at 92 L. ed., 1.c. 1844:

"The Mississippi excise has no more effect upon the commerce than any of the instances just recited. The events giving rise to this tax were no more essential to the interstate commerce than those just mentioned or ad valorem taxes. We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

In the light of the ruling in Memphis Natural Gas Company v. Stone, supra, and the facts made evident by records in the office of the Secretary of State for Missouri, alluded to in the forepart of this opinion, it is the opinion of this office that when Columbia Broadcasting System, Inc., has filed the franchise tax report required by Section 147.020, RSMo 1949, the State Tax Commission of Missouri may, and should, determine and assess the tax due as directed in Section 147.030, RSMo 1949.

CONCLUSION

It is the opinion of this office that Columbia Broadcasting System, Inc., a foreign corporation licensed to do business in Missouri, is liable for payment of Missouri's corporation franchise tax provided for in Section 147.010, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General STATE PURCHASING OFFICER:



When the State Purchasing Agent requests bids for an article, the article shall be described in general terms and by general specification, if by so doing the State Purchasing Agent can obtain the article which he wants, but if he cannot do so by describing the article in general terms and by general specifications he may then use a brand or trade name. Whether he can describe the article in general terms and by general specification is largely a matter within his discretion.

October 2, 1953

Honorable Edgar C. Nelson State Purchasing Agent Division of Procurement Capitol Building, Jefferson City, Missouri

Dear Sir:

Recently you requested an official opinion from this department on the following matter:

"I would like to have an opinion on Section 34.060 Revised Statutes of Missouri, 1949, which deals with requests for bids on supplies and materials and which states that such requests must be in general terms.

"I wish an opinion on this particular section because we receive numerous requisitions asking for stock feeds by brand name rather than by formula of the ingredients.

"Such specifications doubtless arise from the fact that dairymen and business managers at the various state institutions have used certain brand feeds and have gotten satisfactory results from the standpoint of production. This being true, they want to continue to use the same feeds and feel that if they don't specify the brand wanted they may get a feed that will affect production. This is especially true in dairy and egg production."

The question which you want answered appears to be: When the State Purchasing Agent invites bids on various articles which the state wishes to purchase, should he, in his invitation, give the "brand, trade name, or other individual mark" of such article, or should the article be referred to in "general terms and by general specifications".

Honorable Edgar C. Nelson

Section 34.060 RSMo 1949, to which you refer, reads as follows:

"All requests hereafter made for bids and proposals for materials, products, supplies, provisions and other needed articles to be purchased at public expense, shall be made in general terms and by general specifications and not by brand, trade name or other individual mark, provided such article to be purchased can be definitely described without the designation of such brand, trade name or other individual mark. All such requests and bids shall contain therein a paragraph in easily legible print, reading as follows: of statutory authority, a preference will be given to materials, products, supplies, provisions and all other articles produced, manufactured, made or grown within the state of Missouri. "

The meaning of the above section seems to us to be: When the state purchasing agent invites bids for the furnishing of an article, the article shall be described in general terms and by general specification, not by a brand or trade name, if the desired article can be described definitely without stating a brand or trade name, but that if it cannot be, that then a brand or trade name may be used.

It would appear that the underscored lines above are very clearly implied by Section 34.060, supra. Therefore, it would seem that Section 34.060 means that when the state purchasing agent invites bids on an article, he should describe the article in general terms if by so doing he can thereby obtain bids on the article which he wants, but that if he cannot get the article he wants by describing it in general terms, he may describe it by brand or trade name. Clearly it would have to be a matter largely within the discretion of the state purchasing agent, whether be could obtain an article which he wanted by describing it in general terms and specifications. If, in his opinion, he could not do so, he could then use a brand or trade name.

CONCLUSION

It is the opinion of this department that when the state purchasing agent requests bids for an article, the article shall be

Honorable Edgar C. Nelson

described in general terms and by general specification if by so doing the state purchasing agent can obtain the article which he wants; but if he cannot do so by describing the article in general terms and by general specifications he may then use a brand or trade name. Whether he can describe the article in general terms and by general specification is largely a matter within his discretion.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/ld

SEWER DISTRICTS IN ST LOUIS COUNTY: The extension of a sewer district in St.
Louis County can only be into a "contiguous"
area, and that by "contiguous" is meant
an area which is "adjacent" or lying
immediately next to and adjoining.

JOHN M. DALTON

May 4, 1953



J.C. Johnsen

Honorable L. E. Ordelheide, Director Bureau of Public Health Engineering Division of Health Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The request for an opinion of the Attorney-General which you referred to in your letter of February 9, 1953 regarding the extension of the Affton Sanitary Sewer District in St. Louis County is as follows:

"Can the Affton Sanitary Sewer District extend its limits by condemning a corridor up stream to a developed area and then incorporate the developed area into the sewer district? Can they also extend a corridor down stream from the present district limits and incorporate built-up areas as they come to them? Such a plan of expansion would result in several sewered areas connected and drained through the corridors to the river DePeres. The attorney for the sewer district has informed the Division of Health that such a plan, in his opinion, was legal through the provisions of House Bill 207 which was passed and became law during the last legislative period. Such a plan would result in a desirable system of trunk sewers serving the South St. Louis County area. There was some doubt, however, in our minds that such a procedure was within the intent of the Law. We would appreciate an opinion on this matter as the same problem is arising in the Moline Creek water shed in North St. Louis County."

We note that the Affton Sanitary Sewer District is located in St. Louis County.

Chapter 249, RSMo 1949, was a statement of the law governing sewer districts in St. Louis County and in Jackson County. That portion of the above chapter relating to sewer districts in St. Louis County is found in Section 249.010 through Section 249.420, RSMo 1949. Section 249.010 states in part:

"Whenever the construction and maintenance of a system of sewers for any contiguous area in the state of Missouri shall become necessary for the preservation of the public health or public welfare or will be of public utility or benefit, if any such area shall lie within any county in the state of Missouri now, or hereafter having a population of not less than one hundred and fifty thousand, nor more than four hundred thousand inhabitants, said area may be established and incorporated as a sewer district under this act in the manner following, to wit: * * *"

(Emphasis ours)

Senate Bill No. 207 (to which you refer as House Bill No. 207) repeals Section 249.040, 249.060, 249.100, 249.140, 249.150, 249.280, 249.290 and 249.400 of Chapter 249, and makes twelve new sections relating to the same subject matter. However, Section 249.010, supra, is not repealed by Senate Bill No. 207, and it will be noted that it makes Chapter 249 applicable only to counties having a population of not less than one hundred and fifty thousand and not more than four hundred thousand.

We now direct attention to Section 249.020 (which likewise was not affected by Senate Bill No. 207). That section reads:

"The last preceding federal census shall be used as a basis and for the purpose of ascertaining and determining the population of the counties that may come within the provisions of sections 249.010 to 249.420."

We now note that, according to the last decennial census, the population of St. Louis County is in excess of four hundred thousand, being in fact four hundred six thousand, three hundred forty-nine. This fact would, it would appear, remove St. Louis County from the application of Chapter 249, since the county has passed outside the population range fixed by Section 249.010, supra.

In this connection we note that this fact has been recognized by the 67th General Assembly of Missouri, now in session, and that steps have been taken to bring St. Louis County back within the confines of Chapter 249 by the introduction of Senate Bill No. 61 which provides, in part, for the repeal of Section 249.010, supra, and its re-enactment, which reenactment would change the four hundred thousand population figure contained in that section to five hundred thousand. This bill has been enacted into law and was signed by the Governor of Missouri on April 21, 1953. It will become effective ninety days after the final adjournment of the Legislature, which will make the effective date the latter part of August, 1953.

However, at this time, as noted above, St. Louis County has passed beyond the confines of Chapter 249, and Senate Bill No. 61, which will bring St. Louis County back within those confines, has not yet become effective. In view of this situation, the question arises as to the legal status of Affton Sanitary Sewer District during this interim period. However, we do not believe that it is necessary for us to go into that question here, because we have concluded, by a process of reasoning which we will shortly disclose, that it would be contrary to law for the Affton Sanitary Sewer District to make the extension contemplated by your letter even if its present legal status was such that it could continue to function in all respects as it had been doing before a population increase in St. Louis County moved that county out of the population bracket contemplated by the law under which the Affton Sanitary Sewer District was organized and has functioned. As stated above, we do not here decide whether the population change has or has not affected the functional status of the Affton Sanitary Sewer District. because it is not necessary for us to do so in order to decide the question which you submit. Let us now proceed to examine the matter of the proposed extension of the Affton Sanitary Sewer District.

It appears from your letter that the Affton Sanitary Sewer District is an established district, and that in this proposed action it simply seeks to extend the boundaries of its already established district.

Section 249.132, (Vernon's 1949 Annotated Missouri Statutes, Cumulative Annual Pocket Part), (Section 249.100, Laws of Missouri, 1951, p. 630), states in numbered paragraphs 1 and 2:

- "1. Whenever any sewer district shall have been organized as provided by sections 249.010 to 249.420, and it shall appear necessary, convenient or advisable to extend the boundaries of such district for the purpose of including therein a contiguous area which could be efficiently served by the sewer system of such district, or by reasonable modifications, extensions, or improvements thereof, the boundaries of such district may be extended in the following manner; provided that such extension shall not include any territory within the boundaries of any other sewer district.
- "2. The trustees of such district may, and shall upon a petition therefor, signed by twenty-five or more persons residing within such district and owning property therein which is liable for assessment for the sewers constructed therein, file with the circuit court having jurisdiction of such district a petition setting forth the reason or necessity for extending the boundaries of such district; the boundary lines of the proposed extension and a request for the appointment of a sanitary engineer, with duties as herein provided, and a prayer for such further action as may be necessary to determine the question as to whether the boundaries of such district should be extended."

It will be noted that by paragraph 1, supra, an established sewer district may, subject to the conditions and procedure set forth in paragraph 2, supra, extend its boundaries, subject to following certain procedure set forth in the remainder of the section and with which we are not here concerned. It will be

noted, however, that this extension is "for the purpose of including therein a contiguous area * * *." We believe that the clear implication of the above is that such an extension may not be made if the area or areas proposed to be included are not "contiguous."

Let us therefore determine whether your proposed extension conforms to that portion (paragraph 1) of Section 249.132, supra, which states that the extension of a sewer district can be made of a "contiguous" area or areas, subject to paragraph 2, supra, of the above section. In other words, is the area which you propose to join to the Affton Sewer District contiguous to the Affton Sewer District?

On this point, in your letter, you state:

"Can the Affton Sanitary Sewer District extend its limits by condemning a corridor up stream to a developed area and then incorporate the developed area into the sewer district? Can they also extend a corridor down stream from the present district limits and incorporate built-up areas as they come to them? Such a plan of expansion would result in several sewered areas connected and drained through the corridors to the river DePeres."

You do not state the width or length of these "corridors", but we assume that they are relatively narrow areas extending for an appreciable distance, not populated, and used simply as connectors between populated areas which will be served by the sewer district. Under these circumstances can it be said that the areas which it is proposed shall be included in the Affton Sewer District are "contiguous" to the Affton Sewer District?

In the case of Bolen Coal Company v. Ryan, 48 Mo. App. 512, the court held that "contiguous" means to touch or to be in actual contact, and that where three lots were separated from five other lots by an alley, that they were not "contiguous" lots.

In the Case of Bulger v. Robertson, 50 Mo. App. 499, the court held that "contiguous lots" meant lots which were adjacent to each other.

In the case of Stamm Electric Company v. Hamilton-Brown Shoe Company, 165 S.W. 2d 437, 1.c. 440, the court stated:

"While the word 'contiguous' is a relative term and may have a variety of meanings depending upon the sense in which it is used (17 C.J.S. page 178; 9 Words and Phrases, Perm. Ed., page 90), we have no doubt that in the statute now under consideration it has been used in its primary sense as implying actual contact or connection. For the statute to have application, mere close proximity is consequently not enough, but on the contrary, there must be an actual joining or touching of the lots in order for them to be contiguous. Such is the usual and ordinary meaning of the term; and a different meaning should therefore not be attributed to it unless the context in which it appears, the mature of the subject under consideration, and the ultimate purpose to be served should all indicate (which they do not) that it was purposely employed in the particular instance as connoting mere nearness or adjacency without the necessity for actual contact."

In the case of Hauber v. Gentry, 215 S.W. 2d 754, 1.c. 758, the court held that:

"Contiguous properly applies to objects which touch along a considerable part of the whole of one side: as, a row of contiguous buildings, a wood contiguous to the plain."

In the case of State v. North Kansas City, 228 S.W. 2d 762, 1.c. 773 and 774, the court stated:

"Contiguity. It is contended that relator's proposed annexation area is not contiguous to its present area. Relator's present north city limits, as defined in its charter is the center line of the river. That center line is the northern boundary of Jackson County, and the southern boundary of Clay County, R.S. Mo. 1939, Sec. 13560, 13620, Mo. R.S.A. The area in Clay County described in relator's charter amendment is contiguous to relator's present northern boundaries

and the contiguity is not broken by the Missouri River. McQuillin Municipal Corporations, 3rd Ed. Vol. 2, p. 314, Sec. 7.20; Vestal v. Little Rock, 54 Ark. 321, 15 S.W. 891; Vogel v. Little Rock, 54 Ark. 335, 15 S.W. 836. It is stated that at one point along the west side of respondent, the relator's proposed annexation area is not over 200 feet wide. But that does not render the annexation void, nor break the contiguity. Sharp v. City of Oklahoma City, 181 Okl. 425, 74 P. 2d 383; City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W. 2d 695, 154 A.L.R. 1434; Lefler v. City of Dallas, Tex. Civ. App., 177 S.W. 2d 231; McQuillin Municipal Corporations, 3rd Ed. Vol. 2, p. 312.

"Several tracts may be annexed as being contiguous if one tract is contiguous to the annexing municipality and the other tracts are contiguous to that tract and each other. In any event, relator's 'Northeast Industrial Area', lying in the northeastern portion of relator and directly across the river from the 'southeast farm area' is conceded by respondent and intervenors to be contiguous to that 'southeast farm area'. It is held in Missouri that it does not affect the contiguity of the land proposed to be annexed nor impair the validity of the proposed annexation that a city in one county proposed to annex a contiguous area located in an adjoining county. Schildnecht et al. v. City of Joplin, 226 Mo. App. 47, 41 S.W. 2d 590, 595. We approve that ruling. We hold that the proposed annexation area of relator is contiguous to its present area."

In view of the above holdings we do not believe that the proposed action by the Affton Sewer District contemplates an extension into and of a "contiguous" area or areas; does not comply with paragraph 1 of Section 249.132, supra, and is, therefore, prohibited.

It would appear to have been the legislative intent that sewer districts be in a relatively compact body, not tenuous and composed of areas connected by unpopulated districts

narrow in area. It would appear that there are sound, practical reasons for this.

CONCLUSION

It is the opinion of this department that the extension of a sewer district in St. Louis County can only be into a "contiguous" area, and that by "contiguous" is meant an area which is "adjacent" or lying immediately next to and adjoining.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm

INSURANCE:

Officers, of foreign insurance company operating in Missouri without proper authorization, not subject to extradition and prosecution. Sole redress is civil action against corporation for penalty prescribed by Section 375.310, RSMo 1949.



June 23, 1953

Honorable Don W. Owensby Prosecuting Attorney Dallas County Buffalo, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading, in part, as follows:

"Several policies of automobile insurance have been sold here in Dallas County by a local agent representing an insurance company with home office in Indiana. I am informed by the Missouri State Insurance Department that this company has never been licensed to do business in the state of Missouri. I am acquainted with the provisions of Section 375.300, R.S. Mo. 1949 as regards the criminal liability of the agent. Please advise as to whether or not it is possible to prosecute and extradite one or more of the officials of the company for receiving premiums under these circumstances. ** * *"

Interstate extradition is accomplished by compliance with Section 3182, Title 18 U.S.C.A., and such extradition may be accomplished only when a person has been properly charged by affidavit or indictment with having committed "treason, felony or other crime". It necessarily follows that before officers of a foreign corporation may be extradited and prosecuted in Missouri, a specific statute of Missouri must be pointed to wherein the acts complained of are denominated a crime in Missouri.

Section 375.310, RSMo 1949, represents the legislative declaration in Missouri relative to redress which may be taken against a foreign insurance company doing business in this State without proper authorization. Such statute only provides for a civil action to recover a stated penalty, and reads as follows:

"Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance division of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense, which penalty may be recovered by ordinary civil action in the name of the state, and shall, when recovered, become part of the school fund, as by law provided for other fines and penalties; suit for said penalty may be brought by the attorney general, the superintendent of the insurance division, or any county, circuit or prosecuting attorney, in either the city or county in which the policy was delivered, or in which the money was paid to any agent of such association or corporation, or in which the receipt was delivered, or in any county or city in which an attorney for service or any agent of said association or corporation may be found; and if the plaintiff recover, an attorney's fee of twentyfive dollars for each cause of action upon which recovery is had shall be taxed as and added to the costs; service shall be made of process in any such action, either as in other civil actions or as provided in this chapter for service on insurance companies."

CONCLUSION

It is the opinion of this office that officers of a foreign insurance corporation may not be extradited and prosecuted in Missouri when such corporation conducts its business in the State without proper authorization. Redress against such corporation can only be had by civil action under Section 375.310, RSMo 1949, for the money penalty prescribed therein.

Honorable Don W. Owensby

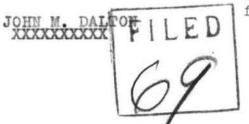
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M:lw

STATE PARK BOARD: CONSTITUTION: APPROPRIATIONS: State Park Board has no authority to convey property of State of Missouri. Sec. 3, sub-sec. 1, proposed Senate Bill No. 8, constitutional; however, Legislature must appropriate money from fund before State Park Board can expend same.



February 13, 1953

John C. Johnsen

Senator J. F. Patterson Chairman Committee on State Departments State Capitol Building Jefferson City, Missouri

Dear Senator Patterson:

This will acknowledge receipt of your request for an official opinion which reads:

"Please find enclosed copy of Senate Bill No. 8 relative to the creation of a State Park Board.

"We had the first hearing on this bill yesterday before the Committee on State Departments. I was requested to secure an opinion from you as to the power of the present Park Board to negotiate land transactions. I was further instructed to secure your opinion on Senate Bill No. 8 as to the legality of paragraph 1, section 3, pages 3 and 4 with reference to the expenditure of money by the proposed State Park Board on funds received from bequests. These inquiries are brought about because of privately owned lands being located within state park areas and some doubt as to the title of such property.

"The committee is withholding action on the bill until some of these questions are clear."

The State Park Board is a creature of statute and has only such authority as may be granted by an Act of the Legislature and such additional authority as may be necessary to carry out that granted by said statute.

In Ray County v. Bentley, 49 Mo. 236, 1.c. 242, the Court, in holding the county court was merely a creature of statute

Senator J. F. Patterson

and had only such powers given it by the Legislature, said:

" * * * The County Court does not derive its powers from the county, and it can exercise only such powers as the Legis-lature may choose to invest it with. Whatever jurisdiction is conferred upon it is wholly statutory. It acts directly in obedience to State laws, independently of the county. Where it acts for and binds the county, it exercises its authority by virtue of power derived from the State government, and it obtains authority from no other source. (Reardon v. St. Louis County, 36 Mo. 555.)"

The present State Park Board Act is very brief, consisting of merely two statutes, namely, Section 253.010, RSMo 1949, creating the State Park Board, and Section 253.020, RSMo 1949, specifying the powers and duties of said Board. Section 253.020 reads:

- "1. The state park board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said park board or the exercise of its powers hereunder necessary for the recreation of the people of the state of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the state highway commission.
- "2. Said park board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks.
- "3. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. All vouchers for the payment of bills or

Senator J. F. Patterson

for compensation shall be drawn and approved by the director of state parks and when presented to the state auditor shall be paid out of the funds appropriated for such purposes."

The foregoing provision vests in the State Park Board broad powers to acquire all necessary property, even to the extent of acquiring said property by eminent domain; however, it is conspicuous by its silence as to any authority to sell or dispose of any of its property. While said statute does vest in said Board power to make and promulgate all rules and regulations it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all State Parks, this in itself cannot possibly be considered authority to sell or dispose of State property.

Therefore, in the absence of any specific statutory or constitutional authority authorizing said Board to sell any State property, said Board cannot do so. The Legislature is the only body that has such authority and retains it until such time as it sees fit to delegate it to some State agency or the State Park Board.

You further inquire as to the legality of paragraph 1, Section 3, of proposed Senate Bill No. 8, with reference to the expenditure of money by said Board on funds received from bequests as provided in said section.

We assume that this inquiry is directed at the authority of said Board to expend said funds from such bequests without the necessity of first having such funds appropriated by the Legislature.

There can be no question as to the validity of that portion of said bill authorizing the State Park Board as the agency to accept said gifts and contributions or money or real or personal property. This has been done repeatedly and upheld by the Courts. Furthermore, the Legislature can also designate the fund to which such money may be placed and the purposes for which said gifts and bequests may be used, and provide that such can only be expended by the State Park Board. Section 15, Article IV of the Constitution of Missouri, indicates that the General Assembly may designate and allocate certain money and revenue of the State to certain funds.

In view of the foregoing, the only remaining question as to the validity of said section is whether the fund stands

Senator J. F. Patterson

appropriated or is it necessary for the General Assembly to appropriate money out of said Park fund before said Board may expend it for any purpose. The language used in this Section 1 is very clear. At first blush, we would be inclined to think that the General Assembly intended that it should be appropriated. However, Section 28, Article IV, Constitution of Missouri, provides that no money shall be withdrawn from the State Treasury except by warrant drawn in accordance with an appropriation made by law. Notwithstanding the foregoing constitutional inhibition, there may be exceptions to same, but only when excepted therefrom by constitutional amendment, such as Section 30, Article IV of the Constitution of Missouri, which provides that certain State revenue shall be credited to a special fund and stand appropriated without legislative action for certain specified purposes. The Court, in State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33, 1.c. 51, in construing Section Was of the Constitution of Missouri, 1875, which was similar to present Section 30, Article IV, Constitution of Missouri, said:

"Relator contends that Section Wa of Article IV of the Constitution appropriates, without further legislative action, money from the motor vehicle license taxes, for the payment of the maintenance of the State Highway Commission.

"The language thus sought to be construed by relator is as follows:

"'Any motor vehicle registration fees or license fees or taxes, authorized by law, except the property tax thereon, less the cost and expense of collection and the cost of maintaining any State Highway department or commission, authorized by law, shall, after the issuance of such bonds, and so long as any bonds herein authorized are unpaid, be and stand appropriated without legislative action for and to the payment of the principal and interest of said bonds, and shall be credited to a sinking fund to be provided for by law.' (See Sec. lula, Mo. Const.; Laws 1921, lst Ex. Sess., p. 196.)

"This provision makes no attempt to appropriate without legislative action, the

money to pay the maintenance expense of the Highway Commission. It does appropriate without further legislative action that portion of the money received from automobile license fees which remains after deducting the cost of collecting the tax and maintaining the Highway Commission, and it appropriates the remainder to the payment of the principal and interest of certain bonds. It makes no attempt whatever to appropriate without legislative sanction the amount needed for the expenses of the Commission. Who, therefore, is to determine the amount required to maintain the Highway Commission? Is this to be determined by the Highway Commission, unhampered by legislative permission, or by the Legislature in the regular way by an appropriation act?"

It is so well established that we deem it unnecessary to cite authority that the General Assembly cannot with any validity enact legislation in conflict with the Constitution of Missouri or the United States. So, in view of the foregoing, we are of the opinion that the bill is valid. However, while the money in said fund can be expended only by the State Park Board, it must first be appropriated by the General Assembly.

CONCLUSION

Therefore, it is the opinion of this department that under the present State Park Board Act, the State Park Board is vested with no authority to negotiate or convey any land of the State of Missouri. Further, Section 3, sub-section 1 of said proposed Senate Bill No. 8, is valid as to all provisions contained therein; however, said provision does not vest authority in said Board to expend the money placed in said Park fund without first being appropriated by the General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General OFFICERS: FEES AND SALARIES: SHERIFFS: Fees collected by sheriff for commitment of a person to jail must be charged and collected by him on behalf of the county.

March 11, 1953

XXXXXXXXXXX

JOHN M. DALTON



XXXXXXX

J. C. Johnsen

Honorable James L. Paul Prosecuting Attorney McDonald County Pineville, Missouri

Dear Sir:

Your letter of February 26, 1953, requesting an opinion has been received. Your question was stated as follows:

"There has been a question arise in this county as to who is entitled to the one dollar commitment fee on prisoners, the sheriff or the county."

Provision for payment of fee to sheriffs for commitment of persons to jail under certain circumstances is made by Section 57.290, RSMo. 1949, quoted, in part, below:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

* * * *

For committing any person to jail - - - \$1.00

* * * * . "

However, Article 6, Section 13, Mo. Constitution, 1945, provides certain limitations on the disposition of fees collected by state and county officers, and is quoted herewith:

"Compensation of Officers in Criminal Matters-Fees.--All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for

their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law."

(Underscoring ours)

Section 57.310, RSMo. 1949, specifies the total compensation for sheriffs of counties of class one. Section 57.330 provides for compensation of sheriffs in class two counties, and Section 57.370 provides disposition of fees collected by sheriffs in criminal matters in class two counties.

Provision for disposition of fees accruing to sheriffs of third and fourth class counties in connection with criminal matters is made by Section 57.410, RSMo. 1949, as follows:

"In all counties of the third and fourth classes, the sheriff shall charge and collect for and on behalf of the county every fee accruing to his office which arises out of his duties in connection with the investigation, arrest, prosecution, care, commitment and transportation of persons accused of or convicted of a criminal offense, except such criminal fees as are chargeable to the county. The sheriff may retain all fees collected by him in civil matters."

(Underscoring ours)

CONCLUSION

Therefore, it is the opinion of this office that the one dollar fee provided by Section 57.290, RSMo. 1949, accruing to the sheriff for committing a person to jail must be charged and collected by the sheriff on behalf

of the county.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

PM:mm

TAXATION:

Assessment lists cannot be added to the Assessor's book in class three counties after his book has ASSESSOR'S FEES: been turned over to the County Clerk.



January 31, 1953 /-3/-53

Honorable Elmer Peal Prosecuting Attorney Pemiscot County Caruthersville, Missouri

Dear Mr. Peal:

This will be the opinion you requested from this Department whether or not the Assessor of your county is entitled to fees for making a tangible personal property list for a citizen in 1952 for the previous year, when no tax list was made by the citizen in 1951, after the Assessor's book has been turned over to the County Clerk as required by law, and whether or not such Assessor is entitled to a fee for making a tangible personal property list for the same individual for the year 1952 itself, after the Assessor's book has been turned over to the County Clerk. Your letter requesting this opinion reads as follows:

"Obye Coker, Assessor, requested me to obtain your opinion as to whether or not he is entitled to a fee in the following cases:

"Where a person who was not assessed last year, and in order to obtain license tags for his car he must have a personal tax receipt, he voluntarily requests an assessment be made and the assessment is made, and the assessor has to make a supplemental or a return on the tax books, which have been turned over to the County Clerk as required by law. In such a situation is the assessor entitled to a fee.

"The other situation is the above person is assessed at the same time for this year, 1952. The books are in the hands of County Clerk, when the return is made after the books have been delivered to County Clerk is Assessor entitled to a fee?

"I am sure you see the situation and will cover the matter in all respects, I am,"

Your letter submits two questions respecting the right of an Assessor to fees under slightly different conditions of fact, but both questions must be subject to the positive condition stated in your letter that in each factual case the Assessor's book had been turned over to the County Clerk of your county before either of the recited assessments of tangible personal property of the citizen referred to were made by the Assessor. We believe, therefore, that both questions may well be, and they here will be, answered together.

Pemiscot County is a county of the third class, and we will consequently refer to the sections of our present revised statutes relating to third class counties, respecting the date when an Assessor of a third class county shall deliver his book to the County Clerk and what fees such Assessor may be entitled to and when he may collect such fees. Subsection 1 of Section 137.245, RSMo 1949, fixing the date when Assessors of third class counties shall deliver the assessment book to the County Clerk of such counties, reads as follow:

"1. The assessor, except in St. Louis city, shall make out and return to the county court, on or before the thirty-first day of May in every year, a fair copy of the assessor's book, verified by his affidavit annexed thereto, in the following words, to wit:

makes oath and says that he has made diligent efforts to ascertain all the taxable property being or situate, on the first day of January last past, in the county of which he is assessor; that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law."

Section 53.130, RSMo 1949, prescribing the compensation of Assessors in counties of the third class in Missouri, based upon the required recitals in the Assessor's book, reads as follows:

"The compensation of the county assessor in counties of the third class shall be forty-five cents per list, and each county assessor shall be allowed a fee of six cents

per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the third class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided, that nothing contained in this section shall be so construed as to allow any pay per name for the names set opposite each tract of land assessed in the numerical list."

Your letter states that, in compliance with the terms of that part of Section 137.245, quoted above, the Assessor's book, before the assessment for the citizen was made in 1952 for the year 1951, on certain tangible personal property described in your letter, and before the assessment of tangible personal property of the same individual was made in 1952 for the 1952 current year, had already been delivered to the County Clerk. It seems clear in reading Section 137.245, supra, and the affidavit required to be made by the Assessor in support thereof, that the Legislature intended in the enactment of such section that the duties of the Assessor imposed upon him in any fiscal year in making up his book should be fully complied with before turning the assessment book over to the County Clerk, on or before the 31st day of May of each fiscal year, and that his connection with and his authority over such books would then be at an end. We find no statute, or any part of any statute, giving the Assessor any authority, or the County Clerk, in behalf of the Assessor, any authority, to add property, unassessed while the book was in the hands of the Assessor, to such book after it reaches the custody of the County Clerk. The affidavit required to be made by the Assessor that his book contains a list of all property in his county, so far as he has been able to ascertain, adds support to our belief that the book must be completed and all assessment lists for that year be included in such book before May 31st of each year and before the book is turned over to the County Clerk, and that after which date and time neither the Assessor nor the County Clerk may add unassessed property thereto, and that, in such case,

there is no compensation due the Assessor for making such lists out of time and which are not in the book.

We believe, under the terms of Section 137.245, which requires that the Assessor's book must be turned over to the County Clerk on or before May 31st of each year, and under the terms of Section 53.130, which provides that the Assessor is entitled to compensation for assessing property listed and described in said book, and it further appearing that the two assessments noted in your letter had been made by the Assessor after his book had been turned over to the County Clerk, the Assessor is not entitled to compensation for either of such assessments.

It has become a trite saying in the decisions construing the statutes allowing fees to public officers for their services that they must base their claims for compensation upon a statute permitting it. Our Supreme Court in the case of Nodaway County vs. Kidder, 129 S.W. (2d) 857, considering such a case, l.c. 860, said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

CONCLUSION.

It is, therefore, the opinion of this Department that, considering the premises, the Assessor of Pemiscot County is not entitled to compensation for making an assessment list in 1952 for an individual on tangible personal property not assessed in 1951, said assessment being made after the current 1952 assessment book had been turned over to the County Clerk of said county, and neither is the said Assessor entitled to compensation for making an assessment list for the same individual in 1952 for the fiscal year of 1952, where such last

named assessment is made after the Assessor's book for 1952 has been turned over to the County Clerk of said county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General MERIT SYSTEM:

DEDUCTIONS FROM WAGES:



The Superintendent of the St. Louis State Hospital does not have the authority to deduct the sum of \$\phi 9.00 per month, for the noon meal, from the salaries of day employees, unless such deduction was made a condition of employment and unless such employees are required to take such meal at the hospital.

February 9, 1953

Honorable Robert Pentland Senator First District Missouri Senate Capitol Building Jefferson City, Missouri

Dear Senator:

This department is in receipt of your request for an official opinion. You thus state your request:

"The following situation has arisen at the St. Louis State Hospital. The Director of the hospital has required that all employees of the hospital, on day shifts pay \$9.00 each month for one meal per day at the hospital without reference to whether the employees take, or wish to take any meals there at all. This is completely aside from those employees who live on the premises and have indicated their desire to take all of their meals at the hospital, and also aside from those employees who do not live on the premises but have nevertheless indicated their desire to take the one meal. The \$9.00 is deducted from the wages of all the employees, so that they have no choice in the matter whatsoever. Some of these employees live quite near the hospital and prefer to have their noon meal at home, and in fact do take this meal at home. Some of the employees have compelling reasons for having lunch there, such as the necessity of preparing lunch for an invalid husband at home.

"In view of Section 36.140 of the 1949 Revised Statutes, which provides that

'each employee appointed to a position subject here to after the adoption of the pay plan shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed, it would seem that this policy is illegal since it results in the employee receiving less for his wages than set forth in the pay plan without any compensating benefit.

"Accordingly, I am requesting your opinion upon the following points:

- "1. Whether an Appointing Authority, namely, the Director of the St. Louis State Hospital, has the legal power to take deductions from the wages of employees without their consent, for services which the employees do not want and which they do not accept.
- "2. Whether the Personnel Advisory
 Board, or other officials, of the Personnel Division of the State Department
 of Business & Administration has the
 legal power to authorize an Appointing
 Authority, namely, the Director of the
 St. Louis State Hospital, to take deductions from the wages of employees
 without their consent, for services
 which the employees do not want and
 which they do not accept."

Since receiving the above, you have informed us, orally, that these deductions were begun in the latter part of September or the early part of October, 1952; that they were enforced upon persons already employed; and that at the time of employment these deductions were not made a condition of employment.

Our approach to this problem will begin with the general, and certainly uncontroverted, observation that in order for deductions to be properly taken from the wages

of employees of the St. Louis State Hospital, the person or agency making such deductions must have clear-cut legal authority for doing so. Our search of the laws of Missouri relating to the management of state institutions, such as the St. Louis State Hospital, has not been productive of our finding any specific authority vested in the superintendent of such institution to make the specific deduction which you mention, under the circumstances which you set forth.

Section 36.140, RSMo 1949, to which you direct our attention, reads as follows:

"After consultation with appointing authorities and the state fiscal officers, and after a public hearing, the director shall prepare and recommend to the board a pay plan for all classes subject to this law. Such pay plan shall include, for each class of positions, a minimum and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing such rates, the director shall give consideration to the experience in recruiting for positions in the state service, the rates of pay prevailing in the locality for the services performed, and for comparable services in public and private employment, living costs, maintenance, or other benefits received by employees, and the financial condition and policies of the state. Such pay plan shall take effect when approved by the board and each employee appointed to a position subject hereto after the adoption of the pay plan shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed. The pay plan shall also be used as the basis for preparing budget estimates for submission to the legislature in so far as such budget estimates concern payment for services performed in

positions subject here to. Amendments to the pay plan may be recommended by the director from time to time as circumstances require and such amendments shall take effect when approved by the board. The conditions under which employees may be appointed at a rate above the minimum provided for the class, or advance from one rate to another within the rates applicable to their positions, shall be determined by the regula tions."

(Underscoring ours.)

The underlined portion of the above section is clear and plain, and, as we noted above, any legal and proper deviation from it would need to be supported by a statute equally plain and clear. As we also stated above, we do not find such a statute.

In our consideration of this matter we have explored the possibility of such a deduction as you mention coming under the general administrative powers of the Superintendent of the St. Louis State Hospital. And we had the thought that if, in the opinion of the Superintendent, it was necessary, for the proper functioning and operation of the hospital, that day employees take the noon meal at the hospital, that it might properly lie within his powers to make such a requirement and to make a deduction therefor. We felt that such a conclusion would be strengthened if the taking of the noon meal at the institution, and a salary deduction therefor, were made a condition of employment. However, this theory becomes untenable in view of your statement, supra, that "Some of these employees * * * in fact do take this meal at home," which means that the Superintendent, while making the meal deduction from all employees on the day shift, does not require them to take the noon meal at the hospital, which explodes the theory that the taking of the noon meal at the hospital is, in the opinion of the Superintendent, necessary for operational efficiency. Since the Superintendent does not require all day employees to take the noon meal at the hospital, apparently giving all day employees their option in the matter, it is obvious that he does not take the deduction for the noon meal on the ground that the taking of this meal at the hospital is necessary for administrative efficiency.

Neither is there any showing that the taking of this meal has been made a condition of employment. Indeed, the contrary appears to be the case, i.e., that it was not a condition of employment but was apparently enforced upon persons already employed, and that it has not been made a condition of employment as to persons employed since the deduction plan went into effect.

As we stated above, in order for the Superintendent of the St. Louis State Hospital to make the deduction in question, his authority for doing so must be clear and plain. Not only do we fail to find any authority vested in him or in any other state agency for so doing, but we also fail to find any tangible theory or general grant of power which would enable him, or any state agency, to do this, in view of the facts and circumstances stated to us by you.

CONCLUSION.

It is the conclusion of this department that the Superintendent of the St. Louis State Hospital does not have the authority to deduct the sum of \$9.00 per month, for the noon meal, from the salaries of day-employees, unless such deduction was made a condition of employment and unless such employees are required to take such meal at the hospital.

It is the further opinion of this department that the Personnel Advisory Board or other officials of the Personnel Division of the State Department of Business and Administration does not have the legal power to authorize an appointing authority, namely, the Director of the St. Louis State Hospital, to take deductions from the wages of day employees under the circumstances set forth above.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General STATE FORESTRY LAW: TAXATION:

Owner must pay taxes carried against the land if forest cropland is removed from said classification.



February 24, 1953

Honorable Hugh Phillips Prosecuting Attorney of Camden County Camdenton, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads in part as follows:

"I am requesting an opinion from your office on certain items under the State Forestry Law, Chapter 254.

"Recently, lands in this County which were classified as Forest Crop Lands were sold. The new owner by his use of the lands is to be cancelled by Missouri Conservation Commission from the classification. Contention is made that since cancellation is being made he does not now owe the County Collector of this County for those taxes which have been carried forward each year on the County Tax Book.

"The question then is:

"Is the owner of lands which have been classified as Forest Crop Lands obligated and indebted to the County where such lands are located when the classification is removed by cancellation by the Missouri Conservation Commission and removal is not his own request even though it is by his own deliberate acts that removal is necessary. Are these sections in conflict?"

Honorable Hugh Phillips

The inquiry which you make involves an interpretation of the State Forestry Law as contained in Chapter 254, RSMo 1949. Under the provisions of this chapter a person may have his lands classified as forest croplands upon application to, and approval of the conservation commission, thereafter, a transfer of ownership of such lands shall not of itself affect its classification, Section 254.060, RSMo 1949.

During the time that lands are classified as forest croplands they shall receive partial relief from taxation. Section 254.080, reads as follows:

"Any lands approved and classified by the commission as forest croplands as defined in this chapter shall receive partial relief from taxation, as provided in said chapter, during a period or periods of time not to exceed twenty-five years in any instance."

Section 254.090 specifies the partial relief by providing that forest croplands shall be assessed at one dollar per acre and taxed at the local rates. This section provides:

"During the time any such lands are classified as forest croplands under this chapter they shall be assessed for general taxation purposes at one dollar per acre and taxed at the local rates of the county wherein the lands are located."

Section 254.220 provides that the regular tax levy shall be carried out so that in the event the owner wishes to remove his lands from the classification he may do so by paying all taxes due as carried in the collector's book, less taxes paid under Section 254.090, supra, plus a penalty equivalent to five per cent interest thereon. This section reads:

"The assessor shall carry the assessment of all forest cropland on the assessor's book and the county clerk shall carry out the tax levy as levied by the different political subdivisions which are entitled to levy taxes on said forest land. The collector shall keep all records of all taxes due on said forest lands so that in the event the owner of such lands may desire to remove his land from the forest class, he may do so by paying all of the taxes carried against the land based on the assessment plus a penalty equivalent to

five per cent interest thereon, less taxes paid as set up by section 254.090. Whenever this is done by the owner such land shall automatically be dropped from the forest cropland class."

Thus, it is seen that taxes are levied against such lands and entered in the tax books based upon the ordinary and regular assessed valuation although the owner is liable only for taxes based upon an assessed valuation of one dollar per acre due to the partial tax levy provided by this chapter.

You state that lands which were classified as forest croplands have been or will be dropped from this classification by the conservation commission because the owner had failed to maintain proper forest conditions and practices consistent with the purpose of the law, and inquire what taxes the owner will be liable for. Section 254.200 provides for such cancellation and reads as follows:

- "1. When any lands have been so classified the classification shall be continued as long as proper forest conditions and practices are maintained and continued thereon, and for such periods of time as do not exceed the provisions of this chapter.
- "2. Use of such lands for pastures, destruction of tree-growth by fire and failure of owner to restore forest conditions, removal of treegrowth and use of land for other purposes, or any changed condition which in the opinion of the commission shall show that the requirements of this chapter are not being fulfilled, or the use of such lands for pasture in violation of any regulations promulgated by the commission shall be sufficient ground for the cancellation of such classification. If the commission find the provisions of this chapter are not being complied with, it shall forthwith cancel the classification of such lands, sending notice of such cancellation to the assessor, the county clerk of the county in which the land is situated and to the owner of such lands. Such lands shall thereafter be taxed as other lands."

It is fundamental in the interpretation of statutes that effect must be given to the legislative intention as indicated by the language used, and the object and purpose of the act, City of St. Louis v. Pope, 344 Mo. 479, and that portion of an act which are in pari materia are

to be construed together, State ex rel. McKittrick v. Carolene Products, 346 Mo. 1049.

Following the above noted rules of construction and considering together Sections 254.210 and 254.220, we are of the opinion that where a person's classification has been cancelled by virtue of the authority vested in the conservation commission by Section 254.200, the owner is liable for the taxes carried in the tax book less the amount that has been paid under Section 254.090, for Section 254.210 specifically provides that the reimbursement to the state for grants to the county in lieu of taxes which shall be in addition to any annual taxes which may have been paid or "may be collected." It would be absurd to presume that the legislature intended to place a premium upon a wilfull violation of the provisions of this chapter to secure cancellation rather than a voluntary request.

CONCLUSION

Therefore, it is the opinion of this office that where lands classified as forest croplands are removed from such classification by the conservation commission for failure to maintain proper forest conditions and practices, the owner is liable for taxes carried in the tax book, less taxes already paid under the partial relief from taxation provision of the State Forestry Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant. Mr. D. D. Cuffey.

ry truly yours,

JOHN M. DALTON Attorney General

DDG:hr

LICENSES: PEDDLERS:

Bakery products such as cakes, bread, etc. are not "Agricultural and Horticultural Products" under the exception in Sec. 150.470, RSMo. 1949.

The term "land carriage" used in paragraph 3 of Sec. 150.500RSMo. 1949 would include motor vehicles

JOHN M. DALTON

May 18, 1953



XXXXXXX

J. C. Johnsen

Mr. John P. Peters Prosecuting Attorney Linn, Missouri

Dear Mr. Peters:

We are acknowledging receipt of your request for an opinion as follows:

"I write to inquire, if the Exception mentioned in Section 150.470, Statute relating to Peddlers, would include bread, cakes, muffins cinnamon Rolls, and Bakery Products Generally, as "Agricultural and Horticultural products". Also would a Motor Vehicle, used in such business, be a "Land Carriage" within the meaning of the subdivision, of the Statute, fixing rates for Licenses of Peddlers."

You first inquire whether persons who sell Bakery Products such as cakes, bread, etc. would come under the exception as "Agriculture and Horticulture Products" under Section 150.470, RSMo. 1949.

In Getty v. Barnes Milling Co., 19 Pac. 617, 618 the court said:

"The product of agriculture is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural unmanufactured condition, as cotton is a product of agriculture: yet cotton cloth or other fabrics made from cotton could hardly be termed 'Agricultural products'." In St. Louis Rose Co. v. Unemployment Compensation Commission, 159 S.W.(2d) 249, 250, our Supreme Court defines Horticulture as "The cultivation of a garden or orchard: the science and art of growing fruits, vegetables and flowers or ornamental plants. Horticulture is one of the main divisions of agriculture."

Also, in Crawley v. State, 195 S.E. 453, 57 Ga. App. 376, it is held that "Groceries and candy are not 'agricultural products' within a statutory exemption of seller of such products from the necessity of obtaining a peddler's license."

It would appear from the foregoing that bread, cakes, muffins, etc. are not "Agriculture and Horticulture Products" within the meaning of the statute. They are manufactured articles and are not products in their natural unmanufactured condition.

You next inquire whether a motor vehicle is a "land carriage" under provisions of paragraph 3 of Section 150.500 RSMo. 1949.

It is generally held that a motor vehicle is a "carriage" under exemption laws allowing a head of a family a carriage as exempt. Willis v. Schoelman, 206 S.W.(2d) 283, Texas; Heckman v. Heckman, 234 S.W.(2d) 410, 414, Texas.

CONCLUSION

It is therefore our opinion that:

- 1. Bakery products such as cakes, bread, etc., are not "Agricultural and Horticultural Products" under the exception in Section 150.470, RSMo. 1949.
- 2. The term "land carriage" used in paragraph 3 of Section 150.500, RSMo. 1949, would include motor vehicles.

This opinion, which I hereby approve was written by my assistant Mr. Frank W. Hayes.

Yours very truly,

JOHN M. DALTON Attorney General COSTS: CRIMINAL: MAGISTRATE COURT: Costs for services rendered by reporter or stenographer in transcribing testimony in a homicide case under Section 544.370, Vernon's Annotated Missouri Statutes shall be taxed as costs in the case.



September 14, 1953

Honorable Richard K. Phelps Prosecuting Attorney Jackson County Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion as to whether or not the costs for transcribing of testimony of all homicide cases as incurred pursuant to Section 544.370, RSMo 1949, shall be taxed as costs of the criminal case in which they were incurred.

Section 544.370, Vernon's Annotated Missouri Statutes reads:

"544.370. Homicide, written evidence. In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

Under Section 485.150, Vernon's Annotated Missouri Statutes, a magistrate may appoint a stenographer or reporter to write and certify evidence of witnesses in homicide cases and further provides for a fee for such services to be taxed as costs and paid as other costs in the case. Section 485.150, supra, reads as follows:

"Bach magistrate may appoint a competent stenographer or reporter to write and certify evidence of witnesses in cases of homicide and such stenographer shall be allowed a fee of fifteen cents for Honorable Richard K. Phelps:

every one hundred words and figures. Such fee shall be taxed as costs and paid as other costs in the case."

CONCLUSION

It is, therefore, the opinion of this department that the costs for transcribing testimony of homicide cases as incurred under the provisions of Section 544.370, Vernon's Annotated Missouri Statutes, shall be taxed as costs by virtue of said Section 485.150, Vernon's Annotated Missouri Statutes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARHjr:mv

CRIMINAL COSTS: STATE: State not liable for costs of transcript, on appeal, ordered by trial court under Section 485.100, RSMo 1949, when defendant had not properly perfected an appeal.



September 16, 1953

Honorable Richard K. Phelps Prosecuting Attorney Jackson County Kansas City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion which reads, in part, as follows:

"In the criminal case of State vs. Jesse W. Smith, tried in Division No. 7 of the Circuit Court of Jackson County, Missouri, before the Honorable Ray G. Cowan, an affidavit for appeal in forma pauperis was filed out of time by the defendant. At the time said appeal was taken the trial court directed the court reporter to prepare a transcript of the record of trial. The Supreme Court refused to entertain the appeal because it was not timely filed. Subsequently the Comptroller and Budget Director declined to pay a bill in the amount of \$92.20, submitted by the court reporter, for the cost of preparing said transcript, on the ground that the bill had accrued after the time allowed by statute for taking an appeal.

"QUERY: Under Section 485.100, Revised Statutes of Missouri, 1949, is the State of Missouri liable for the cost of preparing a transcript of the record in a criminal case where the appeal in forma pauperis was filed out of time by the defendant, and the reporter preparing said transcript was directed to do so by the trial court?"

Honorable Richard K. Phelps:

Section 485.100, RSMo 1949, provides that any judge may, in his discretion, order a transcript made and the state shall pay the costs of same where the defendant takes an appeal and is unable to pay such costs. Said section reads:

"Each court reporter shall also receive from any person or persons ordering transcripts of his notes the sum of fifteen cents per folio of one hundred words, each four figures to be counted as one word; and any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use. and the court reporter's fees making the same shall be taxed in the same manner as other costs in the case; provided, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of his notes of the evidence, for one of which he shall receive fifteen cents per hundred words, and shall receive no compensation for the other."

The case in question was appealed to the Supreme Court and a decision was rendered by that court in State vs. Smith, 242 S.W. (2d) 515. The court dismissed the appeal and, as grounds for said dismissal, it held that no appeal was applied for within the time provided by statute, namely, Section 547.040, RSMo 1949, and that no writ of error was applied for or issued within the time fixed by statute or rule of court, therefore the court had no jurisdiction of said appeal.

In view of this decision, there is no need to go into the validity of the application and affidavit for appeal since the Supreme Court has already ruled that it was not valid.

Honorable Richard K. Phelps:

The question now raised, is the state liable for cost of said transcript in view of the foregoing decision.

It is well established that a county or state does not become liable for any unauthorized act of a public official; that persons dealing with any public official are chargeable with knowledge of the extent of their authority and are bound, at their peril, to ascertain and determine whether the public official is acting within the power conferred upon him by the statutes and Constitution of the State of Missouri.

Under the foregoing statutory provisions, Section 485.100, supra, the court was vested with discretionary power and it was not mandatory upon him to order a transcript in any case wherein the defendant had not fully complied with the statutory procedure for perfecting an appeal to the Supreme Court. Under the foregoing decision, at the time the defendant filed his application and affidavit for appeal in forma pauperis in the Circuit Court, the time for filing a motion for new trial and application and affidavit for appeal had lapsed. The law, at that time, required the defendant to file a motion for new trial and application and affidavit for appeal during the same term of court at which the judgment was rendered. See Section 547.070, RSMo 1949.

In view of the fact that the time had lapsed for perfecting an appeal in this case, we question whether the trial court properly exercised its authority in ordering said transcript for the defendant.

Notwithstanding the statute did provide that the trial court, in its discretion, may order a transcript and the state pay the costs of same, in construing the laws, one must consider all sections that are applicable and if we consider Sections 547.070 and 547.080, RSMo 1949, in effect at the time, along with Section 485.100, supra, then certainly it was never the legislative intent, in enacting the latter referred to section, that the Circuit Judge could order a transcript at costs to the state when the defendant had failed to file a motion for new trial and application and affidavit for appeal as provided by statute, as it would avail the defendant nothing and cost the state unnecessary expenses. In this instance, the court should not have ordered the transcript for the reason that the defendant, under the law at the time, could not possibly perfect an appeal. It is quite possible the act of the

trial court, in ordering said transcript, was motivated by an erroneous interpretation of the law as finally determined in this case by the Supreme Court and it is unfortunate if this court reporter, acting upon orders by the court, prepared said transcript and now cannot be compensated by the state.

In Elkins-Swyers Office Equipment Company v. Moniteau County, 209 S. W. (2d) 127, 357 Mo. 448, the court held public officials' unauthorized acts, as distinguished from an individual agent, within apparent scope of his authority, are not binding on the sovereign as principal. In Etna Insurance Company v. 0'Mally, 124 S. W. (2d) 1164, 343 Mo. 1232, 1. c. 1166, the court held that in order for a state officer to enter into a valid contract, he must be so empowered by either the Constitution or statute, and reads, in part, as follows:

"(4-7) Did the superintendent of insurance have the authority to employ the respondents in these restitution proceedings? Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their paril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. State v. Bank of the State of Missouri, 45 Mo. 528; State to the Use of Public Schools, etc., v. Crumb, 157 Mo. 545, 57 S. W. 1030; State ex rel. Blakeman v. Hays, 52 Mo. 578; State v. Perlstein, Tex. Civ. App., 79 S. W. 2d 143; 59 C. J., Section 285, page 172, section 286. In the last citation the author says: 'Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the Legislature. * * *

It has been well established that persons dealing with state officers are chargeable with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. See Sager v. State Highway Commission, 160 S. W. (2d) 757, 1. c. 763, 349 Mo. 341; State ex rel. Blakeman v. Hayz, 52 Mo. 578; and Sugg v. Wisconsin Lumber Company, 263 Fed. 290.

We are not unmindful of the fact that there is some limited authority to the effect that where power or jurisdiction is delegated to a public official or tribunal over a subject matter and its exercise is confined to his discretion, the act so done is generally binding and valid as to the subject matter. See Belcher v. Linn, 65 U. S. 508, 24 How. 508, 17 L. Ed. 754. However, we believe that in view of the foregoing statutes clearly showing that the defendant had not complied with the statutory requirements for perfecting his appeal which fact is undisputable in view of the decision rendered by the Supreme Court in State v. Smith, supra, that the court should have taken cognizance of these statutes in exercising his discretionary authority that to a certain extent these statutes limited his discretionary authority in ordering a transcript at the cost of the state. While it is unfortunate, in this instance, to so hold that the state cannot pay for this transcript in view of the fact it will work a hardship on this particular reporter, we are of the opinion that is the proper construction to place upon the authority granted under Section 485.100, supra.

CONCLUSION

It is the opinion of this department that while the trial judge was vested with discretionary power to order a transcript in a criminal case for the defendant at the cost of the state when the defendant was unable to pay for same, in view of the fact the defendant had failed to file a motion for new trial and application and affidavit for appeal during the term at which the judgment was rendered, as required by law, that the court in so ordering the transcript exceeded his authority and that the state is not liable for the cost of said transcript.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours.

JOHN M. DALTON Attorney General APPROPRIATIONS: CONSTITUTIONAL LAW: GOVERNOR: SCHOOLS: Appropriation for M. U. Medical and surgical school is valid and Governor's attempted partial veto of bill does not render appropriation unconstitutional.

Opinion No. 71

January 21, 1953

Mr. Elmer L. Pigg State Comptroller and Director of the Budget Department of Revenue Jefferson City, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department, which reads as follows:

"I am enclosing a copy of a letter from Robert L. Jackson, attorney of Kansas City, Missouri, in which he questions the constitutionality of Section 10.860 of House Bill 496, which appropriates \$6,000,000 for the construction of a four year medical school. This letter was addressed to Mr. Morris, Mr. Bates, Mr. Holmes and myself. In conference this afternoon it was agreed by all that we request your official opinion as to the question raised in the letter.

"The officials of the University have filed in my office a requisition to encumber the appropriation in Section 10.860, House Bill No. 496, in the amount of \$62,600.00 for grading, plumbing, excavation and footings to the teaching hospital. Also a requisition for \$2,791.96 for architect fees to be charged against the appropriation..

"Your official opinion is requested as to the constitutionality of the appropriation and whether the account can be legally encumbered and payments made out of it."

Mr. Elmer L. Pigg

The Sixty-sixth General Assembly enacted appropriation bills for the biennium July 1, 1951 to June 30, 1953. Among these appropriation bills was House Bill No. 496, which contained the item of appropriation in question here. House Bill No. 496 (Laws of Missouri, 1951, page 250) was a general appropriation bill containing one hundred and three sections making appropriations for a large variety of purposes. One of the sections, namely, Section 10.860, Laws of Missouri, 1951, page 250, of this bill appropriated out of the State Treasury, chargeable to the Postwar Reserve Fund, the sum of \$6,000,000.00 for the use of the Board of Curators of the University of Missouri for establishing and maintaining a four-year medical and surgical school. The said Section 10.860, as passed by both houses of the Legislature, reads as follows:

"Section 10.860. Board of Curators, Missouri University -- for the purpose of establishing and maintaining a fouryear medical school. There is hereby appropriated out of the State Treasury, chargeable to the Postwar Reserve Fund, the sum of Six Million Dollars (\$6,000, 000.00) for the use of the Board of Curators of the University of Missouri for the purpose of establishing and maintaining a four year medical and surgical school, including the purchase or acquisition of necessary land, the construction or acquisition of necessary buildings, the purchase of necessary equipment, and for the cost of operating such school, including the compensation of necessary instructors and personnel for the period beginning July 1, 1951 and ending June 30, 1953.

The Governor endorsed his approval of this general appropriation bill on May 29, 1952, after the sine die adjournment of the Sixty-sixth General Assembly on April 30, 1952.

The Governor's approval of House Bill No. 496 reads as follows:

"Approved this 29th day of May, 1952, as to all items except as to those items and portions of items vetoed and disallowed

as set forth in my message dated May 29, 1952, hereto attached and made a part hereof.

Forrest Smith Governor."

In approving House Bill No. 496 the Governor vetoed and disapproved several items of the bill in their entirety. With respect to Section 10.860, the Governor in approving said section undertook to exclude and disapprove the words "including the purchase or acquisition of necessary land."

The partial disapproval of said section was contained in a message filed with the Secretary of State under date of May 29, 1952, and which, in part, reads:

"My belief in the principle of establishing a medical school forbids me from raising a hand even against this beclouded effort of the General Assembly. It is apparent to me, however, that the dilemna is further accentuated by the fact that the meager amount appropriated in this section not only calls for the erection, equipping and maintenance of the medical and surgical school, but it authorizes the purchase and acquisition by the Curators of additional real estate. With the Sixty-Seventh General Assembly scheduled to convene only seven months hence, which could well consider the expediency of further extensive real estate purchases, I do not believe it to be wise or feasible to spend any part of this small appropriation for land. The appropriation can better be spent in establishing the school itself. Consequently, I am approving, in this section, the \$6,000,000.00 made to the Curators of the University of Missouri for the purpose of establishing and maintaining a four-year medical and surgical school but I am excluding, striking out, and disapproving from this section, in lines six (6) and seven (7), the following words, including the purchase or acquisition of necessary land, '.

The validity of the Governor's action in disapproving the words "including the purchase or acquisition of necessary land" and the validity of the appropriation provided by Section 10.860 have been questioned.

You state that the officials of the University have filed in your office a requisition to encumber the appropriation in question in the amount of \$62,600.00 for grading, plumbing, excavation and footings contracted for in connection with the construction of the teaching hospital. Also, a requisition for \$2,791.96 for architect fees to be charged against the appropriation. Because of the questions which have been raised regarding the validity of the appropriation in question, you have requested the opinion of this department regarding the constitutionality of the appropriation and whether the account can be legally encumbered and payments made out of it.

At the outset, we direct your attention to the fact that the site of the building to be constructed is at Columbia, Missouri, upon land owned by the Curators of the University. No attempt has been made to purchase or acquire land, and the Board of Curators is not challenging the action of the Governor in disapproving the particular part of Section 10.860.

Assuming that the Governor's partial veto was constitutional and valid, the remainder of the section and the appropriation contained therein stands approved. Therefore, the Curators could validly encumber the appropriation for the purpose of constructing a medical and surgical school on land presently owned by the University.

Without deciding the question, but assuming that the Governor's partial disapproval of the section in question was invalid and unconstitutional, we are confronted with the problem of determining the effect of said invalid action upon the particular appropriation. In other words, if the invalid partial disapproval of the Governor would operate to invalidate the entire appropriation contained in Section 10.860, then it could not be encumbered. On the other hand, if the partial disapproval, though invalid, would be ineffectual and a nullity, the appropriation would stand approved without the limiting language of the Governor's disapproval.

Therefore, the basic question to be determined is the effect of the Governor's partial disapproval of the appropriation, assuming that said partial disapproval was invalid.

The authority which the Governor attempted to exercise in excluding and disapproving the portion of the appropriation in question was undoubtedly based on the provisions of Section 26 of Article IV of the Constitution of Missouri, which reads:

"The governor may object to one or more items or portions of items of appropriation of money in any bill presented to him, while approving other portions of the bill. On signing it he shall append to the bill a statement of the items or portions of items to which he objects and such items or portions shall not take effect. If the general assembly be in session he shall transmit to the house in which the bill originated a copy of the statement, and the items or portions objected to shall be reconsidered separately. If it be not in session he shall transmit the bill within forty-five days to the office of the secretary of state with his approval or reasons for disapproval. The governor shall not reduce any appropriation for free public schools, or for the payment of principal and interest on the public debt."

Many other states have a similar constitutional provision as that above quoted, and the appellate courts of other states have had occasion to determine the Governor's authority under such a constitutional provision and to determine the effect of the Governor's action on any appropriation where his partial disapproval was invalid as being unauthorized by the Constitution.

There are no Missouri cases bearing on this problem, but the weight of authority seems to be that, where the Governor's attempted disapproval of part of an appropriation bill is invalid because of the lack of constitutional authority, his action is ultra vires, ineffectual and a nullity and the appropriation stands approved. Peebly v. Childers, 95 Ok. 40, 217 P. 1049; Stong v. People, 74 Colo. 283, 220 P. 999; State v. Forsythe, 21 Wyo. 359, 133 P. 521; Porter v. Hughes, 4 Ariz. 1, 32 P. 165; Commonwealth v. Dodson (Va.), 11 S.E. (2d) 120; In Re Opinion of the Justices, 294 Mass. 616, 2 N.E. (2d) 789; Fergus v. Russell, 270 Ill. 304, 110 N.E. 130; Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405.

In the case of Fergus v. Russell, supra, there was an appropriation of \$2,500.00 per annum for the publication of decisions of the court of claims. The Governor disapproved a portion of the appropriation by striking out the words "per annum." The constitutional provision provided that "if the Governor shall not approve any one or more of the items or sections contained in any bill, but shall approve the residue thereof, it shall become a law." The Supreme Court of Illinois held that the attempted veto was invalid and in declaring the effect thereof stated at N.E. l.c. 148:

" * * * The action of the Governor in attempting to veto portions of the various items indicated in the veto message was void and without any effect whatever. Those items remained valid enactments just as though the Governor had expressly approved of them or had allowed them to become a law without his approval."

In Fulmore v. Lane, supra, the Texas Constitution provided that "if any bill presented to the Governor contains several items of appropriation, he may object to one or more of such items, and approve the other portion of the bill." An appropriation was made for the Attorney General's office, and said bill further provided the manner in which said appropriation was to be expended. The Governor had vetoed this part of the bill. The court held that the Governor had no power to veto a portion of a bill or language qualifying an appropriation or directing the method of its use. In declaring that the veto of the Governor was unauthorized, the court further held that it was therefore ineffective and that the part of the bill attempted to be stricken out would remain as a part of the appropriation. Thus, at S.W. 1.c. 412, the court said:

" * * * It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its uses, becomes noneffective. So that we are constrained to hold that that portion of the veto message contained in subdivision 3 of the statement of objections appended to the appropriation bill and filed in the office of the Secretary of State was unauthorized, and therefore noneffective, and the paragraph so attempted to be stricken out will remain as a part of the appropriation bill. * * *"

In the case of Peebly v. Childers a salary appropriation bill for the University of Oklahoma had been reduced by the Governor from \$700,000.00 to \$500,000.00. The constitutional provision gave the Governor authority to disapprove an appropriation bill or any item therein contained, and provided that he was to communicate such disapproval to the house in which the bill originated, but that all items not disapproved would have the force and effect of law. In holding the Governor's disapproval invalid, and declaring the effect thereof, the court, at P. 1.c. 1052, 1053, said:

"On the other hand, the Attorney General and his assistants, counsel for the Regents of the University of Oklahoma, and several of the lawyers briefing the case amicus curiae, present numerous well-considered cases from other jurisdictions having constitutional provisions similar to our section 12, holding that, where the Governor attempts to approve in part and disapprove in part distinct items contained in an appropriation bill, such attempted disapproval is void and without effect, and such items remain valid enactments, as though the Governor had expressly approved them or allowed them to become a law without his approval.

"The following are some of the cases so holding: * * *

"We have examined the cases cited with considerable care, and find that they are in point and support the proposition of law just stated. These cases constitute the great bulk of case law upon the question now under consideration. They are all based upon the theory that, under our

form of government, the Constitution is a limitation upon the power of the legis-lative department of government, but is to be regarded as a grant of power to the other departments. Therefore, they conclude neither the executive nor the judiciary can exercise any authority or power, except such as is clearly granted by the Constitution, and where a claim of power is advanced by the executive, the question is not whether the power in question has been granted to the people, but whether it has been granted to the executive, and if the grant cannot be shown, he has no title to the exercise of the power.

"This reasoning we think is sound as applied to our Constitution, and leads to the conclusion that the action of the Governor in attempting to approve in part and disapprove in part the distinct items of an appropriation bill was without constitutional warrant, and therefore ineffectual for any purpose."

In the case of Commonwealth v. Dodson, supra, the Governor had vetoed certain parts of an appropriation bill, which the court held to be conditions or restrictions rather than items and that the Governor was without authority to veto them. In declaring the effect of the Governor's veto, which the court said was invalid, it was said at S.E. (2d) 1.c. 134:

"In the conservation and development of its physical resources the Commonwealth of Virginia is a great business corporation. To wipe away this appropriation bill under which it has and is operating would throw its fiscal affairs into undesirable confusion. This as a consequence should be avoided if there be any avenue of escape. We therefore reach the conclusion that these unconstitutional vetoes did not invalidate the budget bill as a whole, which, as we have seen, has been unconditionally approved."

In the above case there had been an approval by the Governor of an appropiration bill similar to the approval given to the bill we are considering.

Perhaps the case nearest in point to the situation we are considering is that of In Re Opinion of the Justices, supra. In that case there had been an appropriation of \$100,000.00 for the payment of certain expenses with the condition that not less than \$50,000.00 were to be spent for specific purposes. This part of the bill the Governor undertook to disapprove. The constitutional provision of the State of Massachusetts provided that "the Governor may disapprove or reduce items or parts of items in any bill appropriating money. So much of such bill as he approves shall upon his signing the same become law. As to each item disapproved or reduced, he shall transmit to the house in which the bill originated his reason for such disapproval or reduction, and the procedure shall then be the same as in the case of a bill disapproved as a whole." In holding the Governor's partial veto invalid, and declaring the effect thereof, the court, at N.E. 1.c. 790, 791, said:

> " * * * No power is conferred to change the terms of an appropriation except by reducing the amount thereof. Words or phrases are not 'items or parts of items.' This principle applies to the condition attached to the appropriation now in question. That condition is not an item or a part of an The veto power conferred upon the Governor was designed to enable him to recommend the striking out or reduction of any item or part of an item. In the present instance His Excellency the Governor did not undertake to veto the appropriation of \$100,000 made by item 101, or any part of it, nor to reduce that amount or any part of it apportioned to a specific purpose. He sought, rather, as shown by his message, to enlarge the appropriation made by the General Court by throwing the \$100,000 into a common fund to be used for any one of several different purposes, We are of opinion that the power conferred upon him by said article 63 does not extend to the removal of restrictions imposed upon the use of the

items appropriated. It is plain that no other provision of the Constitution confers power upon the Governor to disapprove the condition attached to the item in question.

"The result is that the disapproval of that condition was a nullity. That is the only disapproval expressed in the message.

* * * * * *

"The question then arises whether item 101 of the general appropriation bill has become law with the condition attached. Since the disapproval of the condition was without effect, the general approval of the act gave it validity. * * *"

Applying the foregoing authorities to the situation at hand, and assuming that the Governor's action was invalid and unconstitutional in excluding and disapproving a portion of Section 10.860, as hereinbefore quoted, we are constrained to the view that the attempted partial veto or disapproval would be ineffectual and a nullity and the appropriation as contained in said section would stand approved.

CONCLUSION

In the premises, it is the opinion of this department that the appropriation for the purpose of establishing and maintaining a four-year medical and surgical school as contained in Section 10.860 of House Bill No. 496, Laws of Missouri, 1951, page 250, is a constitutional and valid appropriation which may be legally encumbered for the purposes contained therein, and payments may be made out of said appropriation for the payment of said encumbrances.

This opinion, which I hereby approve, was prepared by my Assistants, Mr. Frank Thompson and Mr. C. B. Burns, Jr.

Respectfully submitted,

JOHN M. DALTON Attorney General COUNTY DISTRICT JUDGES OF CLASS THREE COUNTIES: COMPENSATION: A county district judge elected at the November 4th, 1952, general election is entitled to compensation set forth in Section 49.110, Laws Mo. 1951, p. 373; the presiding judge elected on the same date to fill out the unexpired term of his predecessor not entitled to the increased compensation mentioned in Section 49.110, supra.

January 29, 1953

Mr. Walter W. Pierce Prosecuting Attorney Bates County Butler, Missouri



Dear Sir:

Your recent request for an opinion has been referred to me for answer. Your request is as follows:

"An opinion of the Attorney General is respectfully requested in regard to the compensation allowed by law for judges of the county court of the third class. Also an opinion is respectfully requested whether a presiding judge duly elected on 4 November 1952 to fill out the unexpired term of his predecessor is entitled to the increased compensation under the amended laws."

We believe the statute applicable to the questions asked in your request is Section 49.110, RSMo. 1949, Cumulative Supplement, 1951, which reads as follows:

"49.110. Per diem, mileage and fees of judges in counties of class three--effective date. --In all counties of the third class in this state, the judges of the county court, from and after the expiration of their present terms of office shall receive for their services the sum of ten dollars per day for each of the first ten days in any month that they are necessarily engaged in holding court and shall receive five dollars per day for each additional day in any month that they may be necessarily engaged in holding court, and shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court. The per diem compensation herein fixed shall be paid at the end of each month and the mileage compensation shall be paid at the end of each month on presentation of a

bill, by each of the respective county judges setting forth the number of miles necessarily traveled; provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

This statute was passed by the Legislature and approved by the Governor on January 4, 1952, and the statute became effective on March 18, 1952, and would make the compensation, that is, the compensation, and mileage set out in the above statute, the compensation allowed by law for the judges of the county court of the third class who are elected from districts at the November, 1952, election.

In regard to your request about the presiding judge duly elected on the fourth of November, 1952, to fill out the unexpired term of his predecessor, it is our opinion that he is not entitled to the increased compensation under the amended law but is only entitled to the salary that his predecessor received as the above statute distinctly states:

"* * *Provided, however, that this increase in compensation shall not become effective during any county judge's present term of office."

Further, the Missouri Constitution, 1945, Article VII, Section 13, states as follows:

"Limitation on Increase of Compensation and Extension of Terms of Office. -- The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

As you see, the quoted part refers to term of office, which term would normally have run through the year 1954 and not to the individual. Our reason for holding that the present duly elected presiding judge is only filling out his predecessor's term and for authority we cite Thornberry v. City of Campbell, 274 S.W. 847, where at page 848, the court states:

"* * *While we have considered the proposition from the standpoint of a possible increase in salary, under the statute the same reasoning would apply to a decrease. But the term is fixed and the statute preventing a change in compensation is not, in our opinion, personal to the then occupant of the office, but applies to any subsequent holder of the office during the same term. * * *"

CONCLUSION

It is, therefore, the opinion of this office that Section 49.110, Laws Missouri, 1951, p. 373, sets the compensation and mileage of county district judges in counties of class three, they being elected at the November 4th, 1952, general election; that the presiding judge elected at the November 4th, 1952 election as a successor to fill out the unexpired term of his predecessor is not entitled to the compensation and mileage provided in such bill during the remaining two years of his term of office, but will during such period receive the compensation and mileage provided in Section 49.110 RSMo. 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. A. Bertram Elam.

Yours very truly,

JOHN M. DALTON Attorney General

ABE: mw

EMPLOYMENT SECURITY:

John L. Porter, Director of the Division of Employment Security of Missouri, is person who has authority to requisition funds from the Unemployment Trust Fund.

JOHN M. DALTON

2-4-53



February 4, 1953

J. C. JOHNSEN

Mr. John L. Porter, Director Division of Employment Security Department of Labor and Industrial Relations Jefferson City, Missouri

Dear Mr. Porter:

This is in answer to your letter of recent date requesting an official opinion of this department, reading as follows:

"I am enclosing herewith a copy of a letter received by me from the Fiscal Service of the Treasury Department which is largely self-explanatory. The pertinent portion of the material referred to in the second paragraph of this letter is taken from a letter dated May 11, 1951, of the Director of Employment Security, Department of Labor, and reads as follows:

"Treasury Department Requirements for Withdrawals From the Unemployment Trust Fund. In order that State agency requisitions for moneys from the unemployment trust fund may be honored by the Treasury Department, whenever the status of the person or persons previously certified has changed, the Treasury Department requires that the following must be submitted directly to it:

"A. An original, signed opinion or certification by the attorney general of the State, or a certified copy thereof, that the individual over whose signature the requisitions are made has duly

constituted authority under the State law and under resolution of the State agency, if required by law or regulation to make such requisitions. If such qualified individual delegates his authority to requisition funds from the unemployment trust fund, the opinion shall contain reference to the authority for such delegation of power."

Section 288.210 (4), Laws of Missouri, 1951, p. 599, (Sec. 288.220 (4), Missouri Revised Statutes, Cumulative Supplement, 1951) provides as follows:

"Moneys shall be requisitioned from the Missouri account in the federal unemployment trust fund solely for the payment of benefits or for refunds of contributions in accordance with regulations prescribed by the director. The director shall from time to time requisition from the federal unemployment trust fund such amounts, not exceeding the amounts standing to the Missouri account therein, as he deems necessary for the payment of benefits and refunds for a reasonable future period. Upon its receipt the treasurer shall deposit such money in the benefit account and shall issue his warrants for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of moneys belonging to this state in their custody. All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the counter-signature of the director. Any balance of moneys requisitioned from the federal unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned

Mr. John L. Porter

shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the director, shall be redeposited with the secretary of the treasury of the United States of America, to the credit of the Missouri account in the federal unemployment trust fund as provided in subsection 3 of this section."

Under the provisions of such subsection, the director of the division has authority to make requisitions for moneys from the Unemployment Trust Fund.

Section 288.190, Laws of Missouri, 1951, p. 595, (Sec. 288.220, Missouri Revised Statutes, Cumulative Supplement, 1951) provides in part as follows:

"The division of employment security of the department of labor and industrial relations shall be under the control, management and supervision of a director who shall be appointed by the governor, by and with the advice and consent of the senate. Such director shall be a citizen and qualified voter of this state, and he shall serve at the pleasure of the governor. * * * *

Section 28.060, RSMo 1949, applicable to the Secretary of State of Missouri, provides as follows:

"He shall keep in his office an abstract of all commissions issued and appointments made by the governor, and shall register therein the substance of each commission, specifying the name of the person appointed, the office conferred, the district or county for which the appointment is made, and the term of office; and when any office shall become vacant he shall enter, in a space to be left for that purpose, a memorandum of such vacancy and the occasion thereof, with a reference to any evidence deposited in his office."

The official records of the Secretary of State of Missouri

Mr. John L. Porter

disclosed that on December 22, 1952, at which date the Senate of the State of Missouri was not in session, Forrest Smith, governor of Missouri, appointed and commissioned John L. Porter as Director of the Division of Employment Security of the Department of Labor and Industrial Relations, for a term ending at the pleasure of the governor, and that such commission and appointment of John L. Porter is officially registered in the office of Secretary of State of Missouri.

Mr. John L. Porter, therefore, is at present the Director of the Division of Employment Security of the Department of Labor and Industrial Relations of Missouri, and as such is the person authorized under the laws of this state to requisition funds from the Unemployment Trust Fund.

CONCLUSION

It is the opinion of this department that Mr. John L. Porter, Director of the Division of Employment Security of the Department of Labor and Industrial Relations, is the individual who has duly constituted authority under the laws of Missouri to make requisitions for moneys from the Unemployment Trust Fund.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

CBB:1rt

GENERAL ASSEMBLY: EXPENSES: Under provisions of 16a, Article III of the Constitution, a member of the General Assembly is entitled to reimbursement for actual and necessary expenses as reported to the proper officers and certified to the state comptroller in an amount up to and including ten dollars per day.



March 5, 1953

Honorable William Pittman Representative, DeKalb County Missouri House of Representatives Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"Section 16a, Article III of the Constitution as adopted by the people in November 1952 first recites that members of the general assembly shall be reimbursed for their expenses and then it requires payment of 'such expense allowance' upon certification by certain officers. Now, it is obvious that such officers have knowledge of and can certify only to the presence or absence of the various members of the general assembly; they cannot possibly know or certify to the amount of the actual expenses of any such member. Yet, the comptroller is required to approve and the treasurer to pay the amount of such expense allowance upon the certification. Moreover, such payments are to be made 'without legislative enactment', which would seem to indicate that the provision as to payment, at least, is self-executing.

"Under such circumstances I wish to request that you give me your opinion as to whether or not, upon certification of the proper officers, the payment of a flat allowance of ten dollars for expenses to each member of the general assembly is required. If the payment of a flat allowance is not required, I will appreciate your expression as to the proper construction to be given this constitutional provision."

Section 16a of Article III of the Constitution of Missouri, adopted November 4, 1952, as part of Constitutional Amendment No. 1, submitted at the election held on that date, provides as follows:

"Each senator or representative shall be reimbursed from the state treasury for the actual and necessary expenses incurred by him in attending sessions of the General Assembly and which do not exceed the sum of ten dollars (\$10.00) per day for each day on which the first roll call, following the opening prayer, in the Journal of the Senate or House respectively, shows the presence of such senator or representative. Upon certification by the president and secretary of the Senate and by the Speaker and chief clerk of the House of Representatives as to the respective members thereof, the state comptroller shall approve and the state treasurer shall pay monthly such expense allowance without legislative enactment. No such reimbursement shall be paid to any senator or representative for any day of a regular session after May 31 following the convening of the General Assembly in regular session on the first Wednesday after the first day of January following each general election, nor for any day after the sixtieth calendar day following the date of its convening in special session."

(Emphasis ours.)

You inquire whether or not a member of the General Assembly is entitled to a "flat allowance of ten dollars" per day for actual and necessary expenses upon a certification to the proper official by designated officers as to his presence at the first roll call following the opening prayer. In other words, is a member entitled to ten dollars per day merely upon certification as to his presence.

In answering this question we would first call attention to certain rules of constitutional construction. First, words used in the Constitution are presumed to have been employed in their natural and ordinary meaning, State ex rel. Randolph County v. Walden, 357 Mo.

167; second, the intent and purpose of lawmakers is of primary importance in determining the true meaning and scope of constitutional provisions, Graves v. Purcell, 337 Mo. 574; and third, the meaning apparent on the face of the Constitution is controlling and no forced or unnatural construction is permissible, State ex rel. Heimberger v. Board of Curators, 268 Mo. 598.

You will note that Section 16a of Article III provides that the members of the General Assembly shall be <u>reimbursed</u> for actual and necessary expenses and reading further it states that <u>no such reimbursement</u> shall be paid after certain dates. The term "expense" is defined in Webster's New International Dictionary, Second Edition, as follows: "That which is expended, laid out, or consumed, * * *." The term "reimburse" is defined in 36 Words and Phrases, as follows:

"'Reimburse' means to pay back that, which has been expended. Lyons v. Moise's Ex'r, 183 S.W. 2d 493, 495, 298 Ky. 858.

"Reimburse means to refund, to place in treasury or private coffer that which has been taken, lost or expended, to pay back to, to render an equivalent, to repay to. Pasternak v. Thrift Inv. Co., Ohio Com. Pl., 104 N. E. 2d 712, 715."

Applying the ordinary and natural meanings of these terms as above noted and in light of the above indicated rules of constitutional construction, we believe that it is quite clear that the purpose of this constitutional provision is for the purpose of paying back to the members of the General Assembly that which they have paid out as actual and necessary expenses incurred by them in attending sessions, subject to the limitation that such expenses shall not exceed ten dollars per day and that the members are not entitled to said amount unless it is actually expended. Therefore, the amount of such authorized expenditures, if the member desires reimbursement, would have to be reported to the proper officers in order that a certification might be made to the state comptroller as provided.

CONCLUSION

Therefore it is the opinion of this office that under the provisions of Section 16a of Article III of the Constitution of Missouri, adopted November 4, 1952, a member of the General Assembly who answers the first roll call is entitled to reimbursement for his actual and necessary expenses as certified by the proper officers to the state comptroller in the sum not to exceed ten dollars for each day he so answers and that a member is not entitled to ten dollars per day unless such amount was expended as authorized.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General QUO WARRANTO: PROSECUTING ATTORNEYS: Prosecuting Attorney should not represent respondents in Quo Warranto.



March 24, 1953

Honorable W. H. Pinnell Prosecuting Attorney Barry County Cassville, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Some two years ago I was employed by the City Officials of Exeter, Missouri to represent them in an action in which they were Defendants. This prior suit was an Injunction Suit brought by certain citizens of the community to enjoin the issuance of bonds for a water works system. This suit was subsequently carried all the way to the Supreme Court where an appeal by the Plaintiffs was dismissed. Some two months after the Appeal was dismissed a similar suit was filed by the same plaintiff alleging the same facts with the only difference being the action was brought in the form of Quo Warranto, through the Attorney General of this State. My question is this 'May I represent the Defendants who have again consulted me in this second action of Quo Warranto brought in the name of the Attorney General. "

Section 56.060, RSMo 1949, provides, in part, as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses.

Although you do not so state in your request, the proceeding about which you inquire is an action in the nature of quo warranto filed in the name of the Attorney General at the relation of a private individual. It is not an action filed by the Attorney General, ex officio.

Section 531.010, RSMo 1949, provides:

"In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney general of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil case, an information in the nature of a quo warranto, at the relation of any person desiring to presecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the attorney general of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

Any action in quo warranto at the relation of a private individual, is an action in which the state is a nominal party. However, as appears from Section 531.010 quoted above, the relator is the actual party in interest and is given the right to control the proceeding. Therefore, we do not feel that, because of the nominal interest of the state in the matter, it would be such a matter as the prosecuting attorney would be required to present on behalf of the state in accordance with Section 56.060, RSMo 1949. Consequently, we do not feel that there would be conflict under the duties imposed upon the prosecuting attorney by that section.

However, under Section 531.010 the prosecuting attorney is authorized to exhibit his information in que warrante upon the relation of any person desiring to prosecute the same. In view of this fact, we feel that, as a matter of public policy, it would be unwise for the prosecuting attorney to be authorized to represent the respondents in actions filed by the Attorney General. While we know that such is not the situation in this case, it appears to us that to sanction such representation by the prosecuting attorney might have a tendency to cause the prosecuting attorney to be reluctant to file actions in que warrante, and cause the prosecuting attorney rather to depend upon the Attorney General with the hope, or expectation, that he might be called upon to represent the respondents. In view of this situation we feel that the prosecuting attorney should not represent the respondents in such proceedings.

CONCLUSION

Therefore, it is the opinion of this department that the prosecuting attorney should not represent the respondents in a quo warranto proceeding filed in the name of the Attorney General, and brought at the relation of a private individual.

Honorable W. H. Pinnell

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW: lw

GENERAL ASSEMBLY:
HOUSE OF REPRESENTATIVES:
OFFICERS:
FEES, COMPENSATION AND
SALARIES:

(1) House Resolution No. 30 is a directory provision and compliance is not mandatory.

(2) Reimbursement to Legislator for expenses not justified by mere certification as to presence.



May 1, 1953

Honorable William Pittman Representative, DeKalb County Capitol Building Jefferson City, Missouri

Dear Mr. Pittman:

In your letter of recent date, you requested an official opinion on the following questions:

"1. Are members of the General Assembly required to report their actual expenses to any officer in this state and if so, what officer, and by what authority?

"2. Assuming that the officers mentioned in the constitutional provision certify as to the presence of a given member of the General Assembly and nothing more, what is to happen?"

Reimbursement to legislators for actual and necessary expenses incurred was authorized by Article III, Section 16a of the Missouri Constitution of 1945, adopted November 7, 1952, as follows:

"Each senator or representative shall be reimbursed from the state treasury for the actual and necessary expenses incurred by him in attending sessions of the General Assembly and which do not exceed the sum of ten dollars (\$10.00) per day for each day on which the first roll call, following the opening prayer, in the Journal of the Senate or House respectively shows the presence

of such senator or representative. Upon certification by the president and secretary of the Senate and by the speaker and chief clerk of the House of Representatives as to the respective members thereof, the state comptroller shall approve and the state treasurer shall pay monthly such expense allowance without legislative enactment. No such reimbursement shall be paid to any senator or representative for any day of a regular session after May 31 following the convening of the General Assembly in regular session on the first Wednesday after the first day of January following each general election, nor for any day after the sixtieth calendar day following the date of its convening in special session. Adopted general election November 4, 1952."

The Legislature may enact such legislation as will implement and facilitate operation or prescribe a practice for enforcement of a constitutional provision even though it be self-enforcing according to State ex rel. Randolph County vs. Walden, 357 Mo. 167, 1.c. 177, which states as follows:

"* * Such legislation may be enacted as will facilitate operation, prescribe a practice to be used for enforcement, provide a convenient remedy for the protection of the right secured or the determination thereof, or place reasonable safeguards around the exercise of the right. * * *."

The Missouri General Assembly has not so acted, but by House Resolution No. 30, found on page 149 of the Journal of the House of Representatives, provision was made to facilitate payment of incurred actual and necessary expenses as follows:

"BE IT RESOLVED, that, in order to comply with the provisions of Constitutional Amendment No. 1 adopted on November 7, 1952, each member of the House of Representatives of the Sixty-Seventh General

Assembly of the State of Missouri certify to the Speaker and Chief Clerk of the House, at the conclusion of each calendar month during the session of the Legislature, that he or she has incurred actual and necessary expenses on each day on which he or she answered the first roll call of the House following the opening prayer in excess of ten dollars, or such amount as is actually and necessarily incurred if less than ten dollars, and that the Speaker and Chief Clerk of the House make such certification as is required by said Constitutional Amendment."

While a House Resolution is not a statute for lack of the necessary requisites, and cannot be given the effect of law, nevertheless it may be binding upon the members of the House since the Missouri Constitution of 1945, Article III, Section 18, gives the Legislature power to make rules for its own proceedings.

In order to determine the efficacy of the above Resolution it is necessary to determine whether the provisions of the Resolution are directory or mandatory. Nowhere in said Resolution does the word "shall" appear.

In the case of State ex inf. Attorney General ex rel. Lincoln vs. Bird, 295 Mo. 344, 1.c. 351, 244 S.W. 938, it was said in deciding whether a statute was mandatory or directory:

"* * * this construction may be sustained in that if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law. * * *."

Also, in the case of Granite Bituminous Paving Co. vs. McManus, 129 S.W. 448, 144 Mo. App. 593, 1.c. 607:

"* * * If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory. * * *."

Therefore, the provisions of the said Resolution should be construed as directory only to facilitate reimbursement of legislators and not restrictive in the sense that payment cannot be had by other means.

In answer to your second question, it is noted that Section 33.010, RSMo 1949, provides for appointment of a Comptroller who shall head the Division of Budget and Comptroller.

Section 33.030, RSMo 1949, is quoted, in part, as follows:

"The division of the budget and comptroller shall have the power and its duties shall be:

* * * * * * * * * * * * *

"(3) To preapprove all claims and accounts and certify them to the state auditor for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that such claims and accounts are regular and correct. Each such certification from the comptroller to the state auditor shall be accompanied by a copy of the invoice."

(Underscoring ours.)

If the Comptroller is merely notified of the presence of a certain legislator he would not be justified in approving reimbursement for a legislator for "the actual and necessary expenses incurred", unless a claim were

made to him, and there is some basis upon which to "ascertain that such claims and accounts are regular and correct." Nor must the Comptroller automatically approve a claim, even though submitted in the manner prescribed by the House Resolution previously discussed, since such Resolution can have no binding effect on anyone but the House and its members.

CONCLUSION

It is, therefore, the opinion of this office that:

- 1) Members of the House of Representatives of the 67th General Assembly are not required to certify their expenses in compliance with House Resolution No. 30;
- 2) However, reimbursement to legislators under Article III, Section 16a, Missouri Constitution of 1945, as adopted on November 7, 1952, upon mere certification of presence of legislators is not justified. There must be a claim by each legislator for his actual and necessary expenses incurred, either directly to the Comptroller, or (by House members) to the Comptroller through the Speaker and Chief Clerk of the House, in accordance with House Resolution No. 30. The Comptroller may require such proof as is reasonably necessary to establish the correctness of the claim before he approves it.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

AGRICULTURE:

DAIRY PRODUCTS:

A field representative or field superintendent) employed or acting on behalf of a dairy products) manufacturing plant located in another state or) for a cream station or milk route is not required) to obtain a field superintendent's license under) the provisions of Section 196.605, RSMo 1949.



June 19, 1953

Honorable Paul L. Porter Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Sir:

We render herewith our opinion on your request dated May 28, 1953, which request reads as follows:

"We have fieldmen who live in another state who solicit or act as procurement men for creameries of another state for cream and milk from Missouri. Some have part ownership in cream and milk truck routes; some who solicit for routes only; some who are on company payrolls and some who are not; some who work for companies who have only cream buying stations in the state who buy cream and milk from Missouri for processing in another state.

"Part of these men have field superintendent's licenses and some do not. Some of these men have had field superintendent's licenses for a number of years as an accepted requirement.

"The question now arises as to what authority does the Department of Agriculture have in requiring the licensing of these men?

"We are respectfully requesting an interpretation of the law on this matter."

Section 196.525, RSMo 1949, defines a field superintendent as follows:

"196.525. Definitions .-- * * *

"(28) The term 'field superintendent' means any qualified person who is the duly authorized field representative of any one or more dairy products manufacturing plants;"

The "fieldmen" to whom you refer we will assume to be the field superintendents so defined or to perform duties identical to those of a field superintendent except that they represent a cream station or a milk truck route instead of a dairy products manufacturing plant.

The statute requiring the licensing of field superintendents under certain circumstances is Section 196.605. The pertinent portion thereof is subsection 2, which reads as follows:

"2. A field superintendent, prior to performing his duties for a dairy products manufacturing plant in Missouri, must obtain a field superintendent's license from the department. This license, which also grants authority to test, grade, and sample milk or cream, can be issued only to an individual free from communicable disease, who has passed a written examination grading seventy or above, and has paid the annual fee of five dollars; such license may be renewed upon payment of the annual fee, unless previously revoked for cause. Such license is not transferable."

The fundamental question involved is whether the words "in Missouri," as used in the quoted portion of the statute, modify the phrase "performing his duties," thus requiring a field superintendent to be licensed before performing his duties in Missouri regardless whether the dairy products manufacturing plant is located in Missouri or elsewhere; or whether they modify "dairy products manufacturing plant," thus requiring a license only where the duties are performed for a dairy products manufacturing plant located in Missouri.

We believe the latter to be the correct interpretation. The rule of grammar is that a modifier, which could logically relate to either of two objects, relates to that object standing closest to it in the sentence. This rule is frequently applied in the interpretation of statutes. In 50 Am. Jur., Statutes, Section 269, page 258, the rule is stated as follows:

"In construing statutes, qualifying words, phrases, and clauses are ordinarily confined to the last antecedent, or to the words and phrases immediately preceding. The last antecedent, within the meaning of this rule, has been regarded as the last word which can be made an antecedent without impairing the meaning of the sentence. * * *"

This rule is only an aid in ascertaining the legislative intent and is not to be slavishly applied if other circumstances point to a different legislative intent. See 50 Am. Jur., Statutes, Section 269, page 258. In the statute at hand, however, the conclusion that "in Missouri" is intended to modify "dairy products manufacturing plant" is further buttressed by the provisions of the remainder of the statute. The provision for field superintendents' licenses is set between two other provisions relating to dairy products manufacturing plants -- one prohibiting the operation of such a plant or a cream station "within this state" without a license; and the other requiring that each dairy products manufacturing plant "operating in this state" apply for a license. Indeed, the entire remainder of said Section 196.605 is concerned with the dairy products manufacturing plant located or operated in Missouri; and to hold that, when referring to dairy products manufacturing plants, the portion relating to licensing of field superintendents means plants operated outside the state, would make this portion an anachronism.

"The different parts of a statute reflect light upon each other, and statutory provisions are regarded as in pari materia where they are parts of the same act. Hence, a statute should be construed in its

entirety, and as a whole. * * *
All parts of the act should be
considered, compared, and construed
together. * * * * (50 Am. Jur.,
Statutes, Section 352.)

Notice that there is no licensing requirement for persons representing a milk truck route or a cream station, though their duties may otherwise be identical with those of a field superintendent.

CONCLUSION

We conclude, therefore, that a field superintendent employed or acting on behalf of a dairy products manufacturing plant located in another state or a person representing a cream station or milk truck route, though his duties might otherwise be identical with those of a field superintendent as defined by statute, is not required to obtain a field superintendent's license under the provisions of Section 196.605, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

AGRICULTURE:

A locker plant operator is required to furnish insurance to indemnify users against locker content loss, and he is not relieved of this duty by the execution by the customer of a waiver of insurance for failure to furnish such insurance. The Commissioner may revoke or suspend the license of the offending operator or may refuse to issue a license; or the offending operator may be proceeded against by injunction.

LOCKERS:



July 7, 1953

Honorable Paul L. Porter Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Sir:

We render herewith our opinion based on your request of May 28, 1953, which request reads as follows:

"The operators of all locker plants shall furnish satisfactory locker content insurance to indemnify users against loss.

"The question arises--since the cost of such insurance is to be passed on to the locker patrons--as to whether or not it is proper for them to decide whether or not they wish to pay for and have such insurance.

"The insurance is offered to anyone who desires it and a waiver of insurance from those who do not desire it. See attached copy of letter from Knobnoster Locker Company.

"He was advised on December 18, 1952, by Mr. Stakes, that the insurance was to be provided to the users of locker boxes--regardless of whether or not such patrons desired it. This has not been complied with.

"What procedure should this office follow?"

The statute to which you refer is Section 196.510, RSMo 1949. The pertinent portion of that statute reads as follows:

"2. The operators of all locker plants shall furnish satisfactory locker content insurance to indemnify users against loss, issued by companies duly authorized and licensed to do and transact business in the state of Missouri, in a minimum amount for each locker or locker plant to be determined by the commissioner; provided, however, that such operator may, and is hereby authorized to, collect the pro rata amount of the premium for such insurance from the user in addition to the locker rental as an additional service."

Let us begin by saying that we have been unable to find any cases to guide our reasoning in this opinion. Other compulsory insurance statutes (i.e., relating to warehouses) are worded in a different way; and even under them the question whether insurance is compulsory regardless of request or waiver on the part of the customer, or compulsory only when requested or not waived by the customer, has never so far as our research has revealed confronted any court. Neither does any other portion of the law relating to the regulation of locker plants, Section 196.450 through 196.515, shed any light on this problem.

However, we have concluded that the above-quoted portion of Section 196.510, properly interpreted, requires the operators of all locker plants to furnish locker content insurance; and that they cannot be relieved of this duty by the execution by the customer of a waiver of insurance.

The operators, by the terms of this statute, "shall furnish" insurance. "Shall" is ordinarily held to be a word of mandate negating permissiveness or discretion on the part of the subject of the action. In State v. Wade, 360 Mo. 895, 231 S.W. (2d) 179, 1.c. 181, the court made this observation:

" * * * Certainly statutes that use the word 'shall', and then provide

a penalty for failure to do what is required, are mandatory statutes.

Notice that Section 196.515 does provide a penalty for failure to comply with the provisions of Section 196.510 in that it authorizes the revocation or suspension of the license of the offending operator.

There are other provisions of the statute which indicate that the duty of furnishing insurance against loss of locker content is not dependent upon request or absence of waiver on the part of the customer. The minimum amount of insurance upon each locker or locker plant is to be determined by the Commissioner of Agriculture. Had it been the legislative intent to permit the customer to determine whether his property was to be covered by insurance, then it seems that he would have been permitted also to determine the minimum amount of insurance.

The omission of words in a statute may sometimes furnish a clue to the legislative intent. In this situation there are no words or phrases, such as "at the request of the user" or "unless waived by the user," which indicate any intent to leave the question of insurance to the customer. It is reasonable to suppose that had the lawmakers intended to leave the question of insurance to the customer that it could easily have been accomplished by the inclusion in the statute of some such phrase. That it did not do so is evidence of an intention to make the furnishing of insurance by the operator mandatory regardless of request or waiver by the customer.

The fact that the operator is permitted to collect from his customers a pro rata amount of the premium for such insurance does not indicate a different conclusion. This portion of the statute is permissive only; the operator may, if he chooses, absorb the cost of the insurance himself.

For failure of the operator to furnish such insurance there are two courses of action open to the Commissioner of Agriculture. They are prescribed by Section 196.515, RSMo 1949, which reads as follows:

"Revocation of license--enforcement.
--l. Failure on the part of any
locker plant operator to properly
comply with the provisions of sections 196.450 to 196.515 shall
authorize and empower the commissioner
to refuse to license or to revoke or
suspend any license of the offending
operator.

"2. Injunction may issue by any court of competent jurisdiction to enforce the provisions thereof."

CONCLUSION

It is the opinion of this office that a locker plant operator is required to furnish insurance to indemnify users against locker content loss, and that he is not relieved of this duty by the execution by the customer of a waiver of insurance for failure to furnish such insurance. The Commissioner may revoke or suspend the license of the offending operator or may refuse to issue a license; or the offending operator may be proceeded against by injunction.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

LOCKER PLANT: UNINCORPORATED ASSN: AGRICULTURE:



A locker plant operated by an unincorporated association such as the Armstrong Lockerette described in your request is subject in every respect to the law regulating the operation of locker plants, Section 196.450, et seq., RSMo 1949. A locker plant is not required by law to maintain a chill room, a cutting and processing room or a quick or sharp freeze room; nor does the law require that the wrapping or processing of food be done at the locker plant.

July 20, 1953

Mr. Paul L. Porter Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Mr. Porter:

We render herewith our opinion based on your request of May 28, 1953, which request reads as follows:

"The Armstrong Lockerette (Cooperative) is composed of 42 members, with President, Vice-President, Secretary and Treasurer. They have lockers for storage only.

"There is no 'cutting or processing room'; no chill room; or quick or sharp freezing room. Food is processed and wrapped at home or some other place--then put in lockers. This works a hardship on locker plants which try to abide by state regulations.

"This company applied for license and has insurance on lockers. See attached inspection report.

"We respectfully request interpretation of Locker Law in this matter."

In response to our request you have submitted to this office the additional information that the lockers are rented to others than members of the association; that there are forty-five members of the association, each member paying for his locker space at the same rate as nonmembers; that the profits are distributed equally among the forty-five members at the close of the fiscal year; and that the association is not incorporated either as a business corporation or as a co-operative.

Mr. Paul L. Porter

There are several statutes which it will be necessary for us to consider in the course of the opinion. The first is Section 196.450, RSMo 1949, subsection (7), reading as follows:

"(7) 'Locker plant' means a location or establishment in which space in individual lockers is rented for the storage of food;"

We pause here to point out that according to the information which you have supplied to us the Armstrong Lockerette meets this definition.

Section 196.455, RSMo 1949, reads in part as follows:

"196.455. Annual license required.—
It shall be unlawful for any person,
firm, copartnership or corporation to
operate a locker plant in this state
unless such person, firm, copartner—
ship or corporation has secured an
annual license therefor from the depart—
ment. * * *"

The business device by which the Armstrong Lockerette is operated, it appears from the facts stated in your request, is an unincorporated association which has been judicially defined as follows:

"An 'unincorporated association' is an organization composed of a body of persons united without a charter for the prosecution of some common enterprise; it is not a legal entity separate from the persons who compose it. Meinhart v. Contresta, 194 H.Y.S. 593, 594."

The first question presented by your request so far as the necessity for the Armstrong Lockerette to obtain a license is whether an unincorporated association is comprehended within the phrase "person, firm, copartnership or corporation," as used in Section 196.455, quoted above.

We believe that it is, either as a plurality of individuals or as a "firm or copartnership."

Section 1.020, RSMo 1949, subsection (7), provides as follows:

Mr. Paul L. Porter

"(7) The word 'person' may extend and be applied to bodies politic and corporate and to partnerships and other unincorporated associations;"

Hence, under this statutory definition the word, "person," used in Section 196,455, could include an unincorporated association.

We believe that the word "firm" also could include an unincorporated association. This word ordinarily denotes a partnership. Bredhoff v. Lepman, 181 III. App. 247, 1.c. 250. However, it often is given a somewhat broader meaning as in In Re Klein's Estate, 88 Pac. 798, 1.c. 802, 35 Mont. 185.

"In arriving at a conclusion as to the ordinary and popular meaning of the word 'firm,' we naturally first consult the standard dictionaries. Webster defines it thus: The name, title, or style under which a company transacts business, hence a partnership or house, as the firm of Hope & Co. The Century dictionary defines a firm to be a partnership or association of two or more persons for carrying on a business, a commercial house, a concern, also the name or title under which associated persons transact business. * * *"

Indeed, the legislature by using the word "copartnership" in addition to the word "firm" evidently included that the latter word have a broader meaning than partnership.

Nothing appears in the statutes which has the effect of exempting from the operation of the law and applicable regulations a locker plant operated as is the Armstrong Lockerette.

On these premises the Armstrong Lockerette, so far as the application of Sections 196.450 through 196.515, RSMo 1949, is concerned, stands in no different position than other locker plants operated by corporations, partnerships or individuals.

Next, we consider whether the failure to maintain a chill room, a cutting and processing room or a quick or sharp freeze room; or the wrapping or processing of food at some place other than the plant constitutes a violation of the law. Mr. Paul L. Porter

There is no specific requirement in the law that a locker plant maintain a cutting or processing room, a chill room or a quick or sharp freeze room. The act contemplates that such rooms will be maintained but does not require it. Section 196,490, RSMo 1949, provides as follows:

"Food to be quick frozen before placed in locker .-- All food, before being placed in a locker shall be quick or sharp frozen in a quick or sharp freeze room, unless the locker room temperature is maintained at not more than the maximum temperature required by sections 196.450 to 196.515 for a quick or sharp freeze room. No food shall be placed in a locker unless previously inspected by the operator and each portion shall be wrapped and be marked or stamped showing contents, correct locker number and date of wrapping. All fruits and vegetables shall be prepared by an approved method before being quick or sharp frozen."

Thus, under the first portion of this statute, there are two courses open: first, to quick or sharp freeze the food before placing it in the locker room; or second, to maintain the locker room temperature at or below the maximum prescribed by Section 196,485, RSMo 1949, subsection 2, reading as follows:

- "2. Temperatures shall be maintained in the respective rooms as follows:
- "(2) Quick or sharp freeze room-quick or sharp freeze compartments: Temperatures of ten degrees below zero or lower in rooms where still air cooling is employed and temperatures of zero degrees or lower in rooms where forced air circulation is employed, with a tolerance of ten degrees for either type of installation for a reasonable time after putting fresh food into the freezer;"

If such temperature is maintained in the locker room, there is no requirement that the food be quick or sharp frozen.

Section 196.485, RSMo 1949, specifies temperature to be maintained in the quick or sharp freeze room, but neither does this Section nor Section 196.450, defining such room, require that there be one in connection with the locker plant. We recognize, of course, if the temperature in the locker room is not at quick-freeze levels, that it will be a practical necessity to maintain a quick-freeze room in connection with the locker plant, in order to obey the law with respect to quick-freezing of food before placing it in the locker. It would not be feasible to quick-freeze it at some other place.

It is not mandatory to maintain a chill room or cutting and processing room. Section 196.450 defines such rooms; and Section 196.485 prescribes temperature requirements for the chill room. As in the case of the quick or sharp freeze room, although the act contemplates the maintenance of such rooms, they are not required.

As to wrapping and processing food, there is no requirement where or by whom it shall be done. If properly done, it may be done at the home of the user or some other place. So, the fact that food deposited in the Armstrong Lockerette is prepared, processed and wrapped at home by the user is no violation of the law -- so long as it is done in compliance with the law as expressed in the latter part of Section 196.490, supra.

CONCLUSION

It is the opinion of this office that a locker plant operated by an unincorporated association, such as the Armstrong Lockerette described in your request, is subject in every respect to the law regulating the operation of locker plants, Section 196.450, et seq., RSMo 1949.

We further conclude that a locker plant is not required by law to maintain a chill room, a cutting and processing room, or a quick or sharp freeze room, nor does the law require that the wrapping or processing of food be done at the locker plant.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General LOCKER PLANTS:

AGRICULTURE:

A license to operate a particular locker plant may, with the written permission of the Commissioner of Agriculture, be transferred from one person to another; but such license may not be transferred from one locker plant to another.



August 18, 1953

Honorable Paul L. Porter Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Sir:

We render herewith our opinion based on your request of August 4, 1953, which request reads as follows:

"Section 196.455 RSMo 1949 states in part:
'A license issued for a locker shall be transferable upon written permission of the Commissioner.'

"There are two kinds of transfer with which we are concerned -- transfer or change of location; and transfer or change of ownership.

"I should like your opinion as to whether it is lawful to transfer license in case of a change of location of the plant or a transfer of ownership or both."

We believe that the license transfer referred to in Section 196.455, RSMo 1949, for which permission of the Commissioner of Agriculture is required, is the transfer from one person to another, and not from one locker plant or location to another.

We reach that conclusion from an interpretation of Section 196.455, RSMo 1949, reading as follows:

"196.455. Annual license required.--It shall be unlawful for any person, firm, copartnership or corporation to operate a locker plant in this state unless such person, firm, copartnership or corporation has secured an annual license therefor from the department. A separate license shall be secured for each locker plant. The application for such license shall be in writing on forms prescribed and furnished by the department. A license issued for a locker shall be transferable upon written permission of the commissioner."

Now, the obvious meaning of the first sentence thereof is that no person, firm, copartnership, or corporation shall operate a locker plant unless that particular person, firm, copartnership or corporation first obtain a license to do so. This standing alone, would rule out the possibility of assignment from a licensee to a succeeding owner or operator.

However, the last sentence of the statute provides that, with the written permission of the Commissioner of Agriculture, such license may be transferred. We take this to be designed as a qualification on the first sentence, and permits transfer and assignment from one person to another of a license on a given locker plant with the written permission of the Commissioner.

We believe this does not refer to transfer of a license from one plant or location to another. Notice the second sentence of the above-quoted Section 196.455:

" * * * A separate license shall be secured for each locker plant. * * *"

This indicates that a license, issued for one plant, could not be transferred to another.

Our conclusion is further buttressed by these considerations:

1. The law sets up no personal standard for the license to meet -- such as good character, freedom from disease, citizenship, age, etc. The standards set up refer to the plant itself, its

equipment and its operation, Sections 196.475 to 196.510, RSMo 1949. Hence, it may be said that the license issued is referable to a particular plant, and not to the operator. The conditions in various plants, as to sanitation, equipment, and operation will vary, making transferability of the license from one plant to another impractical.

2. The license fees prescribed by Section 196.460, RSMo 1949, vary with the sizes or capacities of different plants. The statute does not provide for any adjustment of fees on transfer from one locker plant to another of a different size by authorizing the Commissioner to condition his permission to transfer on the payment of additional fees, or by authorizing a refund of fees. This points toward the conclusion that no transfer from one plant to another was contemplated.

CONCLUSION

It is the opinion of this office that a license to operate a particular locker plant may, with the written permission of the Commissioner of Agriculture, be transferred from one person to another; but such license may not be transferred from one locker plant to another.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK:fh,lw

CITIES: ELECTIONS: EXPENDITURES: Candidates for election to offices in cities of the third class, operating under the mayor-council form of government, are required to file statements of expenditures under Section 129.110, RSMo 1949, and they are restricted to the expenditures limited in Section 129.100, RSMo 1949.

March 30, 1953

Honorable Stephen R. Pratt Prosecuting Attorney Clay County Liberty, Missouri



Dear Mr. Pratt:

We render herewith our opinion based on your request of March 19, 1953, which request is as follows:

"The following questions have been raised and I would appreciate the opinion of your Department on the following matters:

"1. Do all candidates for election to the offices in a third class city have to file a statement of moneys expended as provided in Section 129.110, Revised Statutes of Missouri, 1949.

"2. Are all candidates for election to the offices in a third class city restricted to the expenditures as set out in Section 129. 100, Revised Statutes of Missouri, 1949."

At our request you have furnished us the additional information that the third class city mentioned in the request operates under the mayor-council form of city government.

The pertinent parts of Sections 129.100 and 129.110, RSMo 1949, read as follows:

"129.100. Amount to be expended by candidates--how determined.

"No candidate for congress or for any public office in this state or * * * municipality

Honorable Stephen R. Pratt

thereof, which office is to be filled by popular election, shall by himself or by or through any agent or agents, committee or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute or expend any money or other valuable thing in order to secure or aid in securing his nomination or election, or the nomination or election of any other person, or persons, or both such nomination and election, to any office to be voted for at the same election, or in aid of any party or measure, in excess of a sum to be determined upon the following basis, namely: For five thousand voters or less, two hundred dollars; for each one hundred voters over five thousand and under twentyfive thousand, four dollars; for each one hundred voters over twenty-five thousand and under fifty thousand, two dollars; and for each one hundred voters over fifty thousand, one dollar -the number of voters to be ascertained by the total number of votes cast for all the candidates for president in the state, or in any county, district or municipality thereof at the last preceding regular election held to fill the same; and any payment, contribution or expenditure, or promise, agreement or offer to pay, contribute or expend any money or valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful.

"129.110. Statement of moneys expended to be made, filed--penalty for failure

"Every person who shall be a candidate * * * at any election for any * * city, * * or municipal office, * * * shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by

Honorable Stephen R. Pratt

such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

By the terms of these statutes candidates for office in cities of the third class are included within their purview. Therefore, unless there be some statute limiting or repealing these statutes by repugnancy, inconsistency or by covering the subject matter, they are to be construed according to their plain meaning.

No statute has been found which limits or repeals these sections insofar as they relate to candidates for office in cities of the third class operating under the mayor-council form of government. The only statute concerned with elections of officers in such cities is Section 77.040, RSMo 1949, which could in no way be construed as having that effect.

CONCLUSION

It is the opinion of this office that candidates for election to offices in cities of the third class, operating under the mayor-council form of government, are required to file statements of expenditures under Section 129.110, RSMo 1949, and that they are restricted to the expenditures limited in Section 129.100, RSMo 1949.

Honorable Stephen R. Pratt

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

LIERARLES: Negotiation of contract between county library district and city library district under Sec. 182.080, RSMo 1949, does not thereby create a regional library district so as to qualify for equalization grants as a regional district under Sec. 181.060(4), RSMo 1949.



April 13, 1953

John C. Johnsen

Mr. Paxton P. Price State Librarian Missouri State Library Jefferson City, Missouri

Dear Mr. Price:

This is in response to your request for an opinion dated March 31, 1953, which reads, in part, as follows:

> "Does the negotiation of a contract (authorized by Section 182.080, R. S. Missouri, 1949) for joint and unified service between a county library district and a city library district (the latter located within the mentioned county) thereby establish a regional library, and qualify those conjoined districts under such contract for equalization grants of state aid as provided for in 4 of Section 181.060, R.S. Missouri, 1949?"

In your request you mention two sections of the statutes which, for sake of convenience, we now set out in full:

Section 181.060.

"1. The general assembly may appropriate moneys for state aid to public libraries, which moneys shall be administered by the state librarian with the assistance of the state library advisory board.

"2. At least fifty per cent of the moneys appropriated for state aid to public libraries shall be apportioned to all public libraries established and maintained under

the provisions of the library laws or other laws of the state relating to libraries. The allocation of such moneys shall be based on an equal per capita rate for the population of each city, village, town, township, school district, county, or regional library district in which any such library is or may be established, in proportion to the population according to the latest federal census of such cities, villages, towns, townships, school districts, county or regional library districts maintaining tax supported public libraries; provided, that no grant shall be made to any public library if the rate of tax or the appropriation for said library should be decreased below the rate in force at the time of the enactment of this chapter and provided further after January 1, 1949 grants shall be made to any public library, according to two alternate standards:

- "(1) To any public library in which the tax rate is one-half or more of the maximum by law: or
- "(2) To any public library for which the tax income yields one dollar or more per capita for the previous year according to the population of the latest federal census.
- "3. The librarian of such tax supported library together with the treasurer of such library shall certify to the state librarian the annual tax income and rate of tax or the appropriation of said library on the date of the enactment of this chapter, and of the current year, and each year thereafter, and the state librarian shall certify to the comptroller for his approval the amount to be paid to each library and warrants shall be issued for the amount allocated and approved.
- "4. The balance of said moneys shall be administered and supervised by the state librarian to provide establishment grants on a population

basis to newly established county or regional libraries and equalization grants on a population basis to county or regional libraries in all districts in which a one-mill or more tax does not yield a dollar per capita to said libraries; and provided further that only a library in a municipality, city, county, region, school district or other library district serving five thousand or more population established by law after January 1, 1947, shall receive grants in aid. Newly established libraries and libraries in which a one-mill tax does not yield a dollar per capita shall certify through the legally established board and the librarian of such library to the state librarian the fact of establishment, the rate of tax, the assessed valuation of the library district and the annual tax yield of such library. The state librarian shall then certify to the comptroller for his approval the amount of establishment grant or equalization grant to be paid to such libraries, and warrants shall be issued for the amount allocated and approved. The sum appropriated for such state aid to public libraries shall be separate and apart from any and all appropriations made to the state library.

"5. The state librarian with the state library advisory board may make such bylaws, rules and regulations in compliance with the provisions of the sections which are deemed necessary for the administration and allocation of such moneys."

"Said county library board may contract with the body having control of a public library for assistance in the organization of a free county library under such terms and conditions as may be stated in such contract, or it may contract with the body having control of a public or school library already established within a county, or any other library within the state, to furnish library service to the people of the said county library district, under such terms and conditions as may be stated in such contract; and the body having control of any library within the state may contract with any such county

library board within the state, to provide library service to the people of such library district under such terms and conditions as may be stated in such contract. In case a contract shall be made for services by any library now or hereafter existing, as herein provided, it shall be the duty of the county library board, by and through a member of the board, to advise and consult with the board controlling said library, with regard to the selection of books, location of branch libraries and other subjects relating to the proper management of the county library."

Section 181.060, supra, with regard to state aid, does mention "regional library districts," but it is to be noted that nowhere in the statutes on libraries or elsewhere is that term defined, nor is there any machinery set up by the Legislature for the establishment of regional library districts. Under Section 181.060, subsection 4, supra, only county and regional libraries are entitled to equalization grants.

The statutes do authorize the establishment of both county and city libraries. Such city and county library districts operate separately and independently of each other except that a city library district may become a part of the county library district by the method provided in Section 182.040, RSMo 1949.

The question then is whether the conjunction of a county library district with a city library district by contract, as provided in Section 182.080, supra, thereby creates a "regional" library district within the meaning of Section 181.060, supra.

Section 182.080, supra, provides two purposes for which a county library district may contract with a body having control of a public library. One is "for assistance in the organization of a free county library" and the second is for the body having control of a public or school library "to furnish library service to the people of the said county library district." In the first instance it is clear that the purpose of the contract is to furnish a county library and not to create another entity known as a "regional" library. The last sentence of Section 182.080 makes it clear that when a contract shall be made for services, the second purpose for which such a contract may be made, the county library board, by and through one of its members, acts in an advisory capacity to the servicing library board with regard to certain subjects "relating to the proper management of the county library." (Emphasis ours.)

Mr. Paxton P. Price

It appears then that a county library district does not in either instance lose its identity as such county library district and become part of any larger district known as "regional" by virtue of a contract entered into under Section 182.080, supra. Rather, the purpose is either the establishment of a county library or the furnishing of service to the people of the county library district as a county library.

CONCLUSION

Therefore, it is the opinion of this office that the negotiation of a contract between a county library district and a city library district under Section 182.080, RSMo 1949, does not thereby establish a regional library district so as to qualify for equalization grants of state aid as a regional district under Section 181.060(4), RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JMD: JWI:ml ELECTIONS:

Senate Bill No. 235 of the 67th General Assembly, relating to time off for employees to vote, covers all elections and is not confined to primary and general elections.



August 28, 1953

Honorable Charles H. Pulis Member of House of Representatives Audrain County Mexico. Missouri

Dear Sir:

We render herewith our opinion based on your request of August 12, 1953, which request reads as follows:

"Senate Bill No. 235, as passed by the General Assembly and approved by the Governor, reads, in part, as follows:

"'Any person entitled to vote at any election held within this State, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting;'

"The Associated Press in a release dated June 12, 1953, and hereto attached, contends that this bill, as passed, applies only to primary and general elections.

"The Senate Bill which came to the House for approval read

"'Any person entitled to vote at a general election held within this State, or any primary election held in preparation for such election, etc.'

Honorable Charles H. Pulis

"This was amended by striking the word 'general' and substituting the word 'any.'

"I will appreciate receiving your official opinion as to whether or not this bill, as passed by the General Assembly and approved by the Governor, applies to all elections or only to primary and general elections, as referred to in the attached Associated Press Release."

You have attached a clipping from a newspaper containing the following paragraph:

"The new law also restricts the timeoff-to-vote privilege to primary and general elections. The old law applied to all elections."

The act, by the use of the phrase, "any election held within this State," purports to cover all elections. The language is certainly broad and comprehensive, and we believe that it includes all elections and is not confined to general elections and primary elections.

As to elections covered by the Act, Senate Bill No. 235 of the 67th General Assembly differs from Section 129.060, RSMo 1949, repealed, only in that it specifically covers primary elections in this language:

" * * * or any primary election held in preparation for such election, * * *"

The reason for such change undoubtedly was to avoid the possibility of a court interpretation that the word "election" did not include "primary election" -- a distinct possibility under such cases as Dooley v. Jackson, 104 M.A. 21, 78 S.W. 330, 334, and other cases cited in 14 Words and Phrases, 244, et seq., "Elections (Primary Elections)."

Should there be any doubt as to the correctness of this interpretation, we may look at the changes made in the bill during the course of its enactment.

Honorable Charles H. Pulis

"In many cases, however, amendments of bills or changes made therein during the course of passage in the legislature as disclosed by the records thereof have been regarded as properly considered by the court's interpreting doubtful or ambiguous provisions of the statutes."

50 Am. Jur., Statutes, Sec. 329.

As introduced in the Senate and as perfected, the bill referred to "a general election held within this state or any primary election held in preparation for such general election." As truly agreed to and finally passed, however, it reads thus:

" * * * any election held within this State, or any primary election held in preparation for such election, * *"

This change indicates a definite and conscious legislative intent to broaden the act beyond general and primary elections and to include all elections as in Section 129.060, RSMo 1949, repealed.

CONCLUSION

It is the opinion of this office that Senate Bill No. 235 of the 67th General Assembly, relating to time off for employees to vote, covers all elections and is not confined to primary and general elections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

COUNTY: Compensation provided for two clerks of Board COMPENSATION: Election Commissioners. CLERKS OF BOARD

OF ELECTION COMMISSIONERS:



October 7, 1953

Honorable Stephen R. Pratt Prosecuting Attorney Clay County Liberty, Missouri

Dear Sir:

This will acknowledge receipt of your opinion request which reads:

"I am writing you at the request of the recently appointed Election Board for Clay County, Missouri.

"I believe that Mr. Simrall talked to you on the phone in regard to the compensation for the Chief Clerks authorized under this Bill. Section 44 of the Bill provides for the employment by the Commission of two Chief Clerks, one democrat and one republican, and from the language of said provision it would appear that the legislation contemplated that these would be permanent employees.

"In Section 45 of said Bill it provides for the compensation of the Commissioners and 'Assistants and Clerks' employed by the day by the Board of Election Commissioners.

"I would like to have your opinion as to whether or not the compensation provision in Section 45 applies to Chief Clerks and if it does not, whether the compensation of said employees can be determined by the Board.

"I would appreciate having your opinion as soon as possible as it is quite important that this Board be organized and registration be started as soon as possible."

The two particular statutes involved in your request are now known as Section 119.090 and Section 119.180, Vernon's Annotated Missouri Statutes, August, 1953. Section 119.090, supra, clearly provides that said Election Commissioners shall appoint two clerks of the Board who are required to give bond conditioned for the faithful performance of their duties, exercise supervisory control over office and clerical force appointed by the Commissioners, also that said clerks take and subscribe to the same oath as given to the Commissioners. Section 119.090, supra, reads:

"Such election commissioners shall appoint two clerks of the board, one from each of the two leading political parties, who shall hold office during the pleasure of such commissioners and shall each give bond to the state in the sum of three thousand dollars, with the security to be approved by said commissioners, conditioned for the faithful and honest performance of the duties of said office: and who shall exercise a general supervisory control and direction over the office and clerical force appointed by the commissioners, and be subject to such rules and regulations as the board may, from time to time, adopt as necessary to efficiently, promptly and carefully perform the duties of the office. Said clerks and employees shall be subject to the same restrictions and take and subscribe the same oaths as said commissioners, and shall file same to-gether with their bonds as clerks with said commissioners."

Section 119.180, supra, fixes the annual salary of said Commissioners and fixes a daily maximum amount of salary for the clerks only employed by the day. Section 119.180, supra, reads as follows:

"In all counties in this state affected by this chapter, the board of election commissioners, clerks of the board, and all assistants employed by the board of election commissioners, except as otherwise herein provided, shall be paid as follows: The members of said board of election commissioners as such, and as members of the board of registry, as herein provided, shall each receive a salary of one thousand two hundred dollars per year, and assistants and clerks employed by the day by the board of election commissioners shall receive a salary of not more than eight dollars per day, and the same shall be paid upon a certificate of the board that the services have been rendered. All expenses incurred by the board of election commissioners shall be paid in like manner.

"2. In all elections embracing the whole county, the expenses specifically incurred for such election shall be paid by the county; in all city elections, the expenses specifically incurred for such elections shall be paid by the city."

The two foregoing statutes comprise a part of Senate Bill No. 5, passed by the Sixty-seventh General Assembly, and are the only provisions that relate to compensation for clerks of the Board of Election Commissioners.

Section 119.180, supra, is somewhat ambiguous in that it provides that the Board of Election Commissioners, clerks of the Board, (which refers to the two clerks in question) and all assistants employed by said Board except as otherwise provided herein, shall be paid as follows; then it fixes an annual salary for the members of said Board and following that provides that assistants and clerks employed by the day by said Board shall receive a salary of not more than eight dollars per day. No further provision as to the compensation for the two clerks of said Board is made. In view of the foregoing, it is evident that the Legislature was attempting to fix compensation for members of said Board, other officials and employees in adopting Section 119.180, supra.

Such clerks of the Board are, in all probability, not temporary appointments but more in the nature of permanent appointments. However, there being no other statute fixing compensation for said clerks, in view of the foregoing statute specifically providing that clerks of said Board except as otherwise herein provided shall be paid as follows; then fixed a maximum of eight dollars per day for only clerks employed by the day, we must conclude that it was the legislative intent that such clerks of said Board shall only be compensated as provided therein at a rate not to exceed eight dollars per day.

Further support of this conclusion can be found in that rule of statutory construction that a public official claiming compensation for official duties performed must point out the statute authorizing such payment. Nodaway County v. Kidder, 344 Mo. 795, 129 S. W. (2d) 857. Also, that a right to compensation for the discharge of official duties is purely statutory and a statute that is claiming to confer such right must be strictly construed. Ward v. Christian County, 341 Mo. 1115, 111 S. W. (2d) 182.

CONCLUSION

Therefore, it is the opinion of this department that the two clerks of the Board of Election Commissioners, under Senate Bill No. 5, passed by the Sixty-seventh General Assembly, shall receive for services rendered an amount not to exceed a maximum of eight dollars per day for each day services are rendered as provided in Section 119.180, Vernon's Annotated Missouri Statutes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH/mv

BOUNDARIES:

FIRE PROTECTION DISTRICTS,) A fire protection district may not extend its boundaries to include) only a part of an incorporated city,) town or village.



April 29, 1953

Mr. Edwin Rader Assistant Prosecuting Attorney St. Louis County Clayton, Missouri

Dear Mr. Rader:

We have given careful consideration to your request for an opinion, which request is as follows:

"Will you please let us have your opinion as to the following:

"Under the following facts may the Wellston Fire Protection District extend its boundaries to include all of the City of Vinita Park except that part of the City which is now in the community Fire District or does the wording and not within only a part of a city' used in section 321.300 R.S. Mo. 1949 preclude such action.

"FACTS:

- "1. The City of Vinita Park is adjacent to and borders the western line of the Wellston Fire Protection District.
- 12. In October of 1952 the City of Vinita Park annexed a small area which is in the Community Fire Protection District. This area is indicated on the attached map of the City of Vinita Park.
- The City of Vinita has no fire protection presently other than a contract for secondary protection with University City, Missouri.
- 1121. The Board of Directors of the Community Fire

Mr. Edwin Rader

Protection District has gone on record that they would not consider extending their boundaries to include the City of Vinita Park,

5. The proposed annexation would include all of the City of Vinita Park with the exception of that portion of the City which is now within the Community Fire Protection District.

"Thanking you in advance for your kind cooperation, I am."

Boundaries of fire protection districts may be changed as Provided in Section 321.300, RSMo 1949. A portion of this section is as follows:

This statute has never been construed by the appellate courts of the state. We must, therefore, rely upon the general rules of statutory construction.

A general principle which seems to apply in this case is defined in 59 C. J. 968-969, as follows:

"As courts are not at liberty to construe a statute when the language is plain, but must give effect to the legislative intent as expressed by the language, it follows that where the language adequately expresses the intention of the legislature, it must

Mr. Edwin Rader

This rule has been sustained by the Supreme Court of Missouri in numerous cases. In Betz v. K. C. Southern Ry. Co., 314 Mo. 390, 410, the court said:

"However, the language of the statute (and particularly the language of the amendatory clause of 1905, creating a fourth class of beneficiaries, in which class plaintiff falls) is plain, clear and unambiguous. In 36 Cyc. 1106, it is said: 'The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statue, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give

The language of Section 321.300 seems to be clear and unambiguous, and we think the general rule defined by the Supreme Court of the State should apply. It simply means that only a part of an incorporated city, town or village may not be annexed to a fire protection district.

a tar a second

CONCLUSION

It is the opinion of this office that the Wellston Fire Protection District in St. Louis County may not extend its boundaries to include only a part of the City of Vinita Park.

Section 321.300 is being amended, however, by the passage of House Bill No. 104, which contains a proviso, as follows: "provided that in the case of a municipality having less than twenty per cent of its total population in one fire protection district the entire remaining portion may be included in another district so that none of the city is outside of a fire protection district at the time."

This act has been signed by the Governor and will take effect ninety days after the adjournment of the 67th General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

BAT: A

STATE HOSPITALS: PHYSICIANS: CONSENT: At the time of entering a mental hospital a patient cannot, nor can anyone in his behalf, give permission to the hospital, to perform upon him surgical operations for an indefinite future time whenever it was decided by the hospital staff that such surgical operations were necessary.



October 14, 1953

Honorable B. E. Ragland, Director Division of Mental Diseases Department of Public Health and Welfare State Office Building Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"About ten days ago, Dr. Stewart, our orthopedic surgeon, asked me whether there was not some way possible to facilitate operative surgery on fractures, his desire being to correct these fractures by operative work within a day or two after they occur. Under the present situation we promptly inform the family when a fracture occurs, and request an operative permit. This has been averaging about ten days in getting results; the family going into consultation with various doctors, or a letter having to be sent to some other place because of the family moving in the meantime, so many fractures are ten days to two weeks old before we can obtain an operative permit giving the go-ahead sign.

"I note in the Voluntary Hospitalization Application, the individual signs a statement when they enter for care and treatment, or surgery that may be necessary in promoting the recovery of said patient. I know in the past it is always considered a medical legal question regarding operative permits on just what type surgery, and how extensive it may be done, under a given permit. There is a

definite legal question in my mind whether a general blanket surgical permit would definitely give us authority to proceed with surgery as indicated without specifically advising the people on the specific situation, as it does occur.

"I know, several years ago blanket permits for post mortem examinations were definitely ruled out as being legally technically correct. I know, at the present time, a pathologist will not do a post mortem on a permit given even before death, even if the permit is ob-tained during the last illness causing death. They feel, to be in the clear legally, a permit has to be obtained after death occurs. I wish, therefore, that you would check with the attorney general as to the legality of any blanket permit that might be obtained on the admission of a patient to the hospital, following, say a year or two later patient falls, sustaining a fracture, with the determination in mind to ascertain whether such a blanket permit could be used with perfect legal clearance from any responsibility. If such a permit would be considered legal, we could, naturally, improve the care to the patients when they do sustain fractures."

As we interpret the Cremer letter the question which it raises is: When a patient is admitted to a state mental hospital for treatment of a mental illness, can the patient, or someone in his behabf, give consent for the performance of surgery, the necessity for which may (or may not) arise subsequently due to some event which has not occurred or which is not directly contemplated at the time of admission and at the time when consent to such surgery is given? In other words, can consent be given for surgery of an unknown kind and degree, the necessity for which may arise at some unknown future time?

It is the opinion of this department that such a permit cannot be given. Strangely, it would seem, there do not appear to be any Missouri decisions on this matter of the consent of a patient to a surgical operation. Neither is there any statutory law on this subject. We must, therefore, turn to decisions, of which there are many, from other jurisdictions. We first call attention to the general statement of the law as found in Volume 70, Corpus Juris Secundum, page 967, Paragraph g, which states:

Honorable B. E. Ragland

"Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician; and a physician or surgeon who performs an operation without his patient's consent, express or implied, is liable in damages. In the absence of an emergency a surgeon may not perform an operation different in kind from that for which consent was given or an operation involving risks and results not contemplated. The fact that the unauthorized operation was performed with skill and care does not relieve the surgeon from liability, but, where the particular operation is not clearly unauthorized, the conduct of the operation with skill and care, and with beneficial results, may relieve the surgeon from liability.

"The patient's consent may be implied from circumstances; thus, if he voluntarily submits to an operation, his consent will be presumed unless he was the victim of false and fraudulent mispersentations. Consent to the performance of an operation is not valid if it is obtained by representations which are false to the knowledge of the surgeon. A consent given to a hospital for the benefit of the surgeon is sufficient to authorize an operation by the surgeon. If the patient is for any reason not competent to consent, the consent of someone who, under the circumstances, would be legally authorized to give it may be obtained."

In the case of Wall v. Brim, 138 F. 2d 478, at l.c. 481, the court stated:

"* * The law is well settled that an operation cannot be performed without the patient's consent and that one performed without consent, express or implied, is a technical battery or trespass for which the operator is liable. The obligation underlying this rule is not satisfied by a consent obtained under a mistaken diagnosis that the operation is simple and without danger, when a later diagnosis, while the patient is still conscious and no emergency exists, discloses that the operation is both difficult and dangerous. The rule extends no further than to hold that if a physician advises his patient to submit to a particular operation and the patient weighs the dangers and results incident to its performance and finally consents, he thereby in effect enters into a contract authorizing his physician to operate to the extent to the consent given but no further. The same principle which supports the holding that a surgeon performing an operation without his patient's consent, express or implied, commits a battery or trespass for which he is liable in damages, also supports the holding that a surgeon may not perform an operation different in kind from that consented to or one involving risks and results not contemplated."

In the case of Franklyn v. Peabody, 228 N.W. 681, at l.c. 682, the court stated:

"The governing rule, supported by modern authority, is well stated in 48 C.J. p. 1130: 'Where a patient is in possession of his faculties and in such physical headth as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician; and a surgeon who performs an operation without his patient's consent, express or implied, commits an assault for which he is liable in damages."

In the case of Gregoris v. Manos, 40 N.E. 2d 466, at 1.c. 470, the court stated:

"The courts have held that the right to control one's own body as against surgical intervention may not be disregarded. The consent of the plaintiff was necessary before the defendants could lawfully perform the operation. Wells v. Van Nort, 100 Ohio St. 101, 125 N.E. 910; Cuthreil v. Protestant Hospital, Par. 375, Kinkead on Torts. * * *"

The above cases clearly establish the fact that, where no emergency exists and the patient is able to consult with the physician, the physician must obtain the consent of the patient to a surgical operation.

As to an "incompetent" the court, in the case of In re Hudson 126, P. 2d 765, 1.c. 781, states:

"It is a well established rule that a surgical operation may not be performed on a person until the patient, if sui juris, consents thereto; or in the case of an incompetent no operation may be performed by a surgeon upon such person until the guardian of that incompetent consents to the operation; and, if an infant, no operation may be performed until consent is first obtained of the natural guardian or of one standing in loco parentis to the infant. Pratt v. Davis, 118 Ill. App. 161; Annotation 76 A.L.R. 562, et seq."

In all of these cases the court has made it perfectly plain that the consent to which it refers is consent to a specific surgical operation. This fact is further shown by the fact that the physician is required to acquaint the patient with the nature of the operation and the risk involved, so that the patient may decide to submit to the operation or not. In the Brim case, supra, it is said: "He (the patient) thereby in effect enters into a contract authorizing his physician to operate to the extent of the consent given but no further."

In view of this it seems clear that it would be wholly contrary to the law, as stated above, for a person, or for someone in his behalf, to give a general and blanket permit to a physician or to a hospital to operate upon him at any time in the future regardless of the nature of the operation or its seriousness, without obtaining permission from the patient, (or from his guardian if the patient is incompetent and has a guardian) for the patient's operation.

You have submitted to us the form entitled "Application for Voluntary Hospitalization (By Patient, Parent or Guardian) Section 202.783 RSMo Supplement 1953, Section 2 House Bill 355, 67th General. Assembly."

This application is to be signed by the patient alone, or by the patient together with his parent or guardian. Paragraph 3 of this application states: "That by making this application, said patient and the person, if any, who makes the application in said patient's behalf, give consent to said hospital to administer such form of treatment or surgery to said patient as may be deemed necessary by the superintendent to promote said patient's recovery."

ment of the law regarding consent for surgery as stated above, Furthermore, the consent there given is for surgery which may be necessary and incidental for treatment of the illness for which the patient was admitted to the hospital, which is mental illness. The question which you ask is whether such consent could be made to cover a situation where at some time after admission the patient sustains a bone fracture, the proper treatment of which, necessitates surgery. The consent to surgery given in the application is, as we stated above, consent to surgery incidental and necessary to the treatment of the mental diseases for the treatment of which the patient was previously admitted to the hospital, whereas, the surgery contemplated herein is one the necessity for which arose from an entire different source.

CONCLUSION

It is the opinion of this department that at the time of entering a mental hospital a patient cannot, nor can anyone in his behalf, give permission to the hospital, to perform upon him surgical operations for an indefinite future time whenever it was decided by the hospital staff that such surgical operations were necessary.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

HPW/ld

JOHN M. DALTON Attorney General APPROPRIATIONS:

Money appropriated under Section 5.161 of House Bill No. 383, 67th General Assembly, may be expended for all purposes necessarily related to the training of professional personnel for mental hospitals of the state.



October 19, 1953

Honorable B. E. Ragland, Director Division of Mental Diseases Department of Public Health and Welfare State Office Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"The 67th General Assembly passed House Bill No. 383 which appropriates funds for the use of St. Louis State Hospital as follows:

"Section 5.161. ST. LOUIS STATE
HOSPITAL-FOR TRAINING PROFESSIONAL
PERSONNEL TO BE EMPLOYED IN VARIOUS
MENTAL HOSPITALS OF THE STATEGENERAL REVENUE FUND.--There is hereby
appropriated out of the state treasury,
chargeable to the General Revenue
Fund, the sum of Two Hundred Fifty
Thousand Dollars (\$250,000.00) for
the use of the St. Louis State
Hospital for the purpose of training
professional personnel to be employed
in the various mental hospitals of
the state; for the period beginning
July 1, 1953 and ending June 30, 1955."

"Said amount was reduced by the Governor as follows:

"'Section 5.161. On page 9, line 3, Training Professional Personnel, I Honorable B. E. Ragland

have reduced the amount from \$250,000.00 to \$100,000.00 and approve said amount, for the reason that \$100,000.00 is ample for this purpose at this time.

Phil M. Donnelly, Governor'

"I respectfully request your official opinion as to whether or not any portion of the amount approved by the Governor can be expended for operations, additions, repairs and replacements for use of the hospital in connection with the training program."

It is apparent that in the preparation of this particular appropriation the General Assembly has followed the requirements of Section 23, Article IV, Constitution of 1945, reading in part as follows:

"Every appropriation law shall distinctly specify the amount and <u>purpose</u> of the appropriation without reference to any other law to fix the amount or purpose."

(Emphasis ours.)

This is in accordance with the further requirements of Section 21.260, RSMo 1949, requiring that appropriations must be itemized.

The "purpose" of the appropriation contained in the Act under consideration is expressed clearly as being that of "training professional personnel to be employed in the various mental hospitals of the state." The "training" of professional personnel being the prime purpose of the appropriation, it becomes necessary to determine what expenditures may properly be made in achieving the result which is desired. It is common knowledge that "training" of any professional group contemplates more than merely academic lecturing and teaching from text books. In many instances, equipment of a highly technical nature may be required. In other words, it may be necessary that particular buildings may be necessary to carry on such a program of "training."

We are completely unfamiliar with the necessary requisites for "training" professional personnel to fit such persons for

Honorable B. E. Ragland

employment in mental hospitals and, of course, express no opinion with respect to any particular expenditure which may be made allegedly for such purpose. However, the necessary essentials of such "training" are no doubt available in accordance with established educational institutional procedures, and the validity of any expenditure or proposed expenditure can be determined by reference to such standards.

CONCLUSION

In the premises, we are of the opinion that the appropriation made under Section 5.161 of House Bill No. 383, 67th General Assembly, may be used for any purpose necessarily connected with the "training" of professional personnel to qualify such persons for employment in the mental hospitals of this state, and that the validity of any specific expenditure made therefrom must be determined by reference to recognized established educational standards designed for such "training."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

WFB/lrt/fh

JOHN M. DALTON Attorney General AGRICULTURE: MO. STATE PENITENTIARY: ANIMALS:

Missouri State Penitentiary is not required to cook the garbage fed to swine owned by the state and fed on the state penitentiary farms under House Bill No. 60 of the Sixty-seventh General Assembly.



June 19, 1953

Missouri State Penitentiary Jefferson City, Missouri

Attention: Paul V. Renz, Superintendent of Farms

Dear Sir:

We render herewith our opinion based on your request of May 15, 1953, which request reads as follows:

"We are wondering if the new 'garbage cooking' law will affect us here at the prison. Our garbage is taken from the kitchens each day and fed directly to the hogs. We use all the meat here. Will you please give us a ruling as to whether we should cook this garbage or not?"

The pertinent portion of the law to which you refer, House Bill No. 60 of the Sixty-seventh General Assembly, reads as follows:

"Section 1-A. Prior to the feeding of garbage, other than garbage obtained from his own household, to any swine located in the State of Missouri, the owner or feeder, as the case may be, shall first obtain an annual permit from the Department of Agriculture of Missouri, for which he shall pay an annual fee of Twenty-five dollars, which shall be deposited in the 'Agriculture Fees' fund and to be

used for the enforcement of this act.

"The applicant for a garbage feeding permit shall certify in an application that he has facilities for cooking garbage. The Commissioner of Agriculture, or his deputy, upon receipt of an application for a permit, shall promptly make an investigation, and if the facilities are adequate for the cooking of garbage, shall issue a permit.

"Section 2. No person, other than an individual who feeds to his own swine only the garbage obtained from his own household, shall feed garbage to swine unless such garbage has been heated to a temperature of 212 degrees Fahrenheit (boiling point) and fed in compliance with rules and regulations promulgated by and under permits issued by the state department of agriculture.

"Section 7. The feeding of raw garbage to swine has resulted in an epidemic of vesicular exanthema, a serious disease of hogs, which prevents the sale of such hogs in interstate commerce, and thereby causes severe losses to the people of this state and endangers the public health. This act, therefore, is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution. This act shall, therefore, be in full force and effect from and after July 1, 1953."

We call your attention to the following rule of statutory construction found in 59 C.J., Statutes, Section 653, at page 1103:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. * * *

Missouri State Penitentiary

This rule is especially applicable in construing a penal statute such as the garbage cooking law quoted above, and hence state agencies, such as the State Penitentiary, are not within the purview of the act.

However, we believe there is a strong moral obligation on the state agencies to institute and follow the garbage cooking practice. The disease of vesicular exanthema is a highly contagious and destructive one. Its outbreak in one herd of swine constitutes a menace to the surrounding area, and could well set at naught the precautions taken to prevent the disease. We respectfully suggest that the officials of the State Penitentiary, in cooperation with the Department of Agriculture, voluntarily institute and follow the practice of cooking garbage before feeding it to swine.

CONCLUSION

It is the opinion of this office that the Missouri State Penitentiary, although under a moral obligation to do so, is not legally required to cook the garbage fed to swine owned by the state and fed on the state penitentiary farms under House Bill No. 60 of the Sixty-seventh General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK: lw

SOCIAL SECURITY: COUNTY EMPLOYEES: County not required to pay social security contributions on wages of former employees not employed at the time of the entry upon agreement with Federal Social Security Agency.

Officers are required to pay contributions for former term although serving a subsequent term at the time county enters into agreement.

XXXXXXXXXXX

JOHN M. DALTON

March 5, 1953

Honorable James T. Riley Prosecuting Attorney Cole County Jefferson City, Missouri



XXXXXXXX

J. C. Johnsen

Dear Sir:

This is in reply to your recent request which is as follows:

"Under the various sections of Chapter 105, R.S.Mo. 1939, the several political subdivisions of the State of Missouri are authorized to enter into agreements to accept the provisions of the Federal Laws relating to old age and survivors insurance. On January 15, 1953, our County Court made an order accepting such provisions and proposing to enter into an agreement with the State Agency retroactive to January 1, 1951.

"Presumably such agreement would have to include each and every person who is employed by the County for any period of time since January 1, 1951. It would also have to include such elective officials whose terms expired December 31, 1952.

"I would like to have the expression and opinion from your office regarding the following:

"(a) Is the County Court or County Treasurer authorized to pay the tax required by the Federal Statutes on the salaries of the employees and officers who are no longer employed by the County, or whose term of office expired prior to the County Court's order of January 15, 1953.

- "(b) If the County Court and County Treasurer is authorized to pay the Federal Tax, is the County then authorized to collect the contributions due from the former employee or elective official by civil suit or otherwise.
- "(c) If the County Court or County Treasurer is unable to collect the contributions due from the employees for the past periods, can the County then pay from its treasury, both the employers and employees contribution under Section 195.380.
- "(d) Can the County Court and County treasurer make its order and contribution effective against an elective official whose term expired on December 31, 1952, and who was re-elected January 1, 1953."

From the context of your letter, we presume that you have reference to sections in V.A.M.S. In order to comprehend the problems of law involved in the State's participation in the Federal Old-Age and Survivors Insurance Act, we feel that a brief discussion of the circumstances of the acceptance by Missouri is first necessary. Section 418, Title 42, U.S.C.A., of the Federal Social Security Act was amended August 28, 1950, making possible the inclusion of the employees of States and the employees of local subdivisions of States under the provisions of the Old-Age and Survivors Insurance Benefits. Section 418, Paragraph (a) (1) as so amended in 1950, is as follows:

"(a) (1) The Administration shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request."

The coverage of State and local government employees

was not automatic under the Act, but required a request and an agreement from the State. The amended law further provided, as to the effective date of the State's agreement by Subsection (f) of Section 418, as follows:

"(f) Any agreement or modification of an agreement under this section shall be effective with respect to services performed after an effective date specified in such agreement or modification, but in no case prior to January 1, 1951, and in no case (other than in the case of an agreement or modification agreed to prior to January 1, 1953) prior to the first day of the calendar year in which such agreement or modification, as the case may be, is agreed to by the Administrator and the State."

The State of Missouri elected to participate in accordance with the above-quoted Federal law, and enacted the State Social Security Law now contained in Laws of Missouri, 1951, pages 788 to 798. This law provided, as to the effective date of the necessary agreement to be made under the Federal Act, the following section, Section 10, page 796, Laws of Missouri, 1951:

"Section 10. Effective date of coverage...
The coverage provided for in this act shall be effective to the employees as defined herein on or before July 1, 1951."

In the Missouri law it was further provided that political subdivisions could come under the provisions of the Social Security Act when a plan submitted to the State agency was approved. It was provided that such political subdivision in making its first payment could agree to pay contributions in respect to wages equal to the amount due and payable if the agreement had been effective back to January 1, 1951. The political subdivisions could thereby set back the beginning of the coverage of their employees under the Old-Age and Survivors Insurance Act. Laws of Missouri, 1951, page 793, Section 5, Sub-section 4.(1), is as follows:

"Each political subdivision or instrumentality whose plan has been approved under this section shall pay into the contributions fund, with respect to wages at such times as the state

agency may prescribe, contributions in the amounts and at the rates specified in the agreement entered into by the state agency, except that each such political subdivision or instrumentality in making its first payment into the contribution fund after the effective date of its agreement with the state agency, may agree to pay contributions with respect to wages, a sum equal to the amount which would have been due and payable had the agreement and this act been effective on January 1, 1951."

(Underscoring ours.)

This is the statutory authority for a political subdivision to make its payments into the contribution fund correspond to the antedating of the effective date of the participation on behalf of its employees. This is the provision for contributions by employers.

Since the enactment of the above-quoted statutes the Federal Social Security Law has been amended, enabling States to further modify agreements so that political sub-divisions may participate until January 1954 with a January 1st, 1951, effective date, by the enactment of Title 42, U.S.C.A., Section 417 (f), June 28, 1952, or 488, 66 Stat. 285.

Our State law in regard to contributions by employees is found in Section 5, Sub-section 4, (2), Laws of Missouri, 1951, page 793, and is as follows:

"(2) Each political subdivision or instrumentality required to make payments under this act is authorized, in consideration of the employee's retention in, or entry upon, employment after the passage of this act, to impose upon its employees, as to services which are covered by an approved plan, a contribution with respect to wages, not exceeding the amount of tax which would be imposed by section 1400 of the Federal Insurance Contribution Act and to deduct the amount of such contribution from the wages when paid, except that such political subdivision or instrumentality may agree to impose upon its employees,

during the first quarter of coverage after the effective date of its agreement with the state agency, a contribution with respect to wages, equal to the amount which would have been due and payable from such employees had the agreement and this act been effective on January 1, 1951. Contributions so collected shall be paid into the contribution fund in partial discharge of the liability of the political subdivision or instrumentality. Failure to deduct the contribution shall not relieve the employee or employer of liability therefor."

(Underscoring ours)

This is the statutory authority of political subdivisions to make deductions from the salaries or wages of employees, as is said, in consideration of the employees retention in, or entry upon, employment, under the Federal Contribution Act. It will be seen, that none of the quoted sections of the statutes requires or authorizes a political subdivision to pay the tax required on the salaries of employees or officers who are no longer employed by the political subdivision. We believe that a county being a political subdivision under the definition of the statutes has no authority to pay the tax for persons not in the employee-employer relation at the time the agreement between the county and the state is accepted by the Federal Government. This answers question (a) of your request. Inasmuch as questions (b) and (c) are only to be answered in the event question (a) is answered in the affirmative, this disposes of the necessity of considering them.

In regard to question (d), there can be no doubt that if the agreement of your political subdivision was accepted by the state and federal authority during the period of coverage - from January 1, 1951, to December 31, 1952 - the elective public officials of the county would have been covered under the law for that period. It is likewise true that they are now under covered employment subsequent to the final acceptance of the agreement for the continuing term of their respective offices. We have then a situation to consider where the same person holds the same position both before and after entry under agreement of his employer, the political subdivision, under the Old-Age and Survivors Benefits Insurance provisions of the Federal Social Security Act.

It is our opinion herein that a person employed at the time of the agreement, and thereafter, is covered by the applicable provisions of the Social Security Act. But here we have an expiration of one term and the entering into another term by the same person. The Act provides an income tax upon the employee and an excise tax upon the employer. This interpretation was put upon this type of regulation as early as 1937 by the United States Supreme Court. In Helvering vs. Davis, 301 U.S. 619, 81 L. ed. 1307, 1.c. U.S. 635, it is stated as follows:

"Title VIII, as we have said, lays two different types of tax, an 'income tax on employees,' and an 'excise tax on employers.' The income tax on employees is measured by wages paid during the calendar year. Section 801. The excise tax on the employer is to be paid 'with respect to having individuals in his employ,' and, like the tax on employees, is measured by wages. Section 804. * * * *."

As given in Laws Mo. 1951, page 789, Section 1, paragraph (2), the definition of employee is, in part, as follows:

"* * * Elective or appointive officers and employees of any political subdivision of the state, * * *."

(Underscoring ours)

The definition of employment following the above employee definition on page 789 is equally as broad as the above and for our purposes here practically all including. At least it makes no distinction in regard to elective officers' terms of office.

Our conclusion then would be that an officer whose term expired on December 31, 1952, and resumed office would still be in employee-employer relation with his county.

In State vs. Sims, 65 S.E. (2d) 730, one of the cases which has been decided concerning the particular laws here in question the Alabama Supreme Court said, Lc. 737, as follows:

" # # Though, without its consent, a State is exempt from taxation by the government of the United States, the State may remove that immunity. United States v. Bekins, 304 U.S. 27, 58 S. Ct. 811, 816, 82 L. ed. 1137. In that case the Supreme Court of the United States said: 'While the instrumentalities of the national government are immune from taxation by a State, the State may tax them if the national government consents (Baltimore National Bank v. State Tax Comm., 297 U.S. 209, 211, 212 (56 S. Ct. 417, 418, 80 L. ed. 586) and by a parity of reasoning the consent of the State could remove the obstacle to the taxation by the federal government of state agencies to which the consent applied. " " " "."

We believe that it may be said further that since the county by its acceptance has waived its constitutional barriers against the Federal law, the employee-employer relationship as provided in the Federal law governs the relationship between the employee of the county and the county. It also appears to be evident from a search of relevant statutes, that a temporary, momentary cessation of the employer-employee relationship such as between expiration of term and entry into another term, is not contemplated and can make no difference under the Federal Tax Law, the Federal Social Security Law or the State law accepting the Federal.

CONCLUSION

It is, therefore, the opinion of this office that a county is not required to pay the tax on the salaries of employees or officers employed during a period of coverage but who are not employed at the time of or after the agreement between the political subdivision and the Federal Social Security agency is entered into, regardless of the effective date of the agreement.

It is further the opinion of this office that upon approval of the plan submitted by a county that the elected officials of the county, whose terms of office expire December 31, 1952, and who were re-elected and serving at the time of

approval are required to pay contributions in respect to wages, for the service under coverage by the agreement which fell within the expired terms.

This opinion, which I hereby approve, was prepared by my Assistant, James W. Faris.

Very truly yours,

JOHN M: DALTON Attorney General

JWF:mm

COUNTY TREASURERS:

OFFICERS:

County treasurer would not receive compensation provided for services in connection with intangible tax if intangible tax is repealed.

JOHN M. DALTON



April 16, 1953

John C. Johnsen XXXXXXX

Honorable James T. Riley Prosecuting Attorney Cole County Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"In the 66th General Assembly the Legislature enacted H.B. 199, see Laws of Missouri, 1951, page 867, which by the imposition of additional duties upon the county treasurer, also, provided additional pay, Section 3, Laws of Missouri, 1951, page 868.

"For the past two years the treasurers of the various counties of the State of Missouri have operated under said law and received such additional compensation as was provided for therein.

"In the 67th General Assembly, S.B. 356 was introduced which has for its purpose the repeal of sections 146.010 to 146.130, RSMo 1949, and sections 146.055 and 146.056, RSMo 1951 Supplement. S.B. 356 does not mention the enactment mentioned in the first paragraph of this letter and now specifically Section 54.275 Cum. Supp. 1951, Chapter 54.

"S.B. 356 does not mention the sections of the intangible tax law relating to Banks, Laws of Missouri, 1945, page 1921; Credit Institutions, Laws of Missouri, 1945, page 1937; nor, Building & Loan, Laws of Missouri, 1945, page 1919. "The question now confronting the county treasurers is: Would the enactment of S.B. 356, which specifically denotes certain sections of the Missouri Laws, but does not mention other sections of the Missouri Laws, all of which relate to the intangible tax law, either by implication or the removal of the additional duties under Section 146.056, Cum. Supp. 1951, cause the loss of the additional compensation as provided under Section 54.275, Cum. Supp. 1951?

"The writer is aware that final passage of the bill has not been accomplished, but due to the fact that one hundred and fourteen (114) county treasurers may be effected by this bill an early opinion from your office would be most deeply appreciated."

Section 146.055, Mo. R.S., 1951 Supp., provides:

"It shall be the duty of the state director of revenue to furnish, on or before the first day of January in each year, to the county treasurers of each county under charter form of government and to the county treasurers of class two, three and four counties in this state, forms for the use of the citizens of this state to make property tax returns on intangibles as provided by section 146.050, RSMo 1949, in sufficient number to meet the needs of the respective counties. At the same time the director shall furnish to each treasurer a list of the intangible taxpayers of the respective counties who filed a state intangible tax return the preceding year."

Section 146.056, Mo. R.S., 1951 Supp., provides:

"1. On or before the fifteenth day of January of each year every county treasurer shall mail to each intangible taxpayer as listed by the director of revenue, and to such other persons as he may have reason to believe may be possessed of taxable, intangible property a form prescribed and furnished by the director of revenue, together

with a brief statement of what is required of the taxpayer under sections 146.055 and 146.056. Every county treasurer shall mail, on or before the first day of February of each year, to the director of revenue, a list of the additional names to whom he has mailed said form, which said list of additional names shall be added to the list held by the director of revenue as those who have intangible personal property subject to taxation.

"2. The county treasurer shall keep all such lists strictly confidential and shall not reveal the contents thereof to any person except as herein provided."

Section 54.275, Mo. R.S., 1951 Supp., provides:

"For the additional duties imposed upon county treasurers by section 146.056, RSMo 1949, they shall receive the following additional compensation, to be paid in the same manner and from the same funds as county treasurers are now paid provided said treasurers shall have used diligence in securing and preparing the additional list and shall have forwarded the same to the director of revenue.

- (1) In class four counties six hundred dollars per annum.
- (2) In class three counties having a population of less than twelve thousand five hundred, six hundred dollars per annum.
- (3) In class three counties having a population of more than twelve thousand five hundred but less than thirty thousand, eight hundred dollars.
- (4) In class three counties having a population of more than thirty thousand, one thousand dollars.
- (5) In class two counties, one thousand dollars.

(6) In counties under charter form of government a compensation to be fixed by the county council."

Senate Bill No. 356 of the 67th General Assembly provides:

"Section 1. That sections 146.010 to 146.130, RSMo 1949 and sections 146.055 and 146.056, RSMo 1951 Supp., be and the same are hereby repealed."

Sections 146.010 to 146.130, RSMo 1949, referred to in Senate Bill No. 356, is the entire statutory scheme for the imposition and collection of the tax on intangible personal property. Should Senate Bill No. 356 become law, there would be no statutory provisions relative to the imposition of taxes on such property. The duties imposed upon the county treasurer under Section 146.056 would no longer be required.

It is quite obvious that the imposition of the duties upon the treasurer and the compensation provided therefor was for the purpose of permitting an increase in the compensation of treasurers during their term without running afoul of the provisions of Section 13 of Article VII of the Constitution of Missouri, 1945, which provides:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

This method of effecting an increase in compensation during the term of an officer has received the approval of our courts. State ex rel. Harvey v. Sheehan, 269 Mo. 421, 429, 190 S.W. 894; Little River Drainage Dist. v. Lassater, 325 Mo. 493, 29 S. W. (2d) 716.

Inasmuch as the additional duties in a situation such as this are, by virtue of the constitutional provision above referred to, inseparably related to the increased compensation, we think it beyond doubt that the removal of the duties would necessarily eliminate the additional compensation provided for such duties. "A public officer has no rights of any sort to compensation for his services before he has earned it, even if prevented from performing such services by legislative action." 67 C. J. S., Officers, Section 83, page 320.

Honorable James T. Riley

Inasmuch as the services required have already been performed for the calendar year 1953, enactment of Senate Bill No. 356 would not affect compensation for 1953.

In your opinion request you refer to the fact that Senate Bill No. 356 makes no reference to the Bank Tax Act (Sections 148.010-148.110, RSMo 1949), the Credit Institutions Tax (Sections 148.120-148.230, RSMo 1949), and the Savings and Loan Association Tax (Sections 148.470-148.530, RSMo 1949). However, Section 146.056, above quoted, imposes no duties upon the county treasurer regarding such taxes. He is required to send return forms to such persons as are required to pay the tax on intangible personal property under Section 146.050, RSMo 1949, one of the provisions which Senate Bill No. 356 repeals.

CONCLUSION

Therefore, it is the opinion of this department that should Senate Bill No. 356 of the 67th General Assembly, as it now reads, be enacted into law, effecting the repeal of the statutes imposing tax upon intangible personal property, county treasurers would no longer be entitled to the additional compensation provided by Section 54.275, Mo. R.S., 1951 Supp., for services formerly rendered by them in connection with said tax on intangible personal property.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

NEPOTISM:

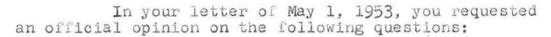
SCHOOLS:

School director causing appointment of relative within certain degree as teacher PUBLIC OFFICERS: or bus driver forfeits office. Purchase contracts between school director and board of education prohibited.

May 15, 1953

Honorable James T. Riley Prosecuting Attorney Cole County Jefferson City, Missouri

Dear Mr. Riley:



"Our County Superintendent of schools has asked me to obtain an opinion from office pertaining to the authority of a six member Board of Education of the Reorganized School District, on the following questions:

- "(1) May such a Board of Education employe a relative of one of its members as a teacher or bus driver for the district.
- "(2) May such a Board of Education purchase supplies and equipment from one of its members.
- "(3) Does a member of such Board of Education forfeit his office if the Board employes one of his relatives as above stated, or if the Board purchases supplies or equipment from such member.

"If we assume that such action is prohibited either by statute or the Constitution, can such prohibition be circumvented by the interested member refraining from voting on the question of such employment or purchases."



Honorable James T. Riley

The matters about which you inquire will be discussed separately i.e., nepotism will be treated first and then the matter of purchasing supplies will be discussed.

Nepotism is prohibited by Article VII, Section 6. Missouri Constitution of 1945, as follows:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

In addition, the Board of Education is prohibited by Section 163.080, RSMo 1949, from employing a teacher who is related to a board member in the following circumstances: "* * * nor shall any person be employed as a teacher who is related within the fourth degree to any board member, either by consanguinity or affinity, where the vote of such board member is necessary to the selection of such person; * * *."

The "anti-nepotism" provision of the Constitution was construed by the Supreme Court of Missouri in State ex inf. McKittrick, Attorney General, vs. Whittle, 63 S.W. (2d) 100. The Board of Directors of a common school district of Miller County had employed a first cousin of a member of the board as a school teacher. Three members of the board voted on whether the cousin should be employed. One director voted against the employment and the other two voted in favor of employing him. One of the members voting in the affirmative was the first cousin of the teacher. Quo warranto proceedings were brought to oust from office the school director who voted to employ his own first cousin, and he was ousted. The Court discussed the background and purpose of the anti-nepotism' provision in the Constitution, l.c. 101, as follows:

"It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials

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and by members of official boards, bureaus, commissions and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.

"It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, * * *."

The Court based its decision that the ousted director had violated the anti-nepotism provision because his vote was necessary to the appointment, 1.c. 101, 102:

"* * * The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district.'

The same type of situation was considered in State ex rel. McKittrick, Attorney General, vs. Becker, et al., 81 S.W. (2d) 948. That case involved the reappointment of a commissioner to the St. Louis Court of Appeals. The Court consisted of three Judges. Two of them reappointed a first cousin of the third Judge as a commissioner. The third Judge declined to vote for the reappointment because of his relationship with the commissioner. The Court decided this was not nepotism, since the reappointment was

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made by the two Judges who were not kin to the commissioner, saying, 1.c. 950:

"* * * The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. * * *."

It is thus clear that a school director who casts a necessary or deciding vote to employ a relative within the prohibited degree forfeits his office. However, if the appointment is made without action by the director related to the proposed employee, the appointment is valid, and the school director does not forfeit his office.

In answer to your inquiry as to whether a school director can enter into contracts with the Board of Education to furnish supplies and equipment, I am enclosing an opinion of this office rendered to the Honorable Fred C. Bollow, Prosecuting Attorney of Shelby County, on June 30, 1948, and an opinion to the Honorable Homer L. Swenson, Prosecuting Attorney of Wright County, dated July 17, 1950. It is believed that these two opinions answer your questions concerning pecuniary relationship between a school director and the school board except as to whether a director selling supplies and equipment to his Board forfeits his office.

Selling of supplies by a director to the school board with knowledge of the illegality thereof, may be considered "willful misconduct or misdemeanor in office," prohibited by Section 558.160, RSMo 1949:

"Every officer or person holding any trust or appointment, who shall be convicted of any willfull misconduct or misdemeanor in office, or neglect to perform any duty enjoined on him by law, where no special provision is made for the punishment of such misdemeanor, misconduct or negligence, shall be punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

(Underscoring ours.)

Honorable James T. Riley

An officer convicted of any official misconduct or misdemeanor in office forfeits his office, and may be summarily removed by the Court in which convicted:

"558.130. Conviction, effect of.--Every person who shall be convicted of any of the offenses mentioned in sections 558.010 to 558.120 shall be forever disqualified from holding any office of honor, trust or profit under the constitution and laws of this state, and from voting at any election; and every officer who shall be convicted of any official misdemeanor or misconduct in office, or of any offense which is by this or any other statute punishable by disqualification to hold office, shall, in addition to the other punishment prescribed for such offenses, forfeit his office."

(Underscoring ours.)

Thus, in State vs. Lawrence, 45 Mo. 492, the trial court (St. Louis Court of Criminal Corrections) upon conviction of a justice of peace for misdemeanor in office, as part of the sentence, deprived the defendant of his office. The Appellate Court declared that forfeiture of office could be declared as punishment, even though in this case the particular trial court exceeded their jurisdiction (later given them by legislative enactment.)

Public policy against such relationship between a Board and a Board Member, as expressed by the Courts, is so strong as to prohibit such contracts by the Board, even though the interested Member abstains from any proceedings in relation to such sales.

CONCLUSION

It is, therefore, the opinion of this office that:

1) A director of a Board of Education who names or appoints or casts a necessary or deciding vote in favor of naming or appointing to public office, or employment, any relative within the fourth degree, by consanguinity or affinity, forfeits his office; and,

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2) A director selling supplies and equipment to the Board of Education on which he serves may be guilty of misconduct or misdemeanor in office, and upon conviction therefor may be removed from office. Contracts between the director and board are void, even though the interested member abstains from voting.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General SOCIAL SECURITY: COUNTY CLERK:

Effective date of additional compensation for county clerks for performing duties imposed after county elects to accept provisions of State Social Security Law.



May 28, 1953

Honorable James T. Riley Prosecuting Attorney of Cole County Jefferson City, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"The County Court of Cole County has requested that I secure your interpretation of Section 51.415 Cum. Supp. 1951. The above section was approved by the Governor on December 20, 1951, and became effective on that date.

"On January 15, 1953, the Cole County Court made an order accepting the provisions of Chapter 105 Cum. Supp. 1951, and in that order the effective date of the contributions was determined to be January 1, 1951. The services required by Section 51.415 have been performed by the County Clerk and his deputy since January 15, 1953. No services were performed by the County Clerk prior to that time, as the County had not elected to accept the provisions of the Social Security Law.

"Notwithstanding the fact the County Clerk performed no services during the calendar years 1951 and 1952, is the County Clerk entitled to the increased annual compensation for the calendar years 1951 and 1952, by virtue of the order of the Court making the contributions retroactive to January 1, 1951."

You state that on January 15, 1953, Cole County, by order of the County Court, elected to accept the provisions of the recently adopted Social Security Law relating to public employees, Chapter 105, Cumulative Supplement 1951. Likewise, by court order, the effective date of the contributions imposed was determined to be January 1, 1951, as authorized by the State and Federal Acts. Section 51.415, to which you refer and about which you inquire reads as follows:

- "1. In all counties of class three and four which shall enter into an agreement with the state agency to place county employees under the Federal Social Security Act in accordance with the provisions of sections 105.300 to 105.450 RSMo 1949, it shall be the duty of the county clerk to keep necessary records, collect contributions of county employees and remit the same to the state agency, and do all other administrative acts required by the agreement or by ruling of the federal or state agency in order to carry out the purposes of the aforesaid law.
- "2. In addition to the compensation now provided by law for said county clerks, and in consideration of the additional duties imposed upon them by this section, they shall receive compensation payable in twelve equal monthly installments out of the county treasury in the following amounts:
 - "(1) In counties of class three, eight hundred dollars per annum;
 - "(2) In counties of class four, six hundred dollars per annum.
 - "(3) In counties of class three the salary of the deputy county clerk shall be increased three hundred dollars per year to be paid in twelve equal monthly installments.

Honorable James T. Riley

"(4) In counties of class four the salary of the deputy county clerk shall be increased two hundred forty dollars per year to be paid in twelve equal monthly installments."

You inquire as to whether or not the County Clerk, under the provisions of this section and the facts stated, is entitled to the increased compensation for the years 1951 and 1952. Before determining this question, we wish to make reference to certain rules of statutory construction. The primary rule is to ascertain and give effect to the lawmakers intent from the words used and put upon such language its plain and rational meaning, taking into consideration the purpose sought to be accomplished by the Act. Roberts v. City of St. Louis, 242 S. W. (2d) 293, and statutes must be held to operate prospectively unless the intent is clearly expressed or the language of the statutes admits of no other construction, Lucas v. Murphy, 156 S. W. (2d) 686. Specifically, in regard to compensation statutes, it is stated in 67 C. J. S., Officers, Section 93, as follows:

"The usual rules of interpretation are applied in determining the intent of the legislature and the meaning of an enactment in so far as concerns the construction of statutes relating to the compensation of public officers must be strictly construed in favor of the government, and an officer is entitled only to that which is clearly given. * *

"Words in a statute simply specifying that an officer shall receive a designated compensation have no retroactive effect unless there is something in the language indicating it. * * *"

With these rules in mind, we now look to Section 51.415.
This section provides that in all counties of the third and fourth class which adopt the provisions of the State Social Security Law, it shall be the duty of the county clerk to keep necessary records, collect contributions and remit same to the state agency, and do all other administrative acts required by the agreement or by ruling of the federal or state agency necessary to carry out the purpose of the law. It is then provided that in addition to the compensation provided by law "and in consideration of the additional duties imposed * * *by this section," the several county clerks shall receive the following enumerated compensation. The clear and stated purpose of the act is to compensate clerks for the additional duties

imposed. Prior to January 15, 1953, the County Clerk of Cole County had no additional duties and while although the contributions were collected as of January 1, 1951, this, of course, was done by the Clerk after the date the county court authorized participation in the program. We cannot conceive, nor is it indicated from the language employed, that it was the legislative intention to provide additional compensation prior to the time the Clerk actually undertook the additional duties or before the effective date of the act itself. On the contrary, the opposite conclusion is clearly manifested.

CONCLUSION

Therefore in the premise, it is the opinion of this office that where a county of the third class, by order of the county court dated January 15, 1953, elects to accept the provisions of the State Social Security Law and likewise, by court order determines that contributions shall be imposed and collected as of January 1, 1951, as authorized by the State and Federal Acts, the County Clerk, charged with the duty of keeping necessary records, collecting and remitting contributions to the state agency and performing other administrative acts required to carry out the purpose of the law, is not entitled to the additional compensation provided in Section 51.415 for such additional duties, for the years 1951 and 1952.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

OFFICERS:

PUBLIC RECORDS: Notice of proposed change in contract required to be filed under Section 295.100, RSMo 1949, is a public record and subject to inspection by the members of the public.

May 26. 1953



Mr. Daniel C. Rogers Chairman Missouri State Board of Mediation Jefferson City, Missouri

Dear Mr. Rogers:

This will acknowledge receipt of your request for an opinion which reads in part:

> "Section 295.100 of the King-Thompson Act provides that the parties to a labor contract in public utilities shall give each other

'. . . at least a 60 day notice of desired changes

in the existing contract and it further provides that the parties shall

'. . . file a copy of such desired changes with the State Board of Mediation at least 60 days before the date fixed for the termination of said contract, agreement or understanding. 1

"The question arises whether the above notices of desired changes filed in the office of the State Board of Mediation are open to public perusal."

Section 295.100, RSMo 1949, reads:

"1. In the case of all existing labor contracts, agreements or understandings which do not provide for at least a sixty-day notice of desired changes and which contracts, agreements or understandings terminate after seventy days following the effective date of this chapter, the parties

thereto shall nevertheless inform, in writing, the other party or parties of any specific changes desired to be made in said contract, agreement or understanding and file a copy of such desired changes with the state board of mediation at least sixty days before the date fixed for the termination of said contract, agreement or understanding.

"2. In the case of labor contract, agreements or understandings terminating within seventy days after this chapter shall become effective, the parties thereto shall forthwith, or not later than ten days after the effective date of this chapter, inform the other party, in writing, of the specific changes desired to be made in said contract, agreement or understanding and promptly file a copy of such demands with the state board of mediation."

Under the foregoing statute it clearly requires the notice and copy of desired changes in said contract provided for therein to be filed with the State Board of Mediation and specifies the particular time for such filing. We are cognizant of the fact that in all probability the legislative intent in enacting said statute was to merely apprise said board of the particular change desired in said agreement, understanding or contract so that said board might proceed with conferences between the contracting parties in an effort to negotiate some amicable settlement between said parties and thereby avoid strikes and the discontinuance of the public services to the public.

There is considerable authority holding that such a filing, as required in said statute, does not constitute a public record and, therefore, not open to general inspection by members of the public. See Vol. 53, C.J., pp. 626, 627, Vol. 76, C.J.S., Sec. 36, p. 137, and People ex rel. Stenstrom v. Harnett, 226 N.Y.S. 338, l.c. 341, 342. The latter decision clearly classifies such a notice as required to be filed herein with the Board of Mediation as not being a public document and, therefore, not open to public inspection.

However, in rendering this opinion we are confronted with two decisions of our Supreme Court which clearly hold contrary to the above. The first is State ex rel. Eggers vs. Brown, 134 SW (2d) 28, 345 Mo 430, wherein the court held that certain records required to be kept by statute in the branch office of the commissioner of motor vehicles in the State of Missouri

Mr. Daniel C. Rogers

were public records and open to public inspection. However, in that case the statute under consideration specifically required such records to be open for public inspection. In so holding, 1.c. 30, 31, the court said:

"Section 7772, Revised Statutes Missouri 1929, Mo. St. Ann. \$ 7772, p. 5192, provides 'upon receipt of an application for registration of a motor vehicle * * * the commissioner shall file such application and register such motor vehicle * * * in a book to be kept for that purpose, under a distinctive number assigned to such motor vehicle. Then the section sets out certain specific records required to be kept and provides: '(c) the commissioner may keep such other classifications and records as he may deem necessary. (d) all such books and records shall be kept open to public inspection during reasonable business hours.'

"Since Section 7760 authorizes the branch office to receive applications and deliver certificates and number plates, and Section 7772 requires applications to be filed and registered as received, we think the statutes contemplate that records shall be kept in the branch offices as well as in the main office. If so, such records are 'official' records or public records because the statute requires them to be kept open to public inspection.

"True, the statute does not specifically refer to 'ditto lists,' but it does include 'such other * * * records as (the commissioner) may deem necessary' and the commissioner has seen fit to keep such lists in the branch office and to keep them for the very purpose of giving information to the public. Therefore, we hold such lists to be public or official records."

There is another decision which we feel must be followed since it is the latest ruling of the Supreme Court of this state and that is State vs. Henderson, 169 SW (2d) 389, l.c. 392. In that case the supervisor of liquor control of the State of Missouri had adopted a regulation conforming to the statutory provision requiring liquor dealers to submit certain copies of invoices to the supervisor of liquor control, State of Missouri. Mandamus proceedings were instituted in the

Circuit Court of Cole County, Missouri to force the supervisor of liquor control to permit inspections of such records and allow them to be copied and sold by the parties desiring to inspect and copy said invoices. The court in ruling made no exceptions and said:

"In all instances where, by law, or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146, Ann. Cas. 1913E, 1208; Robinson v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W. 2d 28."

So it appears to be that the law is fairly well settled in this state that the surest method of preventing public inspection of any public document filed with a public officer is to so provide by statute.

CONCLUSION.

Therefore, it is the opinion of this department, in view of the decision of State vs. Henderson, supra, that said notice of proposed change in agreement, contract or understanding required to be filed with the State Board of Mediation under Section 295.100, RSMo 1949, is a public record and subject to inspection by the members of the general public.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH: SW

CIRCUIT CLERK: COURT REPORTER: In criminal appeals it is the duty of the clerk and the court reporter to make out and certify to the proper appellate court a full transcript; the costs are not required to be advanced.

FILED

May 26, 1953

See Rule 28.08 Rucce

on Crim. Pro.

Honorable Lawson Romjue Prosecuting Attorney of Macon County Macon, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads in part as follows:

"This defendant was charged with tampering with a motor vehicle and convicted after a jury trial.

"After the conviction, he filed one or more motions to appeal as a poor person and also contended that because of the novelty of the charge in the information and the uncertainty of the law, he should be permitted to appeal at the expense of the State and after a hearing as to his financial circumstances, Judge Libby overruled this motion or motions. His attorney is now demanding that the Court Reporter and the Circuit Clerk prepare the transcript without paying or offering to pay for same. Both Judge Libby and I take the position that the Court Reporter and the Circuit Clerk are not required to so prepare the transcript.

"Under the facts outlined above, will you please furnish me with your opinion on the

following question: Are the Court
Reporter and the Circuit Clerk or
either of them required to prepare
and furnish a transcript of appeal to
the defendant under Section 28.08 of
the Rules of Criminal Procedure or
Sections 547.110, 547.120 and 547.130,
R. S. Mo. 1949, or any other applicable
provisions of law, without being paid
for such transcript in advance?"

Section 547.110 RSMo 1949, prescribes the duties of the clerk in regard to preparing a transcript and certifying the same to the proper appellate court where an appeal shall operate as a stay of proceedings and reads as follows:

"When any appeal shall be taken or writ of error issued, which shall operate as a stay of proceedings it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause including the bill of exceptions, judgment and sentence, and certify and transmit same to the office of the clerk of the proper appellate court without delay; provided, however, that any abbreviated or partial transcript of the evidence and oral proceedings, in narrative form or otherwise which the defendant or his attorney for the state may agree upon in writing as sufficiently presenting to the appellate court the issues involved on such appeal, shall be deemed and taken as sufficient on such appeal and shall by the clerk be incorporated in the transcript of the record certified and transmitted by him to the appellate court, instead of the bill of exceptions mentioned above."

Section 547.120 provides that in cases where the appeal does not operate as a stay of proceedings, a transcript shall be made out, certified and returned upon the application of the appellant and further provides that the costs of the transcript shall not be required in advance. Said section reads as follows:

Honorable Lawson Romjue

"When the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned, on the application of the appellant or plaintiff in error, as in civil cases, except that the costs of the transcript shall not be required in advance."

The Supreme Court in several instances has had occasion to interpret these two provisions in regard to the duties of the clerk and court reporter. In the case of State ex rel. v. Daily, 45 Mo. 153, the court held that Section 547.110 was mandatory and that it was the duty of the clerk to make out and certify a transcript although no costs were advanced. The court in its opinion said:

"The duty, then, of sending up a proper transcript, upon supersedeas in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case, and to the execution of the judgment, in which the accused may have no interest; is a duty imposed after an order of supersedeas by the court or a judge, and is essential to the object of the order; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees."

In the case of State ex rel. v. Ittner, 315 Mo. 68, the Supreme Court held that the duty of the clerk was mandatory in the following language:

"Aside from the points discussed it is the statutory duty of the clerk in cases of this character when an appeal is granted to make out and certify to this court a full transcript of the record including the bill of exceptions, judgment and sentence. This duty is mandatory, although no request is made therefor. * * *"

And further cited with approval the Daily case, supra, as follows:

"'In State ex rel. Miller v. Daily, Cir. Clerk, 45 Mo. 153, this court held that Section 4102, requiring the clerk to send up a proper transcript, was imperative and personal to the clerk and that this duty should be performed without the application of the accused and that the law imposes upon no one the obligation of advancing the fees. A like ruling was made in State v. Armstrong, 46 Mo. 588, in which Miller v. Daily was expressly affirmed.'"

In the case of State v. McCarver, 113 Mo. 602, the Supreme Court held that under Section 547.120 it was the duty of the clerk to make out, certify and return a full transcript and that he had no authority to require the costs of the transcript in advance. We note the following from the opinion of the court, 1. c. 605:

"Under the provision of section 4294,
Revised Statutes, 1889, the clerk was
required on the application of the
defendant to make out, certify and
return a full transcript of the record,
etc., in the cause, and he had no authority to require the costs of the transcript in advance. His excuse, therefore,
in not making out the transcript, which
excuse has been hereinbefore quoted
respecting the poverty and inability
of the defendant to pay for the muchneeded transcript was not a legal excuse;
* * *."

See also State v. Dempsey, 168 Mo. App. 298 and State v. Chilton, 200 S. W. 745, as to the duty of the clerk.

From the foregoing authority, we believe that it is clearly the duty of the clerk to make out and certify to the proper appellate court a full transcript where the appeal operates as a stay of proceedings and upon the application of the appellant in cases where the appeal does not operate as a stay of proceedings and that in either case he has no authority to require the costs of the transcript in advance. We note from the facts submitted that the appellant has, by and through his attorney, made application for a transcript.

You likewise inquire as to the duty of the reporter to prepare and furnish a transcript. In the Ittner case, supra, the

court referred to the duty of the reporter after noting the mandatory duty of the clerk and said:

"This being true, it is the statutory duty of the stenographer to make a transcript of his notes taken in cases of this character when appealed, although not ordered and paid for by appellant. To hold otherwise would prevent the clerk from performing his statutory and mandatory duty, defeat the purpose of Section 4102, Revised Statutes 1919, and obstruct the orderly administration of justice; * * * while the duty imposed by it is, by its terms, personal to the clerk * * *, the clerk cannot, under our present system of making and preserving records of the trial of cases, perform the duty enjoined without the aid of a stenographer who, as well as the clerk, is an officer of the court. * * *"

In the case of State ex rel. v. Wofford, 121 Mo. 61, 1. c. 74, the court said:

"* * *Certainly it will be no greater burden on the stenographer to perform his duty than on the clerk, and the clerk can not perform his duty until the stenographer transcribes the portion of his record, that is in the notes. * * *"

The reasoning in the Ittner and Wofford cases would, of course, be applicable to cases where the appeal taken does not operate as a stay of proceedings and where the appellant must make application for a transcript. For the clerk can no more perform his duty in such cases than in cases where he is required to certify a transcript without application. Of course, we do not mean to hold that the reporter must furnish a transcript directly to the appellant but rather that he must prepare a transcript to be certified by the clerk of the proper appellate court.

Having first examined the statutes bearing upon your question, what then is the effect of Rule 28.08 of the Rules of Criminal Procedure upon these provisions? This rule provides as follows:

"The distinction between the 'record proper' and the 'bill of exceptions' for the purpose of determining what

Honorable Lawson Romjue

may be submitted to the appellate court in a criminal case appealed from a trial court is abolished. The transcript on appeal shall be settled. prepared, served and filed in the manner provided for in civil cases; except that in those cases where the appellant has been sentenced to suffer death, it shall be the duty of the clerk of the trial court to prepare, serve and file the transcript on appeal in conformity with the requirements of this Rule; and except also that if the appellant does not print the transcript on appeal, it shall not be necessary for him to deliver to respondent a copy thereof after the date on which the appelant is required to file said transcript with the clerk of the appellate court as is provided in civil cases. The attorneygeneral may direct that the transcript shall include all of the evidence in any felony case."

This rule provides, in so far as we are concerned, that the transcript on appeal shall be settled, prepared, served and filed in the manner provided for in civil cases, except that where the appellant has been sentenced to suffer death, it shall be the duty of the clerk of the trial court to prepare, serve and file the transcript on appeal. It has always been the rule in regard to capital cases, under Section 547.110, that the duty of sending up the transcript was personal to the clerk. State ex rel. v. Daily and State ex rel. Ittner, supra. Likewise, it has been the rule that in non-capital cases the transcript was to be made out, certified and returned as in civil cases upon the application of the appellant. In other words, the duty devolved upon the appellant to see that a perfect transcript was filed and upon application of the appellant the clerk was to make out, certify and return the transcript as in civil cases. In the case of State v. Dempsey, 168 Mo. App. 298, 1. c. 300, the court said:

"* * *But in the absence of such transcript we are constrained to ascertain upon whom the duty devolved of filing a perfect transcript. Section 5308, Revised Statutes 1909, imposes such duty on the clerk of the circuit court in criminal causes where the appeal operates as a stay of proceedings. Section 5309 puts the duty on the appellant where the appeal does not operate as a stay of proceedings and provides that on the application of the appellant, the clerk of the circuit court shall make out, certify and return the transcript 'as in civil cases except that the costs of the transcript shall not be required in advance.'"

It is our view that Rule 28.08, in this regard, is consistent with the already noted statutory provisions, and that since Rule 28.08 does not make reference to the costs of the transcript on appeal, Section 547.120 is controlling and such costs would not be required in advance.

CONCLUSION

Therefore, it is the opinion of this office that when an appeal is taken from a criminal conviction it is the mandatory duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record and certify the same to the office of the clerk of the proper appellate court, and for the performance of this duty the law imposes upon no one the obligation of advancing costs.

We are further of the opinion that it is the duty of the reporter to furnish the clerk a transcript of his notes taken in the cause, likewise without the costs being advanced.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General DITCHES:

: Sections 246.200 and 246.210, RSMo 1949, :prohibiting certain obstructions of

DRAINAGE DISTRICT: : drainage ditches, do not apply to acts :done by the State Highway Commission.



June 24, 1953

Honorable Lawson Romjue Prosecuting Attorney Macon County Macon, Missouri

Dear Mr. Romjue:

By your letter of June 11, 1953, you requested an official opinion as follows:

> "A land owner in this county has organized himself as a private drainage district under the name of Private Rock Branch Drainage and Levee District. A relocation of U.S. Highway No. 36 crosses a drainage ditch of the District. The State Highway Commission instituted condemnation proceedings to acquire the necessary property interest to go over the land and ditch in question and the land owner and District have filed exceptions to the commissioner's report.

> "Under the construction plan of the State Highway Commission, the crossing of the drainage ditch is by means of an earthen fill with a 42 inch flat bottom tube or pipe to allow the water to flow underneath the earthen fill; the land owner and District are not satisfied with this type of crossing because he or it contends that the elevation is not right and also that the pipe will not carry the water and also will fill up by sedimentation. A suit seeking a permanent injunction has been filed by the District against the State Highway Commission and a second suit has been filed by the District against the contractor, which I understand is an Illinois corporation, also seeking a permanent injunction. The Division Engineer of the State Highway Commission here in

Honorable Lawson Romjue:

Macon has advised me that the re-location and plans are entirely regular and approved by the State Highway Commission.

"The land owner (who is really the District) has conferred with me and left a letter with me, copy of which I am enclosing. He of course is seeking by any and all means possible to prevent the construction of the relocation in the manner which the State Highway Commission has approved and is doing the work, contending that a criminal prosecution should be instituted under the provisions of Sections 246.200 and 246.210.

* * * * * * * * * * *

"Under the facts outlined in this letter, will you please advise me (1) what my duties as the Prosecuting Attorney are, (2) what discretion I may have as Prosecuting Attorney to either not file an information or to await the outcome of the injunction suits, and (3) if it is your determination that I should proceed to file a criminal information or informations, what officers or employees of the State Highway Commission should be made defendants."

You ask whether the act of the State of Missouri in placing an earthen fill with a 42 inch flat bottom tube or pipe in a drainage ditch is within the purview of the following sections:

"246.200.--1. No person, corporation, county court or other municipal corporation shall be permitted to sink, set, or drive any posts, pillars or piling in any of the ditches, drains or watercourses constructed by any district organized under the laws of this state for the purpose of erecting any bridge, trestle or covering over or across any such ditch, drain or watercourse. All supports for any such bridges, coverings or trestles shall be erected or placed on the banks of such ditches, drains or watercourses so as not to obstruct the flow of the water therein. * * *."

Honorable Lawson Romjue:

"246.210.--1. It shall be unlawful for any person, persons, association or corporation to fill up, or cause to be filled up, injure, impair or destroy the usefulness of any drain, levee, ditch, dike, revetment or other works now constructed or hereafter constructed in any drainage or levee districts organized under the provisions of any previous existing or future laws of Missouri, relating to the formation of drainage or levee districts to reclaim swamp, wet and overflowed lands for sanitary or agricultural purposes.

"2. It shall also be unlawful for any person, persons, association or corporation to in any manner throw or cause to be thrown, fall or cause to be fallen, place or cause to be placed, float or cause to be floated any tree, tree top, brush, log or other substance in any drain, ditch, floodway, basin or other works constructed by any drainage district constructed in this state; or to build any fence, dam, or other works across any such ditch; or to pasture any stock on any levee or right of way of any levee while the waters in the river or rivers, are at or near flood stage in such rivers; or to use any such levee for road purposes by driving or riding any ass, mule, horse or oxen on the top or on the side of any levee or by driving any vehicle thereon at any time. * * *. *

In determining the meaning of any statute, we have certain rules of statutory construction to aid and guide us. One of these statutory constructions is the rule "expressio unius est exclusio alterius" which is defined by the St. Louis Court of Appeals in City of Hannibal vs. Minor, 224 S.W. (2d) 598, 1.c. 605:

"There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: *Expressio

Honorable Lawson Romjue:

unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another."

Since Section 246.200 specifically prohibits any "person, corporation, county court or other municipal corporation" and Section 246.210 specifically prohibits any "person, persons, association or corporation" from obstructing drainage ditches, it seems that the action of the Legislature in specifically naming the types of persons and organizations to which the statutes apply, would, applying the above rule, exclude the State of Missouri and its agents from the penalties therein provided.

There is another doctrine which excludes the State from the operation of the two sections in question. This doctrine is stated by 59 C.J., "Statutes", Section 653, page 1103, as follows:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein or included by necessary implication. * * *."

The two sections in question do not expressly name the State of Missouri or its agencies, nor does the language of the statutes manifest a clear intention to include the State and its agencies. Since the State is not clearly included within the statutes, we must conclude that commission of the acts prohibited, when done by the State and its agencies, is not criminal.

CONCLUSION

It is, therefore, the opinion of this office that Sections 246.200 and 246.210, RSMo 1949, do not apply to the State Highway Commission in the discharge of their official duties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

SCHOOLS:

SCHOOL DISTRICTS:

Private individual contracting with school district for transportation of public school children in privately owned bus may also contract with parents of individual children or any other person or with a private school

for transportation of such children to a

private school.



August 27, 1953



Honorable F. E. Robinson Member, House of Representatives Jefferson City, Missouri

Dear Mr. Robinson:

This is in response to your request for opinion dated August 13, 1953, which reads, in part, as follows:

"The people of my county are very much disturbed, since the recent interpretation of the school bus law as it affects the parochial school students.

"I am asking your office, at this time, for an opinion on the following:

"If the school bus is owned by an individual, can this private bus pick up private as well as public school students, transport them and collect pay? State funds?"

The recent interpretation referred to in your request must be the cases of McVey et al v. Hawkins et al, 258 S.W. (2d) 927, and Berghorn et al. v. Reorganized School Dist. No. 8, Franklin County, Missouri, et al., not yet reported.

The McVey case, on the facts therein, held unconstitutional the provisos at the end of Sections 165.140 and 165.143, RSMo 1949, primarily on the ground that under the Constitution of Missouri, 1945, Section 5, Article IX, the public school fund cannot be used for any purpose other than the establishment and maintenance of free public schools.

The Berghorn case, among other things, condemned and held unlawful the intermingling of the funds of a school district with those of a church for the joint operation of a school bus.

In a previous opinion rendered to Honorable William L. Hungate, Prosecuting Attorney of Lincoln County, under date of August 27, 1953, this office has ruled that a school district has no statutory authority to provide transportation for children to private schools even though the pro rata cost of transportation is paid by the private school child so transported.

No question has been raised as to the power of a school district to contract with a private individual for the transportation of children to public schools, and we raise none now. The only question is whether the private individual who owns a school bus and contracts with the school district for the transportation of public school children in a privately owned bus may also contract with the parents of individual children or any other person or with a private school for transportation of such children to the private school.

Here we have no question of the use of public funds for transporting children to private schools; there is no question of an intermingling of public funds with those of a religious institution; nor is the school district making any provision for the transportation of private school children. The only action with regard to the transportation of the private school children is that of the private individual who owns the bus. The only funds used to compensate that individual therefor are private funds and not public. Therefore, on this basis we are unable to see on what theory the propriety of this action could logically be questioned.

As long as the owner of the bus fulfills his contract with the public school district to transport its pupils in the manner provided by the contract, and as long as there exists no basis for contention that public funds are being used for transportation of children to private schools, or that there is an unlawful intermingling of funds, it is our conclusion that a private individual who contracts with a school district for the transportation of public school children in a privately owned bus and receives pay therefor from public funds of the district may also contract with the parents of individual children or any other person or with a private school for transportation of such children to a private school, transport such children in the same bus used in transporting the public school children and receive pay therefor from such private individuals or private school.

CONCLUSION

It is the opinion of this office that a private individual who contracts with a school district for the transportation of

Honorable F. E. Robinson

public school children in a privately owned bus and receives pay therefor from public funds of the district may also contract with the parents of individual children or any other person or with a private school for transportation of such children to a private school, transport such children in the same bus used in transporting the public school children and receive pay therefor from such private individuals or private school.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml,lw

Deputy state veterinary surgeon not required to be resident of Missouri.



June 26, 1953

Honorable L. A. Rosner, DVM State Veterinarian Department of Agriculture Jefferson City, Missouri

Dear Mr. Rosner:

We render herewith our opinion based upon your request of June 15, 1953, which request reads as follows:

"I am writing in connection with a situation which has confronted this office the past years and which still prevails, and that is the question regarding eligibility for deputyship of nonresident veterinarians residing along the borderlines of Missouri, licensed to practice veterinary medicine in Missouri and whose practice does extend into the State of Missouri.

"This presents a rather awkward situation in which veterinarians in question are frequently called upon to do either Tuberculosis or Brucellosis testing, sales barn inspection work, issuance of official health certificates on movement of animals originating in Missouri and consigned to other states, and under Missouri statutes are ineligible to do so unless deputized by the Commissioner of Agriculture. In many instances this office could use the services of these veterinarians on special assignments from this office were these men commissioned as Deputy State Veterinarians.

"I would greatly appreciate a ruling from your office as to the eligibility

Honorable L. A. Rosner, DVM

of the non-resident veterinarians in question for a commission as Deputy State Veterinarians for the participation in any and all official work within their respective practice areas within the borders of the State of Missouri."

The ultimate question involved in your request is whether deputy state veterinarians are required to be residents of the State of Missouri. The statute authorizing their appointment and prescribing their powers and qualifications, Section 267.050, RSMo 1949, does not by its terms require residence. That section reads:

"Appointment of deputy veterinary surgeon--qualifications . -- Whenever the state veterinary surgeon shall find it impossible to perform alone in an effective manner the duties imposed by this chapter, the commissioner of agriculture, with the advice of the veterinarian, may appoint, as may be needed, one or more deputy state veterinary surgeons, who shall be competent veterinarians, graduated from some reputable veterinary school or college. Such deputy veterinary surgeon shall, have, when on duty, the same power and same protection as now provided in this chapter for the said state veterinary surgeon, and shall work under his direction and instructions. The state commissioner of agriculture may also employ nonprofessional men and special experts as agents or inspectors whenever such a means shall become absolutely necessary to carry out this chapter properly or enforce the regulations of quarantine as possible in cases of emergency provided against by sections 267.240 and 267.250.

We should consider the effect of Section 8 of Article VII of the Missouri Constitution of 1945, reading as follows:

"Qualifications for public office-nonresidents.--No person shall be
elected or appointed to any civil or
military office in this state who is
not a citizen of the United States,
and who shall not have resided in
this state one year next preceding
his election or appointment, except
that the residence in this state
shall not be necessary in cases of
appointment to administrative positions
requiring technical or specialized
skill or knowledge."

There can be no doubt but the employment of deputy state veterinary surgeon is administrative in nature.

"Executive and 'administrative' duties are such as concern the execution of existing laws." Brazell v. Zeigler, 110 Pac. 1052, at 1055, 26 Okla. 826.

Certainly this describes the duties of deputy state veterinary surgeons, which are concerned only with the administration of existing laws and are in no sense legislative or judicial. The position requires technical or specialized skill or knowledge, bringing it squarely within the exception of the above-quoted constitutional provision.

We do not believe it necessary to consider whether a deputy state veterinary surgeon holds "an office in this state" within the meaning of the above-quoted constitutional provision. We conclude that if a deputy state veterinary surgeon holds an "administrative position requiring technical or specialized skill or knowledge," he is not required to be a resident, even though he might be a public officer. Had the Constitutional Convention intended by the use of the last clause in the above-quoted section to free only public employees from the residence requirement, the clause need not have been included at all. But the clause, introduced by the phrase "except that," is evidently intended to limit the scope of what has been said before, so those in administrative positions requiring specialized skill or knowledge, whether "offices" or not, need not be residents of the state under the above Constitutional provision.

Honorable L. A. Rosner, DVM

The words "except that" in this provision we believe to be synonymous with "but" as used in In Re Naftzger's Estate, 180 P. 2d 873, 875, 24 Cal. 2d 595:

"The word 'but' indicates that what follows is an exception to that which has gone before, that, therefore, what is said before does not control that which follows it; it is an appropriate term to indicate the intention of those who use it to limit or restrain the sense or effect of something which had before been said, or to indicate a proviso, condition, or qualification and the word has been held synonymous with or equivalent to 'except' and 'provided'."

CONCLUSION

It is the opinion of this office that deputy state veterinary surgeons are not required to be residents of this state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh

JOHN M. DALTON

XXXXXXXX

FILED 77

July 16, 1953

John C. Johnsen

Honorable J. A. Rouveyrol Commissioner of Finance Department of Business and Administration Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office, which request reads as follows:

"The following letter has been received from Mr. Stanley E. Sprague, Secretary of the Co-Op Dist. No. 9, I.A.M. Credit Union:

'The Board of Directors of Co-Op Dist.
No. 9, I.A.M. Credit Union have a
problem which we feel is necessary to
have official ruling by your department
as to the method of procedure necessary
to establish a beneficiary. We are enclosing a copy of the card that is the
form we are using at the present time.

'It is our thought that where a joint ownership of an account is established, no problem exists. However, where it is an individual account with only the signature of the shareholder, we are of the opinion that the only method of payment legally allowed us would be to the shareholder's estate.

'In what way could a shareholder legally establish a beneficiary as a matter of record for the Credit Union?'

"May I be favored with your opinion in this connection?"

Section 370.100, RSMo 1949, provides:

"The commissioner of finance shall have exclusive supervision of all credit unions operating in this state, and may make necessary rules and regulations to carry out the provisions of this chapter."

The problem presented by this inquiry involves a great number of considerations and matters of general law, such as the statute of wills, the rights of heirs of a shareholder, the rights of creditors and the rights of the state and federal governments to inheritance and transfer taxes. It does not appear to be a matter which would come within your general regulatory and supervisory power, and therefore any pronouncement which you might make regarding the matter would be of little weight. We will, however, point out problems involved in this inquiry.

Apparently the author of the inquiry was concerned primarily with the matter of contractual designation of a beneficiary in a manner similar to that used in connection with the payment of insurance policies and which has been used frequently in recent years in connection with the registration and payment of bonds issued by the federal government. There are, of course, a number of methods by which rights in corporate stock may be transferred to another, with the donor retaining certain rights during his lifetime, such as the right to dividends. In such cases the problem generally is the question of whether or not a completed inter vivos gift was made, involving generally the problem of intention to make a gift, delivery and other matters. However, because of the nature of credit union shares, the author of the inquiry probably did not have in mind such relinquishment of control by the owner of the shares as would constitute a valid gift inter vivos.

In the case of Kansas City Life Ins. Co. v. Rainey, 353 Mo. 477, 182 S.W. (2d) 624, 155 A.L.R. 168, the question presented to the Supreme Court was the right, as between a designated beneficiary and the executor of the estate of one Hall, to the proceeds of an investment annuity policy purchased by Hall for a single premium payment with income payable to the purchaser during his lifetime and the purchase price to a designated beneficiary upon his death. The question, as stated by the court, was "whether the policy is invalid as a testamentary disposition not in the form prescribed by the statute of wills." In its opinion the court stated:

"There is no set rule applicable to all circumstances for ascertaining if an instrument 'masquerades as a will.' Each instrument must be individually considered and whether or not it is testamentary must be discerned from its own terms. * * *

The court concluded that the policy there in question was a contract entered into for the benefit of a third person and that the beneficiary, as such third party beneficiary, was entitled to the proceeds of the policy as against the executor of the estate of the purchaser.

In recent years numerous cases have arisen regarding the validity of the designation of beneficiaries of bonds issued by the United States government. In three cases courts held that such designation was not effective as between the designated beneficiary and the personal representative of the deceased. Those cases are: Decker v. Fowler, 199 Wash. 549, 92 P. (2d) 254, 131 A.L.R. 961; Sinift v. Sinift, 229 Ia. 56, 293 N.W. 841; and Deyo v. Adams, 178 Misc. 859, 36 N.Y.S. (2d) 734. general rule, however, is to the contrary, and the right of the beneficiary has been upheld by the courts in most jurisdictions. Statutory enactments in New York and Washington reversed the effect of the decision by the courts in those states. The right of the beneficiary to the proceeds of United States Government bonds have generally been upheld on the theory that the Federal Law and Regulations of the Treasury Department recognize the interest of the beneficiary in the bonds and that in such cases there is a contract entered into between the government and the registered owner for the benefit of the beneficiary and the contract is governed by federal rather than the state law. Annotation, 161 A.L.R. 304.

We find no cases in which the courts have considered the effect of designation of a beneficiary of corporate stock. In the case of Kansas City Life Ins. Co. v. Rainey, above referred to, the court cited the case of In re Koss' Estate, 106 N.J. Eq. 323, 150 Atl. 360, as sustaining the designation of a beneficiary, in the event of the death of a participant in an employee's stock purchase plan, as not a testamentary disposition. The court in that case upheld the disposition, again on the theory that it was a matter of contract for the benefit of a third person. The court stated:

"Instead of regarding the designation of the beneficiary as a disposition of property, we regard it as the mere naming of a person for whose benefit a contract is made. We believe this must be so since there never was any specific property to which Gertrude Koss was entitled in her lifetime."

(150 Atl. 1.c. 361.)

In 18 C.J.S., Corporations, Section 477, page 1147, the following statement of the nature of the stockholders' relation to a corporation is found:

"The relation existing between a corporation and its stockholders inter se is one of contract, in which the charter and bylaws of the corporation, the pertinent statutes of the state, and the settled law of the land are embodied."

In view, however, of the absence of any authority upholding the right of a person named as a beneficiary of corporate stock to enforce his right upon the death of the holder thereof, we cannot advise that such designation would be valid and be upheld. In view of the diversity of opinion regarding the validity of the designation of a beneficiary for government bonds, and in view of the fact that the decisions upholding such designation do so generally on the theory that the federal law and regulations are superior to state law in such regard, we consider it doubtful that any such method of disposition of the stock of a credit union would be upheld.

CONCLUSION

Therefore, it is the opinion of this office that credit union shares may not be disposed of upon the death of the holder thereof by the holder's designating a beneficiary to receive such shares after his death.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General BANKS: Administrator holding shares of capital stock of bank in his official capacity as administrator does not own said stock "in his own right" so as to permit him to become a director of said bank under qualifications set forth in Section 362.245, RSMo 1949.



August 6, 1953

Honorable J. A. Rouveyrol Commissioner of the Division of Finance Jefferson Building Jefferson City, Missouri

Dear Mr. Rouveyrol:

The following opinion is rendered in reply to your recent request posing a question which may be restated as follows: May ownership of shares of a bank's capital stock, acquired by one who is an administrator of an estate, qualify such administrator to become a director of said bank in view of the requirements of Section 362.245, RSMo 1949?

Section 362.245, RSMo 1949, sets forth qualifications to be met by those who would become directors of banks. Such statute provides, in part, as follows:

"4. Every director of a bank having a capital of twenty-five thousand dollars or over shall be a stockholder of the bank owning in his own right an amount equal to at least five shares. * *."

The words "owning in his own right" appearing in the quoted portion of the above statute are not ambiguous and seem to connote a definite and well recognized meaning, to-wit, absolute ownership. The word "owner" is treated in Ballentine's Law Dictionary, 1948 Edition, page 923, in the following language:

"Owner: When used alone, the word imports an absolute owner or one who has complete dominion of the property owned, as the owner in fee of real property. There may be a legal and an equitable estate; the trustee and the cestui que trust are both owners. He is the owner of property who, in case of its destruction, must sustain the loss of it."

In the case of Byers et al. v. Weeks, 79 S.W. 485, 105 Mo. App. 72, l.c. 77, we find the rule touching the character of title an administrator acquires to personalty of an estate, as follows:

"The rule that personalty descends to the administrator is but a fiction of law invented for convenience and the benefit of creditors. His title is not absolute, it is a qualified one. He holds as trustee merely for creditors and distributees. And when the debts of the estate are paid, the residue by law descends to the heir at law. The heir at all times has an equity in such property subject to the trust title of the administrator."

From the foregoing definition of "owner" and in light of the rule relative to an administrator's title to personalty of an estate, the conclusion may properly follow that an administrator holding shares of capital stock of a bank in his capacity as administrator, does not own such stock "in his own right" as such term is used in Section 362.245, RSMo 1949.

CONCLUSION

It is the opinion of this office that an administrator who holds shares of stock of a bank in his capacity as administrator does not own such stock "in his own right" so as to qualify him to be a bank director under the qualifications set forth in Section 362.245, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M:lw

GARBAGE:

AGRICULTURE:

ANIMALS:



1. A college which serves food in substantial numbers on a commercial is in dining rooms of the college, and feeds from such dining rooms and kitchens within the purview of H.B. No. 60, 67th General Assembly, and are required to cook such garbage before feeding.

2. A nursing home, which furnishes to elderly people, invalids and convalescents living quarters, nursing service and food on a commercial basis, and who feed the garbage to swine, are within the purview of H.B. No. 60, 67th General Assembly, and are required to cook garbage before feeding.

August 19, 1953

Honorable L. A. Rosner, DVM State Veterinarian Department of Agriculture Jefferson City, Missouri

Dear Sir:

We have your opinion request of July 17, 1953, which request reads, in part, as follows:

"I am writing to ask for an official opinion from your office as to whether or not Section 1 and Section 1-A would require compliance with House Bill 60 and the regulations promulgated thereunder of nursing and rest homes and privately endowed colleges.

"Specific reference, for example, is made to the Cedar Grove Nursing Home, Hillsboro, Missouri, and William Jewell College at Liberty, Missouri.

"The above, and others, have raised the question as to whether or not garbage and refuse from their particular institutions and fed to swine owned by them would not place them in the same category as a person who feeds to his own swine only the garbage obtained from his own household.

* * * * * * * * * * *

The pertinent portions of House Bill No. 60, 67th General Assembly, to which you refer, read as follows:

"Section 1-A. Prior to the feeding of garbage, other than garbage obtained from his own household, to any swine

located in the State of Missouri, the owner or feeder, as the case may be, shall first obtain an annual permit from the Department of Agriculture of Missouri, for which he shall pay an annual fee of Twenty-five dollars, which shall be deposited in the 'Agriculture Fees' fund and to be used for the enforcement of this act.

* * * * * * * *

"Section 2. No person, other than an individual who feeds to his own swine only the garbage obtained from his own household, shall feed garbage to swine unless such garbage has been heated to a temperature of 212 degree Fahrenheit (boiling point) and fed in compliance with rules and regulations promulgated by and under permits issued by the state department of agriculture."

It is our opinion that both nursing homes and colleges are subject to the garbage-cooking law, and that neither come within the exception of individuals, owners or feeders who feed to swine only garbage obtained from their own households.

We assume that the nursing homes are institutions in which are kept elderly, invalid, and convalescent persons, who are furnished living quarters, food, and medical and/or nursing attention on a commercial basis. The garbage fed to swine comes from the kitchen of such institution.

We assume that the college to which you refer maintains a dining room or dining rooms as a service to students, on a commercial basis, and the garbage fed to swine belonging to the college comes from the kitchens and dining rooms where such food is prepared and served.

Neither situation falls within any definition of "house-hold" which we have been able to find. Note these judicial observations on the meaning of the term (19 Words and Phrases 701, 702):

"The term 'household' means those who dwell under the same roof and constitute

a family; a number of persons dwelling under the same roof and composing a family; and by extension, all who are under one domestic head; persons who dwell together as a family; the place where one holds house, his home. Vaughn v. American Alliance Ins. Co. of New York, 27 F. 2d 212, 138 Kan. 731.

* * * * * * * * *

"* * Webster gives the primary meaning as persons collectively who live together in a house or under one head or manager; a household including parents, children, and servants, and it may be lodgers or boarders; but the cases do not generally sustain the inclusion of the latter. To constitute the family relation between persons living together it must be permanent and domestic in character, and not temporary. It embraces a household composed of parents, children, or domestics; in short, every collective body of persons living together within one curtilage subsisting in common and directing their attention to a common object. Robbins v. Bangor Ry. & Electric Co., 62 A. 136, 141, 100 Me. 496, 1 L.R.A., N.S., 963.

"* * * As ordinarily understood, a 'household' consists of the members of the family composing it, or those sustaining some relationship of blood. or of ties which naturally or necessarily link them to such household: and while household and family are substantially synonymous, 'family' is constituted where one or more persons living together in same house are being supported by one in whole or in part and are dependent on him therefor, and he is under natural or moral obligation to render such support. Umbarger v. State Farm Mut. Automobile Ins. Co., 254 N.W. 87, 218 Iowa 203."

The Legislature, in the use of the word "household," evidently intended to include only smaller groups who are served food on a noncommercial basis, and on what will ordinarily be a smaller scale, such as families living under one roof.

Honorable L. A. Rosner, DVM

Furthermore, in arriving at the legislative intent we may consider the evil sought to be remedied, and the means employed by the Legislature to accomplish that end. The statute, when possible, should be construed to accomplish the end sought by the Legislature.

"* * * The construction of the statute should be made with reference to the purpose of the statute, or in the light thereof, and in harmony and conformity therewith, in order to aid, advance, promote, subserve, support, and effectuate such aim, design, motive, end, aspirations, or object." (Section 303, 50 Am. Jur. 286, 287.)

* * * * * * * * *

"In the construction of an ambiguous statute, it is proper to take into consideration the particular evils at which the legislation is simed, or the mischief sought to be avoided .-that it, to the occasion and necessity for the law, or causes which induced its enactment, as well as the remedy intended to be afforded and the result sought to be attained, or the benefits expected to be derived, where these matters can be legitimately ascertained. Where possible, the statute should be given such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit. Under these rules, a case which is within the mischief of a statute has been regarded as within. its provisions, and the tendency has been to so interpret the statute as to embrace all situations in which the mischief sought to be remedied is found to exist. * * " (Section 305, 50 Am. Jur. 291-293.)

What is the purpose of this act? Plainly, to eliminate the disease of vesicular exanthema. Section 7 of the Act reads thus:

"Section 7. The feeding of raw garbage to swine has resulted in an epidemic of vesicular exanthema, a serious disease of hogs, which prevents the sale of such hogs in interstate commerce, and thereby causes severe losses to the people of this state and endangers the public health. This act, therefore, is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution. This act shall, therefore, be in full force and effect from and after July 1, 1953."

The object sought to be attained thus is subserved by this interpretation of the statute. In this connection we quote the fourth paragraph of your letter.

"From the standpoint of what is fundamental in the control of Vesicular Exanthema through feeding of garbage, these institutions are not in the same class as the farmer or swine raiser who feeds only the garbage from his own household and produces his entire pork In other words, the farmer or pork raiser thus exempted is less likely to buy pork or pork products from outside sources as would more likely be the case in nursing homes, colleges and so It would thus seem to me that forth. from the standpoint of what is effective in the control of Vesicular Exanthema through feeding of garbage, that garbage from these latter institutions presents a much greater hazard when fed to swine."

CONCLUSION

It is the opinion of this office:

l. That a college which serves food to students in substantial numbers on a commercial basis, in dining rooms of the college, and feeds the garbage from such dining rooms and kitchens to swine, are within the purview of House Bill No. 60, 67th General Assembly, and are required to cook such

Honorable L. A. Rosner, DVM

garbage before feeding.

2. That a nursing home, which furnishes to elderly people, invalids and convalescents living quarters, nursing service and food on a commercial basis and who feed the garbage to swine are within the purview of House Bill No. 60, 67th General Assembly, and are required to cook garbage before feeding.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK/fh/ir

TRUST COMPANIES: BANKS: Trust companies operating under Chapter 363, RSMo 1949, may refuse to offer fractional shares of stock or issue certificates of stock evidencing ownership of such fractional shares.



September 23, 1953

Honorable J. A. Reuveyrol Commissioner of the Division of Finance Jefferson Building Jefferson City, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

"In a letter recently received from one of the trust companies in this state, relative to a proposed increase in its capital stock, is included the following inquiry:

"'Please also give us your opinion as to our right to refuse to issue fractional shares. Business Corporations have this right under Section 351.300 R.S. Mo. 1949, but the Statutes relating to Trust Companies are not definite on this point.'

"May we have an opinion on this question at your convenience."

Section 351.300, RSMo 1949, provides:

"A corporation may, but shall not be obliged to, issue a certificate for a fractional share, and, by action of its board of directors, may issue in lieu thereof scrip or other evidence

Honorable J. A. Rouveyrol

of ownership which shall entitle the holder to receive a certificate for a full share upon the surrender of such scrip or other evidence of ownership aggregating a full share, but which shall not, unless otherwise provided, entitle the holder to exercise any voting right, or to receive dividends thereon or to participate in any of the assets of the corporation in the event of liquidation. The board of directors may cause such scrip or evidence of ownership to be issued subject to the condition that it shall become void if not exchanged for share certificates before a specified date, or subject to the condition that the shares for which such scrip or evidence of ownership is exchangeable may be sold by the corporation and the proceeds thereof distributed to the holders of such scrip or evidence of ownership, or subject to any other conditions which the board of directors may deem advisable."

A reading of Section 351.300, RSMo 1949, quoted above, discloses that such statute does give a general business corporation the right to offer fractional shares of stock and issue certificates of stock evidencing ownership of such fractional shares, but the statute is merely permissive, and no duty is placed on the general business corporation to is sue fractional shares.

Turning now to Chapter 363, RSMo 1949, the particular law in Missouri pertaining to the organization and supervision of trust companies, no reference is found therein relative to the power or duty of a trust company to offer fractional shares of stock. At 18 C.J.S., Corporations, Sec. 198, p. 628, we find the general rule stated touching subdivision of shares of stock:

"In the absence of legislative authority, it seems that a share cannot be further subdivided."

The above quotation from C.J.S., Corporations, was adopted as lately as 1949 in the case of Kennedy v. Kennedy, 91 N.Y.S. 249, 1.c. 303, where the Supreme Court of Westchester County, N.Y. spoke as follows:

"The Court has found no legislative authority for the issue of fractions of a share and without that authority apparently a share cannot be subdivided."

Honorable J. A. Rouveyrol

In answering the particular question posed in the request for this opinion, heretofore quoted, the conclusion hereinafter reached is directed only to the right of the trust company to refuse to issue fractional shares, and not to the power of the trust company to issue such fractional shares under circumstances which might make such a course advisable.

CONCLUSION

It is the opinion of this department that trust companies subject to the provisions of Chapter 363, RSMo 1949, may refuse to offer fractional shares of stock or issue certificates of stock evidencing ownership of such fractional shares.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

CONSTRUCTION OF STATUTES: TRUST COMPANIES:



Section 363.460, RSMo 1949, is mandatory and requires every corporation doing trust business to create and maintain a surplus fund in the manner and for the purposes provided therein. A corporation chartered for the sole purpose of engaging in trust business cannot carry on any phase of banking business. Not being authorized to accept money deposits, it does not have deposit liability within meaning of Section 363.470, RSMo 1949, and section is inapplicable to such corporation.

October 8, 1953

Honorable J. A. Rouveyrol
Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads in part as follows:

"The Board of Directors of The Guaranty Trust Company of Missouri are desirous of obtaining an interpretation of Sections 363.460 and 363.470 of the Revised Statutes of Missouri, 1949, and their possible application to this trust company.

"'It must be explained that we do no commercial banking, our business being confined to that of trust and estates, and hence, seemingly, Section 363.470 has no application inasmuch as it refers to "a trust company having a deposit liability."'"

It appears that the Guaranty Trust Company of Missouri referred to in the opinion request is a corporation to which a charter was issued in 1947, under the provisions of Section 8024, RSMo 1939, for the purpose of carrying on a general trust business.

Among other things, the articles of incorporation provide that one of the purposes of said corporation shall be to receive upon deposit for safe keeping personal property of every description, excluding money, and to own or control a safety vault, but not to own or control same for rental to the public.

It appears from the charter, and also correspondence attached to the opinion request, that the corporation was organized for and sought to have a charter granted to it for the sole purpose of engaging in a trust business, as it did not wish to engage in a trust business and a banking business.

These facts are further evidenced by the letter of Honorable H. G. Shaffner, then the Commissioner of Finance of Missouri, to the Attorney General in which an opinion was requested upon the proposition as to whether or not the Department of Finance could issue a charter to the Guaranty Trust Company of Missouri, authorizing that corporation to engage in the single business of carrying on a trust business as provided in the articles of incorporation or whether or not the charter must be issued for the purpose of carrying on a trust business and banking business.

On April 14, 1947, the opinion of this department was rendered to the Commissioner of Finance in compliance with his request and in which opinion it was held that the Guaranty Trust Company of Missouri, under the provisions of Section 8024, RSMo 1939, could organize and incorporate for the purpose of carrying out trusts and property rights of others and for the purpose of transacting such business as was provided in its articles of incorporation and that the Commissioner of Finance might lawfully issue a charter to said trust company to carry out the business provided by its articles of incorporation.

It is noticed that the articles of incorporation only provided for the doing of trust business and that since no mention was made of a banking business, the corporation was organized and incorporated for carrying on the former and not the latter type of business.

It further appears that the charter was granted by the Commissioner of Finance on January 6, 1948, and it is assumed that the corporation has been engaged in the trust business, as authorized by its charter from and after said date, and that it has not engaged in the banking business during that period of time.

The present inquiry calls for an interpretation of Section 363.460 and Section 363.470, RSMo 1949, and the possible application of these sections to the Guaranty Trust Company of Missouri.

Section 363.460, RSMo 1949, reads as follows:

"Every trust company shall create a fund to be known as a surplus fund. Such fund may be created or increased by contributions, by transfers from undivided profits, or from net earnings. Such fund up to forty per cent of the capital of the trust company shall be used only for the payment of losses in excess of undivided profits."

Section 363.470, RSMo 1949, reads as follows:

- "1. When the net earnings of a trust company having a deposit liability have been determined at the close of a dividend period as provided in section 363.450, if its surplus fund does not equal forty per cent of the trust company's capital, one-tenth of such net earnings shall be credited to the surplus fund; or so much thereof, less than one-tenth, as will make such fund equal to forty per cent of such capital; provided, that until the capital and surplus fund of any such trust company now existing the capital of which is not equal to the requirements of section 363.080, equals forty per cent more than the minimum of capital for a trust company in its location, one-tenth of its net earnings at the close of each dividend period shall be credited to the surplus fund.
- "2. The balance of such net earnings, or the entire amount thereof if such capital equals such requirements and such fund equals forty per cent, may be credited to the trust company's profit and loss account; or, if its expenses and losses for such dividend period exceed its gross earnings, such excess shall be charged to its profit and loss account.
- "3. The credit balance of such account shall constitute the undivided profit at the close of such dividend period, and shall be available for dividends. The directors of any such trust company may from time to time declare such dividends as they shall judge expedient from such undivided profits."

Section 363.460, supra, refers to a surplus fund of a corporation and the business for which it is created, but does not define said term. Inasmuch as Subsection 12 of Section 363.010, RSMo 1949, defines the term "surplus fund" said subsection must be read along with Section 363.460, supra. Subsection 12, 363.010 reads as follows:

"(12) 'Surplus fund,' means a fund created pursuant to the provisions of this chapter by a trust company from its net earnings or undivided profits, which to the amount specified in this chapter is not available for the payment of dividends and cannot be used for the payment of expenses or losses so long as any such corporation has undivided profits; * * *."

This section is mandatory and requires every trust company to create a surplus fund, regardless of whether the company does a banking as well as a trust business, or whether it merely engages in a trust business as does above mentioned corporation.

The surplus fund can only be created from net earnings or undivided profits and cannot be used for the payment of any of the expenses of a corporation so long as it has undivided profits. The fund, up to forty per cent of the capital of the corporation shall be used to pay losses which are in excess of the undivided profits. Since the Guaranty Trust Company of Missouri has been authorized to engage in a trust business in this state, the provisions of Section 363.460, supra, are fully applicable to it, and it must comply with that section in the creation and maintenance of a surplus fund as therein provided.

While many different transactions may be included, and may be properly referred to as doing a "banking business" it is generally conceded that the most common reference to the term is when a corporation accepts money deposits from the public and then pays it out by order of the depositors. This was held to be the rule in the case of Rosenblum v. Anglim, 43 Fed. Supp. 889, at 1. c. 891, the court said:

"'Ordinarily the business of banking relates to dealing in money by receiving deposits, making loans, discounting commercial paper, making collections, and issuing bills and notes.' American Sugar Refining Co. v. Anderson, D.C., 20 F. Supp. 55, 56. In State Tax

Commission v. Yavapai County Savings Bank, 52 Ariz. 374, 81 P. 2d 86, 90, the Court said:

"'What then is the test of a banking business? In 3 R.C.L. 375 we find the following test: "1. * * * The usual attributes of the banking business are receiving deposits, making collections and loans, discounting commercial paper and issuing notes for circulation, * * * "having a place of business where credits are opened by the deposit or collection of money or currency." * * *

"These definitions differ in their terms, but it will be found that there is at least one element appearing in each and every one of them--a bank is an institution which receives and pays out deposits.' (Emphasis supplied)"

The Guaranty Trust Company being authorized to carry on a trust business only, it cannot accept money for deposit and since this would be the doing of a banking business and would be ultra vires in so far as the powers of the trust company are concerned. From the facts it appears that the trust company has not attempted to engage in any phase of banking business, particularly that of accepting money for deposit.

The beginning of Section 363.470, supra, is in these words, "when the net earnings of a trust company having a deposit liability," (emphasis ours), and in view of this statement, it is our thought that the section has reference only to those trust companies which are authorized to carry on a banking business in connection with their trust business, for the reason that only those trust companies authorized to accept money deposits and to pay them out on the orders of the depositors could have a "deposit liability" within the meaning of that section.

Since the Guaranty Trust Company is not engaged in the banking business and does not receive money deposits as noticed above, it has no "deposit liability" within the meaning of Section 363.470, supra, and said section has no application to said trust company. Consequently, it is believed that it could not serve any useful purpose in the present discussion to construe the provisions of this section further.

CONCLUSION

It is therefore the opinion of this department that the provisions of Section 363.460, RSMo 1949 are mandatory and re-

quires every corporation engaged in the business of carrying out trusts in property rights for others to create and maintain a surplus fund, in the manner and for the purposes provided by said section.

It is the further opinion of this department that a corporation chartered for the sole purpose of carrying on a trust business cannot legally engage in any phase of the banking business. Not being authorized to accept money on deposit, it has no deposit liability within the meaning of Section 363.470, RSMo 1949, and said section has no application to such trust corporations.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

1) Commissioner of Agriculture has no independent power to AGRICULTURE: ANIMALS: promulgate rule requiring testing for Brucellosis of cattle being brought into Mo. and exclusion or other disposition BRUCELLOSIS: ADMINISTRATIVE of those found to be infected with such disease. Sec. 267. 260, RSMo 1949, confers such power upon him acting conjointly with the State Vet. and representatives of the U. S. Dept. of Agri. 2) Com. of Agri. has no independent power to promulgate rules governing transportation of animals to and from community sale barns and terminal stockyard markets but may make such rules relating only to suppression of Bang's Disease conjointly with State Vet. and representatives of the U.S. Dept. of Agri. 3) The power of quarantine extends only to diseased stock and those capable of carrying or causing the disease. The power of quarantine cannot be extended by rule or regulation. 4) State Vet. may refuse to permit cattle owner operating under Plan C of Sec. 267.292, RSMo., Cum. Supp., 1951, to move cattle of adult herd without test showing freedom from Brucellosis. 5) Sec. 267.130, RSMo 1949, covers all dangerous diseases of cattle of a contagious, infectious or spreading character.

October 22, 1953

Honorable L. A. Rosner, DVM State Veterinarian Department of Agriculture Jefferson City, Missouri

Dear Sir:

We have received your opinion request dated July 27, 1953, which request reads as follows:



"Inasmuch as we are contemplating the writing of new regulations for an expanded program of Brucellosis control and eradication, I respectfully request a review of all of the statutes pertaining to Brucellosis and Diseased Animals and specifically Sections 267.130, 267.-240, 267.250, 267.260, 267.280, 267.290, 267.310, 267.330 and 267.430 and House Bill No. 36 of the 66th General Assembly.

"In formulating the new program we need specifically to know:

- "1. Is sufficient authority granted to us under House Bill 36 and Section 267.130, Revised Statutes of Missouri, 1949, to make and promulgate regulations setting down requirements for Brucellesis on cattle entering the State of Missouri?
- "2. For promulgation of rules and regulations covering animals moving out of community sale barns and terminal stockyard markets.
- "3. Authority to quarantine an entire herd suspected of being infected with Brucellosis.

Suspicion of infection in a herd may be on the basis of a positive test for Brucellosis obtained on one or more animals out of this herd.

"4. Authority to quarantine a herd operating under Plan C. in which no test is made of the adult herd and the owner elects to follow a program of vaccination of calves only. In other words can we quarantine this herd with the requirement that no animals be shipped except on permit and to slaughter unless negative to the blood test?

"5. Is sufficient authority granted under Statute 267.260 for the promulgation of rules and regulations necessary to the control and eradication of Brucellosis?

"In addition to the above would Section 267.130 permit promulgation of rules and regulations for the control and eradication, including necessary quarantines, of any dangerous disease of a contagious, infectious or spreading character not specifically referred to in the statute itself, as for example atrophic rhinitis in swine, infectious gastroenteritis of baby pigs, vesicular exanthema, vesicular stomatitis, leptospirosis, listeriosis and other diseases which might make their appearance.

"I should also like to know if this department has the authority to quarantine an entire herd for Tuberculosis when we have reason to suspect Tuberculosis in this herd, based upon the finding of lesions of Tuberculosis in an animal shipped to slaughter or in cases where a reactor has been removed previously from the herd and the owner refuses to retest the herd."

We shall take up the questions in the order in which you have stated them in your letter.

QUESTION NO. 1: "Is sufficient authority granted to us under House Bill 36 and Section 267.130, Revised Statutes of Missouri, 1949, to make and promulgate regulations setting down requirements for Brucellosis on cattle entering the State of Missouri?"

Presumably by this question you contemplate the promulgation of a rule requiring that cattle being brought into the state be tested for Brucellosis and exclusion of those that prove to be infected with the disease.

Section 267.130, RSMo 1949, grants no authority for making such a rule. The only rule-making power contained in such section is given by the following words contained in Subsection 1 of such section:

"* * * unless the said veterinary surgeon is satisfied that it is impracticable to quarantine as herein set forth, then he shall prescribe in writing such other rules and regulations as he may deem best."

This refers only to rules prescribing the manner of quarantine of infected stock, when it is impracticable to quarantine in the manner prescribed in the preceding part of said Subsection 1.

Subsection 2 of Section 267.296, R. S. Mo., Cum. Suppl, 1951, to which you refer as a part of House Bill No. 36 of the 66th General Assembly reads as follows:

"2. The commissioner of agriculture is hereby authorized and directed to make all reasonable and needful rules and regulations for the carrying out of sections 267.292 to 267.298, including rules and regulations governing the importation into the state of all livestock, and including shipments from public livestock markets operating under federal or state inspection within the state."

Although the latter portion thereof standing alone purports to grant the authority for the regulation or regulations you contemplate, we believe this portion of the statute is limited by the preceding portion of the subsection so that the commissioner's regulations would be authorized only in so far as "reasonable and needful for carrying out Sections 267.292 to 267.298, R. S. Mo., Cum. Supp., 1951." These sections authorize the commissioners to supply Brucella vaccine and veterinary service free of cost to persons who co-operate with the Bureau of Animal Industry of the United States Department of Agriculture and the Missouri Department

of Agriculture in a program for eradication of Bang's Disease by participating in certain plans set up in Section 267.294, R. S. Mo., Cum. Supp., 1951. It could not be said that the type of regulation contemplated by Question No. 1 of your request is "needful or reasonable" to implement these sections.

The only authority granted in this general area is in Section 267.240, RSMo 1949, providing that the Governor may order the State Veterinarian to visit any state or territory, where Bang's Disease is said to exist and investigate and report to him. Then the Commissioner and State Veterinarian, subject to the approval of the Governor, may "arrange and adjust such rules and regulations as safety may demand for the transportation of livestock through or into this state" from any state, territory or country where Bang's Disease may exist.

Such regulations, however, would apply only to cattle brought in from particular areas outside the state where Bang's Disease was found to exist and would require the approval of the Governor.

Section 267.330, RSMo 1949, places some restrictions on importation of cattle from outside the state, requiring a certificate that they are free from symptoms of infectious or contagious disease. This section, however, confers no rule-making power upon the Commissioner of Agriculture.

Section 267.260, RSMo 1949, we believe does not confer upon the Commissioner the independent authority to make the rules contemplated by this question, but does confer such power upon him conjointly with the State Veterinarian and representatives of the United States Department of Agriculture. This section of the statutes is discussed further under Question No. 2, infra, which discussion is applicable to the rules contemplated by this question.

QUESTION NO. 2: "For promulgation of rules and regulations covering animals moving out of community sale barns and terminal stockyard markets."

The rules and regulations contemplated by this question would require testing of all cattle consigned for sale to a community sales barn or a terminal stockyard market and would provide that the Department of Agriculture might quarantine any cattle suffering from a contagious or infectious disease.

In accordance with the discussion of subsection 2 of Section 267.296, Cum. Supp., 1951, we believe that such regulations would not be "reasonable and needful" to implement Sections 267.292 to 267.298, Cum. Supp., 1951, and hence it does not authorize the Commissioner to promulgate the regulations contemplated by the question.

Section 267.260, RSMo 1949, reads as follows:

"267.260. Control of Bang's disease-acceptance of federal rules . -- For the purpose of controlling Bang's disease in . neat cattle and cooperating with the United States department of agriculture in suppressing and combating Bang's disease, the commissioner of agriculture may accept and adopt, on behalf of the state, the rules and regulations prepared by the United States department of agriculture relating to the suppression of such disease and cooperate with the authorities of the United States in the enforcement of their provisions; or the commissioner of agriculture may follow such other procedure as to inspection, condemnation, disinfection, disposal and other procedure, reasonably necessary in the suppression of such disease, as may be agreed upon and adopted by the commissioner of agriculture and the state veterinarian and the representatives of the United States department of agriculture. Within the amounts, which may be appropriated for this purpose, the state may pay such proportion of the expenses incurred in suppressing or combating such disease under the provisions of this section as shall be determined by and mutually agreed upon with the United States department of agriculture."

This section purports to authorize the Commissioner to adopt on behalf of the state the rules of the United States Department of Agriculture, relating to suppression of Bang's Disease, and to co-operate with the United States Department of Agriculture in their enforcement. It also provides that the Commissioner of Agriculture may follow such other procedure as to inspection, condemnation, disinfection, disposal and other procedure, reasonably necessary in the suppression of such disease as may be agreed upon by the Commissioner of Agriculture, the State Veterinarian and representatives of the United States Department of Agriculture.

This statute, we believe, confers upon the Commissioner of Agriculture the power to make rules and regulations governing the transportation of animals moving to and from community sales barns and terminal stockyard markets, so long as such rules relate to "inspection, condemnation, disinfection, disposal and other procedure,

reasonably necessary in the suppression of such disease," and so long as such rules are "agreed upon and adopted by the Commissioner of Agriculture and the State Veterinarian and the representatives of the United States Department of Agriculture." It does not confer upon the Commissioner of Agriculture the power independently to make such rules.

The use of the word "procedures" is strange, and ordinarily would refer to the manner of proceeding, or method. Reading the statute as a whole, however, we think the word is intended to mean substantive rules relating to the suppression of Bang's Disease, and we so interpret it.

QUESTION NO. 3: "Authority to quarantine an entire herd suspected of being infected with Brucellosis. Suspicion of infection in a herd may be on the basis of a positive test for Brucellosis obtained on one or more animals out of this herd."

Section 267.130, RSMo 1949, is the only power given in the law to quarantine particular livestock (as distinguished from livestock from particular geographical areas as in Section 267.240 and 267.250, RSMo 1949, infected with Bang's Disease.) Although Bang's Disease is not specifically mentioned in this section, it is included in the phrase "any other dangerous disease of a contagious, infectious or spreading character." Subsection 1 of the said Section 267.130 reads as follows:

"267.130. Quarantine -- notification to county court -- procedure . -- l. If, upon investigation, said veterinary surgeon shall be satisfied that such livestock is suffering from or infected, or capable of infecting with or causing what is known as glanders, farcy, tuberculosis, contagious pleuropneumonia, Texas fever, rinderpest, foot and mouth disease, or any other dangerous disease of a contagious, infectious or spreading character, against which he may think best to quarantine, he shall immediately quarantine the same by placing it in pens, barns or sheds, or fields, completely separated from other susceptible stock not so diseased or infected, until such diseased stock shall be disinfected or completely recovered, and its release ordered by the state veterinary surgeon or his deputies, or shall have been killed or disposed of as herein provided; and all barns, sheds or pens containing the diseased stock shall be surrounded with a good and sufficient fence to prevent any other stock from approaching nearer than one hundred feet to the barn or pen containing such diseased stock, unless the said

veterinary surgeon is satisfied that it is impracticable to quarantine as herein set forth, then he shall prescribe in writing such other rules and regulations as he may deem best."

This section, by requiring that stock which is "suffering from or infected or capable of infecting with or causing " " any other dangerous, infectious or spreading character" be separated from other susceptible stock "not so diseased or infected" until such "diseased stock" shall be "disinfected or completely recovered" contemplates that only diseased stock or those capable of carrying the disease be quarantined. There is no authority for quarantining of an entire herd on the basis of one or two cows therefrom being infected with the disease — unless it may be said that the other cattle in the herd by reason of having been in contact with those infected would be capable of carrying the disease. Cattle capable of infecting with or causing the disease in other cattle may be quarantined under this section.

Neither does this section or any other contain any authority to broaden by rules and regulations the quarantine power beyond the confines of this section.

QUESTION NO. 4: "Authority to quarantine a herd operating under Plan C in which no test is made of the adult herd and the owner elects to follow a program of vaccination of calves only. In other words can we quarantine this herd with the requirement that no animals be shipped except on permit and to slaughter unless negative to the blood test?"

"Plan C," referred to in this question, is defined as follows in Section 267.294, R. S. Mo., Cum. Supp., 1951:

"(3) 'Plan C' means calfhood vaccination without test of any part of the herd and the plan is confined to those herds in which movement of animals is restricted to special permits issued by the state veterinarian."

Any person operating under this plan will have signed the agreement provided for in Section 267.292, Cum. Supp., 1951. Although there is no authority to quarantine his herd, he is not permitted to move any animal except on permit from the State Veterinarian. Such permits could be subject to any reasonable condition the State Veterinarian chose to impose -- including the condition that they be tested and found Bang's Disease free.

The effect, therefore, would be the same as that of a quarantine.

QUESTION NO. 5: "Is sufficient authority granted under statute 267.260 for the promulgation of rules and regulations necessary to the control and eradication of Brucellosis?"

We believe the discussion under Question No. 2, supra, is applicable and fully answers this question.

QUESTION NO. 6: "In addition to the above would Section 267.130 permit promulgation of rules and regulations for the control and eradication, including necessary quarantines, of any dangerous disease of a contagious, infectious or spreading character not specifically referred to in the statute itself, as for example atrophic rhinitis in swine, infectious gastroenteritis of baby pigs, vesicular examthema, vesicular stomatitis, leptospirosis, listeriosis and other diseases which might make their appearance."

Section 267.130, supra, is limited in its scope as to the rules and regulations permitted to be promulgated. The only authority for the promulgation of rules and regulations is contained in the last sentence of subsection 1 of that statute. It reads as follows:

"* * * unless the said veterinary surgeon is satisfied that it is impracticable to quarantine as herein set forth, then he shall prescribe in writing such other rules and regulations as he may deem best."

The rules and regulations authorized by this section relate only to the method of quarantine and will not permit other rules relating to the suppression and eradication of the disease.

So far as the quarantine power is concerned, however, and the power to make rules relating to the method of quarantine, the statute is certainly broad enough to cover diseases other than those named so long as they are "dangerous diseases of a contagious, infectious or spreading character."

You ask whether you can quarantine an entire herd for Tuberculosis when you have discovered lesions of Tuberculosis in an animal shipped from the herd. In our judgment no such power exists unless it is that cattle exposed to the disease may be said to be capable of infecting with or causing Tuberculosis in other cattle. The discussion under Question No. 3, relating to Bang's Disease, is applicable also to Tuberculosis.

CONCLUSION

It is the opinion of this office that:

- 14) Section 267.130, RSMo 1949, confers upon the Commissioner of Agriculture no power to promulgate a rule requiring the testing for Brucellosis of cattle being brought into Missouri, and the exclusion as other disposition of those found to be infected with such disease. Neither does Subsection 2 of Section 267.296, RSMo, Cum. Supp., 1951, grant such power, said section conferring power only to make rules to implement Sections 267.292 to 267.298, R. S. Mo., Cum. Supp., 1951. However, Section 267.260, RSMo 1949, confers upon the Commissioner of Agriculture, acting conjointly with the State Veterinarian and representatives of the United States Department of Agriculture, the power to adopt such rules.
- 2.) The only power conferred upon the Commissioner of Agriculture to promulgate rules and regulations governing transportation of animals to and from community sale, barns and terminal stockyard markets is that given by Section 267.260, RSMo 1949, which gives the Commissioner of Agriculture the authority to make such rules relating to the suppression of Bang's Disease only, as may be agreed upon and adopted by the Commissioner, the State Veterinarian and representatives of the United States Department of Agriculture. The Commissioner has no such authority independently.
- 3.) The State Veterinarian has no power to quarantine an entire herd of cattle on the basis that one or two cattle of such herd is known to have Brucellosis, or Tuberculosis, unless the other cattle of such herd, by reason of having been in contact with infected cattle, are capable of carrying or causing the disease. The power of quarantine extends only to diseased stock and those capable of carrying or causing the disease. The power of quarantine cannot, by rule, be extended beyond the confines of Section 267.130, RSMo 1949.
- 4.) There is no power to quarantine the adult herd, not infected with Brucellosis, the owner of which is cooperating in a Brucellosis control program under "Plan C". However, such owner will have voluntarily submitted to a plan under which he is not permitted to move any animal except on permit from the State Veterinarian, which permit may be conditioned on the testing of such animal and a result of freedom from the disease.
- 5.) The rule-making power of Section 267.130, RSMo 1949, relates only to the method of effecting the quarantine, and does

Honorable L. A. Rosner, DVM

not confer the power, by rule, to extend the quarantine power. Such section covers all dangerous diseases of a contagious, infectious or spreading character.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General

WDK/mv

TRUST COMPANIES:

Trust company subject to Chapter 363, RSMo 1949 needs only majority vote of all its stock membership to amend articles of incorporation to effect increase in rate of cash dividend on its preferred stock.



December 3, 1953

Honorable J. A. Rouveyrol Commissioner, Division of Finance Jefferson Building Jefferson City, Missouri

Dear Mr. Rouveyrol:

The following opinion is rendered in reply to your request involving the power of a trust company, operating under the provisions of Chapter 363, RSMo 1949, to increase the dividend rate on preferred shares of stock. Without quoting the full text of your inquiry, the question to be answered is briefly stated as follows:

In the event a trust company subject to the provisions of Chapter 363, RSMo 1949, desires to amend its articles of incorporation so as to increase the rate of cash dividend on its preferred stock, what percentage of stock ownership must consent to such charter amendment?

Section 363.470, RSMo 1949, discloses what percentage of the net earnings of a trust company are to go to the surplus fund and how the profit and loss account is to benefit from such met earnings. With particular reference to such profit and loss account the statute provides, in part, as follows:

"3. The credit balance of such account shall constitute the undivided profit at the close of such dividend period, and shall be available for dividends. The directors of any such trust company may from time to time declare such dividends as they shall judge expedient from such undivided profits."

Honorable J. A. Rouveyrol

Since we are considering a cash dividend on stock, as distinguished from a dividend payable in stock, we are not concerned with the power of a trust company, found at Section 362.085, RSMo 1949, to issue preferred shares upon the vote of "all of its stockholders" as required by Section 362.075, RSMo 1949. We treat the present inquiry solely as one relating to the authorization of an increased rate of dividend on preferred stock previously issued in a lawful manner.

If the articles of incorporation of the trust company were so drawn, at the time it first exercised its statutory right to issue preferred shares, as to make the rate of cash dividend returnable on such preferred shares a fixed percent, it necessarily follows that any change to be made in such return would involve an amendment to articles of incorporation. However, we consider that such an amendment would be one not inconsistent with Chapter 363, RSMo 1949, and that the vote required to carry the amendment would be governed by Section 363.510, RSMo 1949, which provides as follows:

"An affirmative vote of the persons holding the larger amount in value of all the shares of stock shall be necessary to increase or diminish the amount of its capital stock, or to extend or change its business, as aforesaid, or to enable a trust company to avail itself of the provisions of this chapter."

CONCLUSION

It is the opinion of this office that a trust company subject to the provisions of Chapter 363, RSMo 1949, in amending its articles of incorporation so as to increase the rate of cash dividend on its preferred stock, may do so by a majority vote of all of its stock membership.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Very truly yours,

JOHN M. DALTON Attorney General NEWSPAPERS: LEGAL PUBLICATIONS: NOTICES: Proposed changes in the Nevada Daily Mail and the Nevada Herald will not change their status as legal publications and daily and weekly newspapers respectively.

December 9, 1953

Honorable Donald B. Russell Prosecuting Attorney Vernon County Nevada, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"The Nevada Publishing Company of this city, is, at the present time publishing two newspapers, (1) the Nevada Daily Mail, which is published daily, six days a week, and (2) The Nevada Herald, which is published weekly, on Thursday. These two papers comply with requirements of Section 493.050 of the Missouri Revised Statutes, 1949, and are presently legal publications. The Nevada Publishing Company desires to change the day of publication of The Nevada Herald from Thursday to Sunday and publish the same as the Nevada Sunday Herald; and further, is considering discontinuing the Saturday edition of the Nevada Daily Mail. The Nevada Publishing Company, by representatives, has come to me, as prosecuting attorney, for an opinion as to whether or not the proposed changes would effect the status of these two newspapers as legal publications.

"As to The Nevada Herald the question would seem to be one of whether or not it would be considered a new and different newspaper by reason of the changed date of publication and the change in the name of the paper. As a practical matter it will still be the same newspaper with the same list of subscribers.

"As to The Nevada Daily Mail the question would seem to be one of whether or not the discontinuance of one day's issues would so change the status of the paper as to disqualify it as a legal publication.

"I find no cases in Missouri in point and would appreciate your opinion in regard to these matters. It would be appreciated if your opinion could be forwarded to me as soon as possible as the proposed changes have been planned to take effect in the very near future."

Honorable Donald B. Russell

You state that the two newspapers referred to in your request are presently legal publications and inquire if the proposed change in publication dates of said newspapers and name of one will change their status as legal publications. Ownership remains the same as well as the location of said newspapers.

The Nevada Daily Mail, under the proposed change, will be published only five consecutive days per week instead of six days, the plan being to discontinue only the Saturday edition.

The Nevada Herald, now published only on Thursday of each week, under your proposal, is to be published only on Sunday and you further propose to change the name of the paper to the Nevada Sunday Herald.

You indicate that you have been unable to find any decisions in this state applicable to this request. Neither have we found any decisions applicable. However, we have found several decisions in other states that might at least be persuasive in rendering this opinion.

Furthermore, we find a Statute under Chapter 493, Mo. R. S. Cum. Supp. 51, namely Section 493.045 which specifically defines daily newspaper and reads:

"As used in this chaper the words 'daily newspaper' shall mean a newspaper which is published every day, or each day except Sundays and legal holidays, or which shall be published on each of any five days in every week excepting legal holidays and including or excluding Sundays; except, that when a holiday intervenes in any given week the newspaper may be published on each of any four days in said week. (L. 1951 S. B. 161 § 493.055)"

It seems that we need no decisions defining the word daily newspaper in view of the foregoing statutory provision. However, the following decisions all more or less follow the foregoing statutory definition with the exception of the latter part providing that it may be a daily newspaper when published only 4 days a week when a holiday intervenes. All of these decisions hold that 5 publications each week will qualify a newspaper as a daily newspaper. Hansen vs. City of Havre, 114 Pacific 2d 1053, 1.c. 1057; Fairhaven Publishing Company vs. City of Bellingham, 51 Wash. 108, 98 Pac. 97; State vs. O'Neill, 4 So. 2d 633.

In view of the foregoing statute and decisions we are of the opinion that the proposed change in publication date of the Nevada Daily Mail will not alter its status as a daily newspaper and a legal publication.

We have found no decision in point as to whether the mere change of the name of a newspaper and not the ownership or change of location of said newspaper will change its status as a legal publication.

In Iowa State Savings Bank vs. Jacobson, 66 N.W. 453, 1.c. 456, 8 S.D. 292, 300, the court defining weekly newspaper said:

"In ordinary acceptation, the expression 'weekly newspaper' unerringly conveys the idea of a paper issued once a week * * *".

In Cook vs. Lockerby, 111 N.W. 628, 1.c. 629, 16 N.D. 19, the court said:

"The expression 'weekly newspaper' can have but one meaning, which is that it is a paper published once in each week, * * *."

Therefore, we are of the opinion that the Nevada Herald, which name you propose to change to the Nevada Sunday Herald and also propose to change the publication date from Thursday to Sunday, will continue to be a weekly newspaper and legal publication.

CONCLUSION

It is, therefore, the opinion of this department that the Nevada Paily Mail will not lose its status as a daily newspaper or legal publication by merely discontinuing the Saturday edition. It is the further opinion of this department that the proposed changes in the Nevada Herald from a Thursday publication to Sunday and a change of the name only, not ownership, from Nevada Herald to Nevada Sunday Herald, will not change its status as a weekly newspaper and a legal publication.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

ARH: lw

COUNTY ASSESSOR OFFICER COMPENSATION QUO WARRANTO County officer ousted from office by quo warranto entitled to compensation of office for official duties until his successor is elected or appointed and qualified. In performing any acts of the office subsequent to filing of an information against him in quo warranto proceedings, he is acting as a defacto officer and such acts are valid.

JOHN M. DALTON

February 4, 1953

John C. Johnsen

Honorable Earl Saunders Prosecuting Attorney Jefferson County Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting this department to render an official opinion on the questions presented in the attached letter to you under date of January 14, 1953, from Mr. Wallace V. Coleman, Clerk of the County Court of Jefferson County, Missouri, which reads:

"The County Court of this County has instructed me to procure an opinion from you concerning the status of Martin E. Burgess, former assessor of Jefferson County, Missouri.

"On the 24th day of July, 1952 an information in Quo Warranto was filed in the Circuit Clerk's office of Jefferson County, Missouri, upon the information of J. W. Thurman, Prosecuting Attorney, against Martin E. Burgess, seeking to oust Mr. Burgess from his office as Assessor. In due time the case was tried in the Circuit Court of Phelps County, Missouri, and upon November 19, 1952, a judgment was entered by said court decreeing that Martin E. Burgess had forfeited all right to the office of Assessor of Jefferson County, Missouri on July 24, 1952, and ordering him ousted and removed from said office as of said date.

"On December 26, 1952 and after his motion for new trial had been overruled, Mr. Burgess filed a notice of appeal, and on January 2, 1953, the Clerk of the Supreme Court of Missouri acknowledged receipt of notice of appeal, together with docket fee in said case.

"No bond of any kind was given by Mr. Burgess in connection with his appeal.

"Query No. 1. What is the status of Martin E. Burgess insofar as the office of assessor is concerned while his case is pending on appeal in the Supreme Court?

"Query No. 2. If the Supreme Court affirms the judgment of ouster, will Mr. Burgess be entitled to compensation for any services he may have rendered subsequent to July 24, 1952, the effective date of the ouster judgment?

"Query No. 3. In the event Mr. Burgess undertakes to assess property in Jefferson County, Missouri, in the year 1953, will the assessments be valid and will he be entitled to compensation for any assessments so made by him?"

There is no statutory authority for staying a judgment of ouster and forfeiture of office in a quo warranto proceeding. In fact, numerous decisions of the Supreme Court in this State hold that the judgment in such instances shall even date back to the filing of said information, and further, that if such officer continues to hold such office and perform the official duties of that office, he is usurping the office from and after the filing of the information against him, and in several instances, said officer was fined for usurping the office.

Volume 74 C.J.S., Section 50, page 274, lays down the general rule in such instances and reads in part:

"A judgment of ouster rendered in a quo warranto action or proceeding is not retroactive; but the judgment of ouster may be made to take effect as of the date of the filing of the information on which the proceeding is based."

In State v. Wymore, 132 S.W. (2d) 979, 1.c. 988, the court held that the county prosecuting attorney should be ousted as of August 24, 1937, the date of filing an information against him and until the end of his first term of office. Further, for usurpation of said office from August 24, 1937, to the end of said term, he was fined one dollar and costs. In so holding, the court said:

" * * * He is ousted from the office of prosecuting attorney as of Aug. 24, 1937, and until the end of his first term. For the usurpation of said office from said date until the end of said term he is fined one dollar and taxed all of the costs of this action."

See also State v. Graves, 144 S.W. (2d) 91, 1.c. 98, wherein the court held that ouster should lie as of May 10, 1939, the date the information was filed and until the end of the present term of office, and also assessed a fine against the respondent. Inso holding, the court said:

"We conclude therefore that our commissioner properly found that respondent, by failing to perform the duties of his office, has forfeited the same under Section 11202, R.S. Mo. 1929, Mo. St. Ann. \$ 11202, p. 6143. He should therefore be ousted from the office of prosecuting attorney of Jackson county as of May 10, 1939, and until the end of his present term of office. For the usurpation of said office from said date to the date of the judgment herein a fine of \$1,000 should be assessed against respondent, and the costs of this action should be taxed against him. It is so ordered."

See also State v. Williams, 144 S.W. (2d) 98, 1.c. 105, 106 (31-32).

All of the above decisions herein were rendered by the appellate court several months subsequent to the rendition of judgment of ouster in the lower court. Apparently in each case pending on appeal, said officials continued to perform the official functions of their offices and the courts held that they were usurping their offices.

In view of these decisions, it would appear that such officials having been ousted from their offices are not entitled to be compensated for any services rendered in any official capacity subsequent thereto. This particular phase, however, is not discussed in any of the foregoing decisions.

The general rule is that the right to compensation of an

office is an incident to the legal right to such office and not to the exercise of the functions of the office. In so holding, the appellate court in Stratton v. City of Warrensburg, 167 S.W. (2d) 392, 1.c. 396, said:

"It appears that the office of street commissioner was one to be created by ordinance and was so created. The weight of authority seems to be that an ordinance cannot be suspended by a mere resolution or by an act of the council of less dignity than the ordinance itself. 43 C.J. p. 568, \$ 898. Appellant's statement of the applicable rule of law in reference to the right to the salary of an office is not sufficiently comprehensive. The true rule is that the right to the compensation attached to an office is an incident to the legal right to the office and not to the exercise of the functions of the office. Cunio v. Franklin County, 315 Mo. 405, 285 S.W. 1007, and cases cited.

"The controlling question for determination here is not the existence of the office in question, but the right or title to said office, and whether or not under all the facts and circumstances plaintiff was possessed of such right and title during the period for which he claims compensation."

In view of the foregoing general rule of law, we might be inclined to hold that such ousted officials are not entitled to compensation of their office subsequent to the filing of an information if it were not for the fact that under the Constitution and laws of this State, such public officials as county assessors, elected to office, are required to hold their respective offices until their successors are duly appointed or elected and qualified.

In State v. Tyler, 159 S.W. (2d) 777, 1.c. 781, which is a criminal case, an objection was raised on the ground that the indictment filed therein was signed by W. W. Graves, Prosecuting Attorney of Jackson County, on September 6, 1940, and that he had been ousted from that office prior thereto, and, therefore, had no legal status as prosecuting attorney of Jackson County. The court held that its official record

disclosed that the original epinion of the court was handed down and filed therein September 3, 1940, ousting W. W. Graves, the Prosecuting Attorney, and his motion for rehearing was overruled on November 9, 1940. He had been elected for a two-year term which would have normally expired on December 31, 1940. The court further held that during the interim between the filing of the opinion of the court ousting him from office and a determination of his motion for rehearing that his official acts are not null and void in the absence of a successor being appointed or elected and qualified. In so holding, the court said:

" * * * Section 12989, R.S. 1939, Mo. St. Ann. 8 11363, p. 617, provides: 'If any vacancy shall happen from any cause in the office of * * * prosecuting attorney * * *, the governor, upon being satisfied that such vacancy exists, shall appoint some competent person to fill the same * * *.' See, also, \$ 11509, R.S. 1939, Mo. St. Ann. \$ 10216, p. 3704. Section 12988, R.S. 1939, Mo. St. Ann. \$ 11362, p. 617, provides: 'The * * prosecuting attorneys * * * shall be commissioned by the governor, and shall hold their offices until their successors are elected, commissioned and qualified. (See, also, 8 12934, R.S. 1939, Mo. St. Ann. 8 11309, p. 597). Section 12820, R.S. 1939, Mo. St. Ann. 8 11196, p. 6141, reads: 'All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified. Our constitution, Art. 14, 5, also provides: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified. These (and possibly other) statutory and constitutional provisions are designed to and evidence a public policy on the part of the state to prevent an interregnum between the termination of an incumbent's right to an

office or the expiration of his official term and the qualification of his successor in the public interest. Prosecuting attorney Graves was not a mere usurper or intruder and, whatever may have been his legal status as between himself and the state, we are of opinion that, if not a de jure officer, he was at least a de facto officer (see State ex rel. v. Smith, 345 Mo. 1158, 1165, 139 S.W. 2d 929, 933 (5-8), defined) during the interim between the filing of the original opinion ousting him from office and the determination of his motion for rehearing thereon, no successor having been appointed, commissioned and qualified, in so far as the public and third persons may be concerned, and such acts of an official nature as he may have performed during said period are not null and void and may not be successfully first attacked in a motion for new trial by an accused after taking his chances with and being disappointed by the verdict of the jury. (Cases cited.) * * * "

The law in the State today follows that cited in State v. Tyler, supra.

Section 105.010, RSMo 1949, provides that all officers elected or appointed by authority of the laws of this State shall hold their offices until their successors are elected or appointed, commissioned and qualified.

Section 105.030, RSMo 1949, provides the procedure for filling vacancies caused in any manner.

Article VII, Section 12, Constitution of Missouri, still provides that except as otherwise provided in the Constitution and subject to the right of resignation, all officers shall hold office for the term thereof and until their successors are duly elected or appointed and qualified.

In State ex rel. Evans v. Gordon, 149 S.W. 638, we find a very thorough discussion on the right of such a de facto officer to the compensation of the office. In that case, the court holds that of course if there is a de jure officer, he is entitled to the compensation of the office and the de facto officer cannot claim any compensation. The court cites several Missouri decisions holding in fact that in the absence of a

de jure officer that the de facto officer is entitled to the compensation of the office. In so holding, the court said at 1.c. 642:

"It is also settled law that, as the compensation is incident to the title, it belongs to the de jure officer. As to the right of the de facto officer to draw the salary during his incumbency, the authorities are not harmonious. Both Throop and Mechem lay down the rule, based upon New York decisions, that the de facto officer has no right to the salary, and this because a claim for salary must be based upon title. (Throop on Public Officers, 8 517; Mechem's Public Offices & Officers, \$ 331. And such is the holding in many jurisdictions. Our court, in several cases, adheres to the contrary doctrine. State v. Draper, 48 Mo. 213; State v. Clark, 52 Mo. 508; State v. John, 81 Mo. 13; Dickerson v. Butler, 27 Mo. App. 9; State ex rel. v. Walbridge, 153 Mo., loc. cit. 202, 54 S.W. 447. All the authorities, however, agree that the de jure officer, on establishing his title, may recover from the de facto officer the compensation which the latter has received."

In Dalton v. Fabius River Drainage District, 184 S.W. (2d) 776, 1.c. 782, we again find the court announcing the rule that compensation is incident to the office and belongs to the de jure officer, and he has a right to recover from the de facto officer. However, we still think that since there is no de jure officer or another claiming compensation of the office, since the present official is required to hold the office until someone relieves him, he is certainly entitled to the fee. The court, in so holding, said:

"The rule in most states, including our own state, with respect to compensation for services performed by a public officer, is that such compensation is an incident to the office and belongs to the de jure officer, and he has the right, upon establishing his title to the office, to recover from the de facto officer whatever sums have been paid to that officer by way of salary, fees or emoluments, even though the latter may have performed the duties of the office. 43 Am. Jur. 8 386, p. 167.

"The last above named authority also states that: 'One who intrudes into or usurps a public office has no right to the salary or emoluments attached to the office, and as respects his right to retain as against the de jure officer any compensation paid to him for performing the duties of the office, he stands even in a less favorable position than an officer de facto. The rule that holds the latter liable to the de jure officer should and does apply with more strictness to one who has usurped the office, and in case the compensation or emoluments of the office are paid to him, he becomes liable for them to the de jure officer in an action for money had and received.' 43 Am. Jur., \$ 387, p. 168. (Emphasis ours.)

"The de facto doctrine has been invoked in many cases to protect the interests of the public in connection with the acts of persons exercising the duty of an officer without actually being one in strict point of law. The case at bar affords an example of the necessity for the application of that doctrine. It is said that the de facto doctrine 'rests on the principle of protection to the interests of the public and third parties. * * * The law validates the acts of the de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid. 13 Am. Jur. 8 470, p. 225."

We believe, giving these decisions a reasonable construction, that the court fully intended to hold that if there is a de jure officer appointed or elected and qualified that he is entitled to the emoluments of the office, even if he is not performing the duties of said office. However, if there is no de jure officer or anyone appointed to replace said de facto officer and perform such official duties and he continues to

perform such functions that under the law, he is required to carry on and is entitled to the emoluments of the office.

Therefore, in view of the fact it is necessary that someone perform the official duties of the office of this county
assessor, pending a final determination as to his actual
status in the quo warranto proceedings ousting him from said
office, assuming that no successor in office has been appointed
or elected and qualified, and furthermore, under the foregoing
statutes and Constitution of this State, which provide that
such officer is required to continue to perform the functions
of his office until his successor is appointed or elected and
qualified, we are inclined to believe that such person is
entitled to the compensation of such office until his successor is appointed or elected and qualified.

As to the validity of any official action on the part of this assessor, subsequent to the filing of the information in the quo warranto proceedings against him, the decisions seem to hold that any such official acts performed by him are not null and void for the reason that if he is not acting as a de jure officer, he is at least a de facto officer. (See the above quotation from State v. Tyler, supra.)

In State ex rel. City of Republic v. Smith, 139 S.W. (2d) 929, 345 Mo. 1158, the court defined a de facto officer as one who holds office by some color or right of title. See also St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. Decennial 355.

It was held in State ex rel. City of Clarence v. Drain, 73 S.W. (2d) 804, 355 Mo. 424, that the acts of a de facto officer, although title may be bad, are valid so far as public rights of third persons may have an interest in the things done, and their official acts cannot be impeached collaterally. In so holding, the court said at 1.c. 805, 806:

"The petition of the plaintiffs shows that the mayor and the board of aldermen of the city were de facto officers and assumed the duties and performed the functions of such officers in all matters connected with the bond election. 'The acts of an officer de facto, although his title may be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Official acts

cannot be impeached collaterally.' Harbaugh v. Winsor, 38 Mo. 327; Wilson v. Kimmel, 109 Mo. 260, 19 S.W. 24; Hill v. S. S. Kresge Co., 202 Mo. App. 385, 217 S.W. 997."

Therefore, in view of the foregoing decisions, we conclude that any acts of this county assessor of an official nature are valid notwithstanding the judgment of ouster.

CONCLUSION

Therefore, it is the opinion of this department that the status of Martin E. Burgess, insofar as the office of county assessor is concerned, pending his appeal in the quo warranto proceedings from a judgment ousting him from said office pending in the Supreme Court, is that in the nature of a usurper of office; however, he is in fact a de facto officer until his successor is appointed or elected and qualified.

Whatever action the Supreme Court may take on the judgment of ouster against said county assessor, he is still entitled to compensation of the office for official services rendered at least until such time as his successor is appointed or elected and qualified.

As a de facto officer, any purported official acts of the office of county assessor performed by him shall be valid.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH: VLB

ASSESSORS:

COUNTY JUDGES:

INCOMPATIBILITY:

Offices of associate county judge and deputy assessor, though not the subject of positive statutory or constitutional prohibition from being held by one person, are incompatible and it is improper for the same person to occupy both offices.

JOHN M. DALTON



March 11, 1953

John C. Johnsen

Mr. Earl L. Saunders Prosecuting Attorney Jefferson County Hillsboro, Missouri

Dear Sir:

Herewith is our opinion based on your request of February 28, 1953, which request is as follows:

"Enclosed herewith is copy of letter from Wallace V. Coleman, Clerk of our County Court, to the undersigned concerning W. J. Hilgert, Associate Judge of the County Court. We would appreciate having your opinion on the question presented."

36 36 38

"County Court Judge W. J. Hilgert of the First District is employed by Mr. Martin E. Burgess as a deputy assessor.

"Judge Hilgert would like to have your opinion as to the propriety of serving as said deputy assessor, in view of the fact that Judgment of Ouster has been rendered by the Circuit Court of Phelps County against Martin E. Burgess."

The basic questions here are whether the offices of associate county judge and deputy assessor are incompatible and whether there is any positive statutory or constitutional prohibition against one person's holding both offices.

Mr. Earl L. Saunders

No statutory or constitutional provision has been discovered which enjoins the holding of both offices by one man. We therefore proceed to the first question, i.e., whether the two are incompatible.

Incompatibility has been explained as follows:

" * * * They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * * 42 Am. Jur., Public Officers. Sec. 70.

Incompatibility has also been defined in an early Missouri case, State ex rel. Walker, Attorney General, vs. Bus, 135 Mo. 327, 1.c. 338:

" * * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

One of the most important factors in determining incompatibility is the subordination of the one office to the other. Regarding this we quote again from 42 Am. Jur., Public Officers, Sec. 71:

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to its revisory power. Thus, two offices are incompatible where the incumbent of the one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote."

With these principles in mind let us examine the relationship between the offices of county judge and deputy assessor. We find that in Section 53.190, RSMo 1949, the assessor may be removed from office by the county court for failure to perform the duties enjoined upon him by law. That section reads, in part, as follows:

"Every assessor who shall knowingly fail to perform any duty enjoined upon him by law, in the time prescribed, shall be removed from office by the county court, who shall appoint another in his stead. * * *"

This power in the county court under the foregoing authorities would render the offices of associate county judge and assessor incompatible. It would logically follow that the offices of associate county judge and deputy assessor are also incompatible in that the removal of the assessor would automatically terminate the authority of his deputy, 43 Am. Jur., Public Officers, Sec. 460.

The fact that two other judges of the county court may vote and that the power of removal is not vested in the one associate judge alone makes no difference. The rule has been applied in similar situations to the offices of city marshal and city councilman, State vs. Hoyt, 2 Ore. 246. In that case the court said at 1.c. 249:

" * * As to the other point, that the offices of councilman and marshal are incompatible and cannot be held by the same person, we think admits of no question. The marshal is the executive officer of the council, and has to settle his accounts for fees and services with that body; and it would not be competent for him to pass on his own accounts, and vote money out of the city treasury into his own pocket. * * *

In that case the council consisted of nine members.

The rule has been applied with respect to the office of school trustee (one of three trustees) and school teacher of the same school, Ferguson vs. True and Walker, 3 Bush (Ky.) 255. In that case the court said:

"The only consequence attached to Ferguson's being a trustee, when this agreement was made, would be the vacation of his office as such, the duties of trustee and teacher being incompatible; * * *"

Assuming that the deputy assessor stands in the shoes of the assessor, there are other factors, in addition to the power of removal, contributing to incompatibility in this situation. amount of the assessor's bond is fixed by the clerk or county court, Section 53.040, RSMo 1949. If the assessor fails to consolidate lands owned by one person, in compliance with Section 137.215. RSMo 1949, the county court is required to deduct ten cents from his account for each tract not so consolidated. the papers and documents of the assessor are not returned to the clerk in time, or if they are returned in a mutilated condition, the county court shall withhold so much of his compensation as will be sufficient to pay for the procurement of new copies thereof, Section 137.255, RSMo 1949. Both the county assessor and members of the county court are members of the board of equalization, Section 138.010, RSMo 1949. Such board has power to revise and equalize tax assessments involving reviewing and changing assessments made by the assessor or his deputies, Section 130.030, RSMo 1949. The county court also approves and revises the budget of each county official, with the power, after a hearing, to decrease the same, Section 50.740, RSMo 1949.

Even assuming that the deputy would not stand in the shoes of the assessor and be legally identical with him so far as incompatibility is concerned, still the deputy would be under some obligation to him and would be as associate county judge in an inconsistent position in matters where the interests of the county and of the assessor might be in conflict. It should not be assumed that one in such a position could or would completely divorce himself from self interest.

This supervisory power of the county court over the assesor, as given by these statutes, and the possibility of conflict between the interests of county and that of the assessor set up the sort of situation which the incompatibility doctrine strikes at. The member of the court could not fairly, impartially and with consistency sit in judgment over the assessor and his acts in the matters wherein he is required by law to do so.

CONCLUSION

It is the opinion of this office, for the reasons hereinbefore set out, that the offices of the associate county judge and of deputy assessor, though not the subject of positive statutory or constitutional prohibition from being held by one person, are incompatible and that it is improper for the same person to occupy both offices.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON Attorney General

WDK:ml

SHERIFFS:
DEPUTIES:
POWERS:
OFFICERS:
DEEDS OF TRUST:
PARTITION SUITS:
EXECUTION:
TRUSTEE:

Deputy sheriffs may act for sh riffs to levy and sell real estate in satisfaction of judgment; to sell real estate pursuant to order of circuit court in partition suits; and to sell real estate in foreclosure of deeds of trust when sheriff is ordered by circuit court to sell.

XXXXXXXXXX

JOHN M. DALTON



March 11, 1953

XXXXXXX

J. C. Johnsen

Honorable Wm. O. Sawyers Senator, 34th District Missouri Senate Jefferson City, Missouri

Dear Senator Sawyers:

Your letter of March 3, 1953, requesting an official opinion of this office was phrased, in part, as follows:

"Where the Circuit Court of Buchanan County pursuant to a judgment orders the sheriff to levy and sell real estate at public sale, and in such cases where the Circuit Court of Buchanan County orders real estate sold in a partition suit by the sheriff of Buchanan County, and in such cases where in a deed of trust the Sheriff of Buchanan County is authorized in case of default to sell real estate in lieu of a deceased or absent second party trustee named in said deed of trust, would it be legal for a deputy sheriff duly appointed and acting in Buchanan County, to act in lieu of the sheriff in performing the sales of real estate during the sheriff's absence while receiving medical treatment at Rochester. Minnesota."

Upon examination of various statutes setting forth the powers of sheriffs and their deputies, it is found that RSMo 1949, Section 57.100, states:

"Every sheriff shall . . . execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates." RSMo 1949, Section 57.270, sets forth the powers of deputies as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

To determine the authority of a deputy in each particular instance you cite, it is necessary to ascertain whether the act or acts are "duties prescribed by law to be performed by the sheriff", or is a power of the sheriff.

In the matter of levy of execution directed by a circuit court pursuant to judgment, RSMo 1949, Section 513.040, provides that any party entitled to an execution from a court of record may have it directed to any sheriff in the State of Missouri; and such execution may be levied, served and returned by any sheriff in this state to whom it may be delivered and within the county of which he is sheriff. Thus, in addition to the general power given sheriffs by Section 57.100 to execute all process directed to him by legal authority, they are specifically empowered to levy execution in satisfaction of judgment of a court of record.

In regard to sales ordered by circuit courts in partition suits, RSMo 1949, Section 528.370, states that in partition suits (when duly ordered by the circuit court) the sheriff "shall in due time proceed to advertize and sell"; thus, specifically prescribing a duty of the sheriff in such cases, in addition to his general duty to serve process. Thus, a duly appointed deputy is empowered to make such sales.

In performing as trustee under a deed of trust, a sheriff may act in either his individual or official capacity.

RSMo 1949, Section 443.340, provides that a circuit court may appoint the sheriff or some other suitable person of the county, trustee to execute a deed of trust, if trustee named in the deed of trust shall not act because of death, insanity, removal out of this state, neglect or refusal to act, or inability to act because of sickness or other disability. If the sheriff is appointed trustee under Section 443.340, supra, he may make the sale through his deputy according to the ruling of State ex rel. Reid v. Griffith, 63 Mo. 545, deciding whether a deputy could act for the

sheriff who was appointed trustee by a common pleas court: (1.c. 549).

"* * * It has been decided by this court that when a sheriff has been appointed in place of a trustee to execute the trust deed in selling the property, he is acting officially, and that in so acting, a sale, though made by his deputy, is valid and binding. (Tatum v. Holliday, Administrator, 59 Mo. 422.)"

In the case of Howard v. Thornton, 50 Mo. 291, the court made the following statement concerning the authority of an agent of the trustee, 1.c. 292:

"2. A trustee in a deed of trust, or a mortgage in a mortgage with power of sale, cannot act through an agent in the sale of the property. His own powers are delegated and are a personal trust, and unless the deed authorizes him to delegate his powers, he can not act through an agent. This was expressly decided by this court in the case of Graham v. King, ante, p. 22. * * *"

In Dunham v. Hartman, 55 S.W. 233, 153 Mo. 625, the following distinction is made as to whether a sheriff is acting officially or individually, 1.c. 632:

"In the case at bar the sheriff was not appointed by the court nor in pursuance of the statute, but by an individual and in pursuance of the terms of a private deed. In such case he is no more acting in his official capacity nor liable as such, than he would be if he were employed to assist in any other private business. Whereas when he is appointed by the court, in the words above quoted, 'he acts simply in the execution of a judicial power,' but when he is employed by an individual he is simply a substituted trustee. * * * *"

It should be noted that a sheriff's deed executed by a deputy must be in the name of the sheriff according to Samuels v. Shelton, 48 Mo. 444, 1.c. 450:

"*** The deed was acknowledged by the deputy sheriff in his own name as deputy and therefore was no acknowledgment at all. The deputy can only act in the name of his principals. (Atwood v. Reyburn, 5 Mo. 533; Evans v. Wilder, 7 Mo. 362; McClure v. Wells, 46 Mo. 311.)"

CONCLUSION

- 1. It is, therefore, the opinion of this office that a duly appointed deputy sheriff may act for the sheriff in selling real estate in (but is not limited to) the following instances:
 - (a) In execution of judgments of circuit court.

(b) By order of circuit court in partition suits, and

- (c) When the sheriff is appointed as trustee pursuant to Section 443.340, RSMo 1949, to execute a deed of trust.
- 2. It is further the opinion of this office that a deputy sheriff may not act for the sheriff as trustee of a deed of trust, when the "sheriff of _____ county" is named as substitute trustee in the deed of trust.

This opinion, prepared by my assistant, Mr. Paul McGhee, is hereby approved by me.

Very truly yours,

JOHN M. DALTON Attorney General

PM:mm

COUNTIES: COUNTY COURT: QUO WARRANTO:

Salary, duties and liabilities of county assessor COUNTY ASSESSOR: ousted from office under Judgment of Circuit Court in quo warranto proceedings and his successor appointed and qualified.



April 4, 1953

Honorable Earl Saunders Prosecuting Attorney Jefferson County Hillsboro, Missouri

Dear Mr. Saunders:

This will acknowledge receipt of your request for an official opinion, which request reads as follows:

> "Enclosed is copy of letter dated March 16, 1953, from Wallace V. Coleman.

"In addition to the facts in said letter, reference is made to your opinion of February 4, 1953, and to the following.

"Defendant's appeal from the judgment of ouster is still pending.

"Under date of March 16, 1953, there is the following record entry of the County Court.

"Now on this day comes Martin E. Burgess, former assessor within and for Jefferson County, Missouri, and presents to the Court his account for making the assessment of said County to March 12, 1953 and recording same in the assessment books and for other services rendered.

"The Court, after examining said account finds that prior to March 12, 1953, Martin E. Burgess correctly performed the following work, to-wit:

1/2 County, 1/2 State State County Total "Date

3-11-53 To taking 8,460 Personal assessment lists at 45¢ each 1903.50 1903.50 3807.00

3-11-53 To entering 21,891 real estate property at 6d each

656.73 656.73 1313.46

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3-11-53 To taking 2236 Crop Reports for State Board of Agriculture at 10¢

111.80 111.80 223.60

상상상

3-11-53 To taking 4,450 nonresident real estate lists at 45¢ each

1001.25 1001.25 2002.50

Totals

3673.28 3673.28 7346.56

"Whereupon, the Court orders the account of Martin E. Burgess filed and further orders that the clerk request the prosecuting attorney for an opinion as to the right of the court to pay said account out of the County Treasury."

"According to Mr. Coleman, the assessing as shown by Mr. Burgess' statement attached to the enclosed letter and set forth above, is not a complete assessment.

"Your opinions will be appreciated on the questions in the enclosed copy of letter from Mr. Coleman and also on the following.

- "(1) Must or should a determination be made of the extent and completeness and of the correctness and accuracy of Mr. Burgess' assessing? If so, who is to make such determination and how is this to be done?
- "(2) Is a verification as provided by Section 137.245, R. S., 1949, necessary for a valid assessment? In your opinion should such a verification be made? If this should be done, by whom is the verification to be made and how should the affiant be qualified?

- "(3) If your answer to Question No. 3 in the enclosed letter is in the affirmative, how and by what method should Mr. Kasten ascertain the accuracy of the work performed by Mr. Burgess; how much compensation is Mr. Kasten entitled to for making such ascertainment; by whom is this amount to be paid; how is the amount of such compensation to be determined and by whom?
- "(1) If Mr. Burgess is entitled to compensation, how much should he receive; when should he receive it; how is the amount of his compensation determined and by whom?
- "(5) Do the deputy assessors employed by Mr. Burgess have any valid claim against the county or state for pay and if so, how should the amount of their compensation be determined and by whom?"

We will answer the questions in your request in the order stated therein, and then answer the questions in Mr. Coleman's letter, a copy of which is attached to your request.

You first inquire: "Must or should a determination be made of the extent and completeness and of the correctness and accuracy of Mr. Burgess' assessing. If so, who is to make such determination and how is this to be done?"

We can see no particular reason for causing any extensive investigation as to the correctness or accuracy of Mr. Burgess' assessment to March 12, 1953, the date of expiration of his tenure in office, in the absence of the county court having some particular reason to be suspicious of the accuracy of his account and assessments. The late assessor was under bond for the faithful duties of his office. However, we are of the opinion that Mr. Burgess should be required to make an affidavit similar to the one contained in Section 137.245, RSMo 1949. Of course, the affidavit should be confined only to the authenticity of the assessments made by him to March 12, 1953, the last day he held office, and not to a complete assessment as shown by affidavit in the statute hereinabove referred to.

The county court, according to entry made as of March 16, 1953, found after examining his account that prior to March 12, 1953, the date his tenure as county assessor expired, that he had correctly performed the work shown by said account. The only questions seem to be as to when they could pay him for services rendered.

So, in view of the foregoing, we are of the opinion that unless the county court has some particular reason to question the correctness of his account and assessment, which is not reflected in the record entry of said court hereinabove referred to, that it is unnecessary to further determine the accuracy of his assessment to March 12, 1953.

We have answered your second request in our first answer. It is necessary for a valid assessment that Mr. Burgess' account be verified as hereinabove shown under Section 137.245, supra.

In answer to your third request we will say that our answer to question No. 3 in the enclosed letter of Mr. Coleman is in the negative and that Mr. Kasten, the present Assessor, needs certify to only that part of the assessment made by him after assuming office.

Your next inquiry No. 4 is that if Mr. Burgess is entitled to compensation, how much should he receive, when should he receive it, how is the amount of his compensation determined and by whom? It is our opinion that Mr. Burgess is entitled to compensation for services rendered as provided by statute which clearly states the amount the assessor should receive for particular work performed as shown in his account on page one of your request. (See Sections 53.130 and 53.160, RSMo 1949.)

Under the law such county assessor would ordinarily be entitled to receive such compensation when he has properly complied with the law by making the foregoing affidavit and after June 1, 1953, the date when the assessment must have been completed as provided in Section 137.115, page 853, Laws of Missouri 1951, and a copy of the assessment book is returned to the county court as provided in Section 137.245, RSMo 1949. However, in view of the fact that Mr. Burgess' services as assessor has been discontinued by judgment of the Circuit Court in quo warranto proceedings and appointment and qualification of a successor, we believe that he is entitled to receive whatever compensation is due him for services rendered whenever he furnishes the proper affidavit as provided hereinabove and in Section 137.245, supra.

In your last question No. 5 you inquire if deputy assessors employed by Mr. Burgess have any valid claim against the county or state for pay and, if so, how should the amount of their compensation be determined?

Under Section 10946, RSMo 1939, county assessors of third class counties were authorized to appoint as many deputies as they may find necessary, to be paid for out of funds allowed such assessors. However, while there is still some statutory authority for hiring and paying deputies to assessors in other class counties, we find no such statute for counties of the third class. The foregoing statute, 10946, supra, was repealed by the Sixty-fifth General Assembly and Section 5 was enacted in lieu thereof, Section 5, page 1782, Laws of Missouri 1945, now known as Section 53.060, VAMS, provides the assessor may appoint as many deputies as he may need, to be paid as provided by law. However, no statute was enacted for the payment of compensation for deputies. Section 53.095, RSMo 1949, Cumulative Supplement 1951, provides that county assessors in third class counties may appoint and fix compensation of such clerical and stenographic assistance as may be necessary for efficient performance of the duties of his office. That compensation will be paid from the county treasury and should not exceed \$600 per annum.

Therefore, in the absence of any special statute authorizing county assessors of third class counties to provide for compensation for their services, we are forced to conclude that no deputies can have any valid claim against the county or state for compensation.

We shall now answer the four questions in the attached letter from Mr. Coleman addressed to you under date of March 16, 1953, as requested in your letter.

His first inquiry deals with the authority of the county court to pay Mr. Burgess for the work he has completed to March 12, 1953, as per the statement attached, which statement is attached to your request.

Under date of February 4, 1953, this department rendered you an opinion in which it was held, that the county assessor was entitled to the compensation of the office for official duties until his successor was appointed and qualified.

The second inquiry is whether the county court is vested with the authority to pay Mr. Burgess compensation before the tax books, both real and personal, are turned over to the county court according to Section 137.245, RSMo 1949.

In view of the fact that this question was fully discussed in our opinion hereinabove, we deem it unnecessary to give it any further consideration.

The third question in Mr. Coleman's letter deals with the right of Mr. Burgess' successor to receive compensation for ascertaining the accuracy of the work performed by Mr. Burgess in order that the said successor may properly certify the tax books to the county court under Section 137.245, RSMo 1949.

In view of the fact there is no statutory authority requiring his successor in office to determine the accuracy of his predecessor's assessments, neither is there any statute allowing compensation for such services rendered by the present incumbent, under the well established rule of statutory construction in Nodaway County v. Kidder, 129 S.W. (2d) 857, 344 Mo. 795, holding that a public official claiming compensation for official duties performed must point to statutory authority for such payment, we must hold that the present county assessor is not entitled to receive such compensation.

In reply to the fourth question in Mr. Coleman's letter, we have no knowledge of any other course of action necessary in order for the county court to pay the compensation of Mr. Burgess as per the account submitted by him to the county court and spread on the record of the said court, other than obtaining an affidavit as to the authenticity of said account as held in the foregoing opinion, in the absence of some particular grounds for questioning such authenticity.

CONCLUSION.

It is the opinion of this department: (1) that there is no need to make a determination of the completeness or accuracy and correctness of Mr. Burgess' account in the absence of some substantial ground for questioning the authenticity of the account and assessment of the former county assessor to March 12, 1953; (2) that it is necessary for a valid assessment that Mr. Burgess' account be verified as hereinabove shown; (3) that, in our opinion, our answer to the third question in Mr. Coleman's request is in the negative, and that the present county assessor, Mr. Kasten, need certify only to that part of the assessment made by him after assuming the office of county assessor: (4) that Mr. Burgess is entitled to compensation for services rendered as provided by statute which clearly states the amount the assessor shall receive for particular work performed as shown in his account on page one of his request, when he furnishes the foregoing affidavit; (5) that no deputy appointed by said county assessor has any claim against the county or state for compensation for services rendered as a deputy for the reason there is no statute providing compensation for such deputies.

It is further the opinion of this department, answering Mr. Coleman's letter attached to your request, that Mr. Burgess is entitled to compensation for work performed as of March 12, 1953, upon filing the proper affidavit hereinabove prescribed.

We deem it unnecessary to answer the second inquiry as it has been hereinabove answered.

As to his third inquiry it is the opinion of this department that there is no statutory duty upon the present county assessor to determine the accuracy of his predecessor's assessments made to March 12, 1953, the last date that he assumed the duties of his office, and that it naturally follows that there is no compensation provided for such services.

It is our opinion as to the last inquiry in said letter that there is no other course of action necessary for the county court to take in order for said court to pay Mr. Burgess compensation for services rendered as of March 12, 1953 other than to obtain his affidavit mentioned hereinabove.

This conclusion is based upon the statement in the request that the account of said assessor has been fully audited and found to be correct by the county court.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

ARH:SW

COUNTY HEALTH CENTERS:

EXPENDITURES:

Counties in Missouri maintaining County
Health Centers are liable for expense of
providing warrants for use in paying obligations of such Health Centers, and are
also liable for cost of publishing the
detailed financial statement of the county
for the preceding year as it relates to
County Health Centers, all to be paid out
of the County General Revenue Fund.

June 4, 1953

Honorable Earl Saunders Prosecuting Attorney Jefferson County Hillsboro, Missouri

Dear Mr. Saunders:



This will be the opinion by this office which you requested in your letter of recent date, following the request of Mr. Wallace V. Coleman, County Clerk of your county for an opinion from your office on the questions:

- 1) "Is the County General Revenue Fund or the Health Unit Fund liable for the payment of office supplies including warrants purchased by or for the use of the health unit," and
- 2) "Is the County General Revenue Fund or the Health Unit Fund liable for the payment of the cost for the publication of the annual sworn statement of the County Health Unit.?"

The answer to each of the foregoing questions depends upon the construction of different sections of the Public Health and Welfare Act relating to county health centers.

The County Health Center Act constitutes the authority to establish a county health center as an entire county entity, that is, the project embraces the whole of the county and touches, by taxation, all of the property within the borders of any county establishing, maintaining and operating any such health center. Section 205.010, Laws of Missouri, 1951, page 779, (Section 205.010, Cumulative Supplement, Laws of Missouri, 1951, page 203), states that, if upon a petition of at least ten per cent or more of the qualified voters of any such county, as determined by the vote for Governor

at the preceding general election, so praying, the County Court, after due notice, shall submit the question to the qualified voters of the county at the next general election, or at a special election called for the purpose of creating a county health center, the proposition of levying an annual tax not in excess of ten (10¢) cents on each One Hundred (\$100.00) Dollars assessed valuation of property in the county for the maintenance thereof.

Section 205.020, Laws of Missouri, 1951, page 780 (Section 205.020, Cumulative Supplement, Laws of Missouri, 1951, page 203), provides that the qualified voters of any such county may vote upon the proposition to levy the tax "for a county health center and the maintenance and operation of the same." That section further provides that if two-thirds majority of the votes cast shall vote in favor of such tax the County Court shall proceed to levy and collect such tax and deposit the same in the county treasury to the credit of the Health Center Fund, and such fund shall be expended as hereinafter (in said Act) provided.

Subsection 2 of Section 205.040, Laws of Missouri, 1951, page 782 (Subsection 2, Section 205.042, Cumulative Supplement, Laws of Missouri, 1951, page 204), reads as follows:

"The county treasurer of the county in which such county health center is located shall be treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the board, upon its order as provided in this act, but shall receive no compensation from such board."

Subsection 4 of Section 205.045, Laws of Missouri, 1951, page 782 (Section 205.042, Cumulative Supplement, Laws of Missouri, 1951, pages 204 and 205), in speaking of the health center trustees reads, in part, as follows:

"* * * They shall have the exclusive control of the expenditures of all moneys collected to the credit of the county health center fund, * * * * * All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered

drawn by the county court upon properly authenticated vouchers of the board of health center trustees."

These two subsections of said Section 205.045. Laws of Missouri, 1951, page 782 (Section 205.042, Cumu-lative Supplement, page 204, Laws of Missouri, 1951), provide that the county treasurer shall receive and pay out all monies under the control of the board, as it appears, because the funds are public money. These funds must be deposited under said Subsection 4 to the credit of the health center fund and must be paid out only upon warrants ordered drawn by the County Court upon properly authenticated vouchers of the Board of Health Center Trustees. We believe that the provision that the fund shall be deposited to the credit of the County Health Center Fund does not change the fund from being public county funds. Nowhere in the County Health Center Act is there any provision for the Trustees as a Board, or otherwise, to issue warrants. That function is plainly imposed upon the County Court and the County Clerk. Section 50.180. RSMo 1949, provides that when the County Court shall ascertain that any sum of money shall be due from the county, the Court shall order its clerk to issue therefor a warrant. Section 50.190, RSMo 1949, provides that every county warrant shall be signed by the president of the Court and shall be attested by the clerk. Section 54.140, RSMo 1949, makes it the duty of the County Treasurer to separate and divide the revenues of the county into separate funds as they come into his hands and to pay out the revenues thus subdivided on warrants issued by the order of the Court upon the respective funds so set aside and subdivided and not otherwise.

It would appear clear, we believe, that with such duties as these sections provide to be performed by the County Courts and County Clerks of the respective counties in regard to the ordering issued and the issuing, the signing and the countersigning of warrants, that the County Court, at the hands of its clerk, should provide and have available the blank warrants which should be drawn upon the funds of the County Health Center. The only duty under the County Health Center Act imposed upon the Trustees in such matters is that they shall present properly authenticated vouchers to the Court in support of the purchases or contractual obligations created by the Board in its operation and maintenance of the Health Center. A warrant, if issued by the Health Center Board would be a nullity. The Board may direct the expenditures of the funds of the Health Center, but, under the Act, it has no power to issue a warrant against such funds.

We do not find any authority in the County Health Center Act for the County Court to purchase office supplies, including warrants for the use of the County Health Center. If, as in this instance appears to be the case, the County Court of Jefferson County, Missouri, has purchased blank warrants for use in discharging the duly authenticated obligations created by the Board of Trustees of the County Health Center, the county, not the Trustees, is obligated to pay for the same.

As this office views the provisions of the County Health Center Act as provided in Laws of Missouri, 1951, page 779, and as contained in the Cumulative Supplement to Laws of Missouri, 1951, pages 203 to 205, inclusive, the answer to your first question is that the County General Revenue Fund is liable for the payment of warrants purchased for the use of the County Health Center. This must be the procedure under the provisions in said Subsections 2 and 4, supra, of said Section 205.045, Laws of Missouri, 1951, page 782 (Section 205.042, Cumulative Supplement, Laws of Missouri, 1951, pages 204, 205), which respectively (Subsection 2) states: "* * * The treasurer shall receive and pay out all the moneys under the control of the board, upon its order as provided in this act, * * *." Subsection 4: "All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers of the board of health center trustees." However, if the County Health Center upon the action of its Board of Trustees and on its own initiative obligates the center in the purchase of office supplies or other property, not the duty of the county to supply, as provided by law, such obligations must be discharged by paying therefor out of the County Health Center Fund, upon the properly authenticated vouchers of the Health Center Board presented to the County Court, by means of warrants ordered drawn by the County Court, signed by the Presiding Judge of the Court, attested by the County Clerk of the County and paid by the County Treasurer acting as treasurer of said health center and custodian of its funds.

Your second question states:

"Further, with reference to Sec. 205.090 and Sec. 50.810 R.S. Mo. 1949

"Is the County General Revenue Fund or the Health Unit Fund liable for the payment of the cost for the publication of the annual sworn statement of the County Health Unit?"

Section 205.090, Laws of Missouri, 1951, page 784, and Section 205.090, pages 205, 206, Cumulative Supplement, Laws of Missouri, 1951, read as follow:

- "1. On or before the seventh day of January in each year, the board of health center trustees shall file with the county court a report of their proceedings with reference to the county health center and a sworn statement of all receipts and expenditures during the preceding calendar year.
- "2. The board of health center trustees shall prepare and submit to the county budget officer a budget for the ensuing year at the time and in the manner provided by the county budget law applicable to such county."

Sections 50.800, 50.810 (to which you call our attention in your second question) and other succeeding sections, define the procedure with respect to publishing county financial statements each year. The detailed provisions of Section 50.810 do not appear to be especially pertinent to the answer to your second question. Said Section 50.810 provides for the application of the standard column width measure that would take the least space in the preparation of the statement by the publisher; that the publisher shall file two proofs of publication with the County Court. The Court shall forward one proof to the State Auditor and shall file the other in the office of the Court. The County Court, so this section states, shall not pay the publisher until such proof of publication is filed with the Court and shall not pay the person designated to prepare the statements for the preparation of the copy for such statement until the State Auditor shall have notified the Court that his copy of publication has been received, and that it complies with the provisions of Section 50.810. Thus, it appears that the form of the statement and the payment and the amount of payment to be made to the publisher for the publication of the statement are the only provisions, and indirect ones at that, that Section 50.810 has in its terms relating to this question. We deem it unnecessary, therefore, to quote from any section of the statute relating to "County Financial Statements," as contained in Chapter 50 except parts of Section 50.800, RSMo 1949. Section 50.800 in some of its subsections covering different requirements of a county financial statement is pertinent here and must be applied in connection with Section 205.090, Laws of Missouri, 1951 (Section 205.090, Cumulative

Supplement, pages 205, 206, Laws of Missouri, 1951.)

The subsections of Section 50.800, as they relate to this question, under the subject of "County Financial Statements", RSMo 1949, read, as numbered, as follow:

"On or before the first Monday in March of each year after the taking effect of this law the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December thirty-first, preceding.

"4. Said statement shall show the total valuation of the county for purposes of taxation, the highest rate of taxation the constitution permits the county court to levy for purposes of county revenue, the rate levied by the county court for the year covered by the statement, division of the rate levied among the several funds and total amount of delinquent taxes for all years as of December thirty-first.

"5. The statement shall show receipts into each and every fund separately. First, from the general tax book; second, from railroad tax book; third, from billiard and other table licenses; fourth, ferry licenses; fifth, from land back tax books; sixth, from personal delinquent lists; seventh, fines and penalties; and eighth, from other sources. The total receipts for the year into all funds shall be shown in the recapitulation.

"6. Disbursements shall be shown in detail and each and every warrant issued shall be

shown separately except as herein expressly provided. Date of warrant, number, person to whom issued and purpose for which issued shall be shown. Under separate heading in each fund the statement shall show what warrants had been paid (or to pay which funds were in the hands of the county treasurer as of December thirty-first) and under a separate heading what warrants were outstanding and unpaid for the lack of funds on that date with appropriate balance or overdraft in each fund as the case may be."

Section 11 of said Section 50.800 provides that at the end of the statement the person designated by the County Court to prepare the financial statement required by the statutes, shall append his certificate that he has checked the records of the county and that the above and foregoing statement is complete and correct as to every item of information required by the statutes; that he has checked every receipt from every source whatsoever and every disbursement of every kind and to whom and for what purpose disbursement was made, the certificate to be appropriately dated.

Subsection 1 of Section 205.090, Laws of Missouri, 1951, page 784 (Section 205.090, Cumula tive Supplement, Laws of Missouri, 1951, pages 205, 206), supra, requires the filing on or before the 7th day of January of each year, a report of the proceedings by the Health Center Trustees with reference to the County Health Center and a sworn statement of all receipts and expenditures during the preceding calendar year. The only purpose and end this requirement may serve is to advise the County Court of facts for the benefit of the person appointed to prepare the financial statement of the county for the preceding year for publication as required by the statute. This report and statement is not, in its academic sense at least, required to be supplied for an audit. It is merely informative. Subsection 4 of Section 205.045, Laws of Missouri, 1951 (Subsection 4, Section 205.042, Cumula tive Supplement, Laws of Missouri, 1951, pages 204, 205) provides, as we have seen, that the Board of Health Center Trustees "shall have exclusive control of the expenditures of all moneys collected to the credit of the county health center The County Court, therefore, has no duty to perform respecting the fund, except to order warrants drawn to be paid out of said fund "upon properly authenticated wouchers of the board of health center trustees." The County, as a whole, in which any such Health Center is located and maintained, is entitled to know what the annual tax levy at the

rate fixed on each One Hundred Dollars of the assessed valuation of property in the county has brought into the fund the previous year and how it has been spent. This report, therefore, is the first step required, we believe, in the process of preparing the annual financial statement of the county for the previous year for publication as it affects the receipts coming into and which have been paid of the County Health Center Fund. Said subsection merely requires that such report and statement shall be filed with the County Court. There is no provision whatsoever in the County Health Center Act requiring the Trustees of the County Health Center to publish said report and statement, much less to pay for the cost of the publication thereof. It is, therefore, clearly apparent that Section 205.090, supra, requires the report and statement only for the purpose of aiding the County Court and the County Clerk in the preparation of the annual statement, according to the terms of Section 50.800, RSMo 1949, supra. This statement naturally and inevitably should contain the facts supplied in such report and sworn statement by the County Health Center Trustees of all receipts and expenditures during the preceding calendar year affecting the County Health Center Fund. The terms of Subsection 1 of said Section 50.800, RSMo 1949, supra, provide that the County Court of each county in this State, on or before the first Monday of March in each year, shall prepare and publish a detailed financial statement of the county for the year ending December 31st, preceding. It follows that each county in this State must bear the expense out of a sum set apart in the County Budget for such purpose derived from the general revenue fund of the county for the preparation and publication of such detailed financial statement. It also is apparent that the County Health Center Trustees, or Board, are not liable for the payment of the cost of any part of said detailed annual statement although the facts respecting the receipts and expenditures during the preceding year of the County Health Center Fund as submitted by the County Health Center Trustees in their report and sworn statement under said Section 205.090, supra, is included, as we believe it must be, in the detailed financial statement of the county for the preceding year published by the County Court. The question of the publication by County Courts in this State of a detailed financial statement of the county for the preceding year was before the Supreme Court of this State in the case of State ex rel. Taylor, Attorney General, vs. D. P. Wade, Members of the County Court of Ozark County, Missouri, 360 Mo. 895, 231 S.W. (2d) 179. The Court held that the publication of such statement by the

County Court of the several counties of this State is mandatory. In order that the public may be kept informed as to the receipt and expenditure of public funds by means of the publication of said detailed statement, the Court, 1.c. 899, 900, said:

> "* * * Certainly the enactment of these statutes for the publication of detailed information about the financial affairs of counties, with the requirement of filing proof of publication with the state auditor, was a sufficient demonstration of the interest of the State therein. Of course, the interest of the State is plain enough in having counties. which are political sub-divisions of the State, fully disclose their financial affairs to their own inhabitants, to the public generally and to the state auditor. Such publicity as to the source and use of public funds has been considered essential to the proper conduct of county government for more than 100 years. (See Laws 1841, p. 57.) It is now more important than ever since it provides means for determining compliance with the county budget laws. # # #.

The Court held in that case that the County Courts of the several counties of this State shall set apart in their respective budget a sufficient sum to pay for the publication of such detailed statement. So holding, the Court, 1.c. 901, further said:

"* * * So here, while the Legislature did not fix the exact amount to be included in the budget, its direction in these statutes that such a statement must be prepared and published annually is a mandate to the county court to include a reasonable amount for that purpose in each year's budget; * * *."

As this office construes the above-cited statutes, and views the decision cited by our Supreme Court, this constitutes our answer to your second question.

Honorable Earl Saunders:

CONCLUSION.

Considering the premises, it is the opinion of this office that:

- 1) The County General Revenue Fund in any county in this State maintaining a County Health Center, is liable for the payment of warrants used in the payment of obligations incurred by Trustees of a County Health Center ordered issued by the County Court upon properly authenticated vouchers of the Board of Health Center Trustees, and that the County Health Center Fund is not liable for such supplies;
- County Health Center is liable for the payment of the cost of the publication of a detailed financial statement of the county for the preceding year ending on December 31st, under the terms of Section 50.800, RSMo 1949, including the facts contained in the report of their proceedings with reference to the County Health Center and a sworn statement of all receipts and expenditures during the preceding calendar year submitted to the County Court by the Board of Health Center Trustees as provided in Section 205.090, Laws of Missouri, 1951, page 784 (Section 205.090, Cumulative Supplement, Laws of Missouri, 1951, pages 205, 206), to be paid out of the General Revenue Fund of any such county, and that the County Health Center Fund is not liable for the payment of the cost of any part of such detailed financial statement of the county for the preceding year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

GWC:irk

JOHN M. DALTON Attorney General MINISTERS: MARRIAGE: CRIMINAL LAW: ORDINATION: Whether a person who is ordained as a minister of the gospel by the Pentecostal Church, Inc., in 1942, remains an ordained minister of the gospel, is a matter which must be determined by the Pentecostal Church, Inc., and such fact will not be determined by this office. If a person not authorized by Section 451.100 purports to perform a marriage ceremony under the circumstances prescribed in Section 563.250, RSMo 1949, he shall be guilty of a misdemeanor.

Carried San Come on April Control San A Con-

December 21, 1953

Honorable Earl Saunders Prosecuting Attorney Jefferson County Hillsboro, Missouri



Dear Sir:

By your letter of November 25, 1953, you requested an official opinion of this department as follows:

"A resident of this county was in 1942, ordained as a minister of the gospel by the Pentecostal Church, Inc. Later, he withdrew from this church and is not affiliated with it. For several years he has been the pastor of a local church which is not affiliated with the above named church. He has not been ordained by any church other than the one in which he was originally ordained and from which he has withdrawn all affiliation. We would appreciate your opinion as to whether this pastor may under sec. 451.100, R.S. 1949, validly solemnize marriages in view of the fact that he is no longer affiliated with the church by which he was ordained and further, whether he would be subject to the penalties imposed by sec. 563.250, R.S., 1949, if he does attempt to solemnize marriages.

Section 451.100, RSMo 1949, which lists those persons eligible to perform the marriage ceremony reads as follows:

"Marriages may be solemnized by whom. -Marriages may be solemnized by any licensed

or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

A definition of what is an ordained minister is given by 76 C.J.S., Religious Societies, Paragraph 39A, page 794, as follows:

"An ordained minister is one consecrated to the ministry by some act of admitting and setting apart. In general acceptation a duly ordained minister is one who has followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching that religion through an ordination ceremony of an established church by which he has been commissioned, and who is subject to the control and discipline of the church by which he was ordained. Within the meaning of the marriage acts requiring one licensed to marry to be an 'ordained minister,' the term is not confined to the Christian ministry."

If, as you state in your letter, the person in question was ordained by the Pentecostal Church, Inc., in the year 1942, the question of whether he is or is not, now an ordained minister must depend upon whether he is recognized as such by the Pentecostal Church, Inc. The ordination of the ministers of each particular denomination, or sect, is strictly an ecclesiastical matter which is to be done in accordance with the rules of each particular denomination, or sect, and is not governed by statute; nor will the courts interfere to determine whether a person is worthy of being ordained or whether he should be removed from his position. This is substantiated by the Supreme Court in Warren vs. Pulitzer Publishing Company, 336 Missouri 184, 78 S.W. (2d) 404, 1.c. 416:

"* * The charges were made for the purpose of determining the fitness of plaintiff to continue in the ministry as one of the leaders of his church and its communicants, and not to punish him for a crime against the law of the

land. No other tribunal had jurisdiction of this matter, a fact which plaintiff recognized in submitting his case to it. Farnsworth v. Storrs, 5 Cush. (Mass.) 412; Fairchild v. Adams, 11 Cush. (Mass.) 549; Rodger v. American Kennel Club, 138 Misc. 310, 245 N. Y. S. 662; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239. Its decision was final upon this question, except for appeal to its appellate body. * * *." (Emphasis ours).

Therefore, whether this person is presently ordained is a matter of fact which must be ascertained by contacting the proper officials of the Pentecostal Church, Inc., and is not one which we can determine as a matter of law.

Section 563.250, RSMo 1949, imposes certain penalties for performance of marriage ceremonies by unauthorized persons. Said section reads as follows:

"Marriages illegally solemnized -- penalty .--Every person who shall solemnize any marriage, having knowledge of any fact which renders such marriage unlawful or criminal in either of the parties under any law of this state, or, having knowledge or reasonable cause to believe that either of the parties shall be under the age of legal consent, or is insane, mentally imbecile, feeble-minded or epileptic, or where to his knowledge, any other legal impediment exists to such marriage, and every person not authorized by law to solemnize marriages who shall falsely represent that he is so authorized, and who, by any pretended marriage ceremony which he may perform, shall deceive any innocent person or persons into the belief that they have been legally married, shall on conviction be adjudged guilty of a misdemeanor, and be punished by imprisonment in the county jail not exceeding one year, or by a fine not less than five hundred dollars, or by both such fine and imprisonment." (Emphasis ours).

If a person not within the categories provided by Section 451.100 falsely represents that he is authorized to perform the marriage ceremony, and who does perform such ceremony, deceiving any

Honorable Earl Saunders

innocent person or persons into believing that they have been legally married, such person shall be guilty of a misdemeanor in violation of Section 563.250.

CONCLUSION

It is therefore the opinion of this office that whether a person who was ordained as a minister of the gospel by the Pentecostal Church, Inc., in 1942, remains an ordained minister of the gospel, is a matter which must be determined by the Pentecostal Church, Inc., and such fact will not be determined by this office. If a person not authorized by Section 451.100 purports to perform a marriage ceremony under the circumstances proscribed in Section 563.250, RSMo 1949, he is guilty of a misdemeanor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:vlw

DEPUTY COURTY CLERK: There are no minimum age requirements for a deputy county clerk of a fourth class Missouri county.

January 5, 1953 /-6-53

Honorable J. B. Schnapp Prosecuting Attorney Madison County Fredericktown, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Paul Rose, the County Clerk of Madison County, Missouri requests that I secure from you your opinion as to whether or not a Deputy of the County Clerk of Fourth Class County must be over the age of twentyone years, or whether it is permissable for the Deputy County Clerk to be under the age of twenty-one years.

"In other words we desire to know the minimum age requirement for the Deputy County Clerk of a Fourth Class County."

Section 51.050, RSMo 1949, states that a person elected or appointed county clerk must be "over the age of twentyone years."

Section 51.460, RSMo 1949, states that a county clerk in fourth class counties shall be entitled to employ deputies and assistants. The section also states the sums that the clerk will be allowed to pay such deputies and assistants, which sums are based upon population. Nowhere in the chapter on county clerks is there any statement regarding the qualifications of deputies. Nor are we able to find, in the general statutory law, any qualification requirement for deputies which we believe could apply to a deputy county clerk. We must therefore approach the question from another direction.

As we stated above, the law does require that the county clark must be "over the age of twenty-one years," which means we take it, that the county clerk need simply be twenty-one. One day past that age would be "over." There is nothing in the law of Missouri regarding the duties of deputy county clerks. However, in the case of Springer v. McSpadden, 49 Mo. 299, a case dealing with the powers of a deputy circuit clerk, we find the following general statement of law regarding the powers of deputies (1.c. 300, 301):

"Although the statute, when speaking of the duties and powers of the clerk in respect to taking acknowledgments, refers to him alone, yet it by no means follows that he cannot act by deputy. The law, in prescribing the duties of clerks, invariably designates the clerk alone, yet the functions of his office may always be performed by deputy duly appointed.

"No discrimination is made by saying that the clerk shall do certain acts in his own proper person, and that others may be done by the deputy; but the language is broad and explicit, that the deputies may, in the name of their principals, perform the duties of the chief clerk. The deputy has no authority to act in his own name. but when he performs an official act in the name of the principal, it is the act of the principal himself. Taking the acknowledgment of deeds and granting certificates thereon are among the powers expressly devolved upon the clerk, and the deputies, acting in the name of their principals, have the same power as the clerks themselves. As an historical fact, we know that the deputies have exercised this power in the name of their principals ever since the organization of this State. The practice has been universally acquiesced in the courts and the profession, and, as far as our knowle dge extends, it was never before challenged. To sanction the ruling of the Circuit Court in this case would be to unsettle and destroy the title to nearly all the land in the State."

The case of Sawyer v. Mangni, 43 N.W. (2d) 775, holds that a deputy can execute all the ministerial duties to be performed by the incumbent of the office.

In the case of Blake v. Allen, 20 S.E. (2d) 552, the holding is that the position of a deputy is that of a subordinate who has power to do every act which his principal may do.

The case of Styres v. Forsyth County, 194 S.E. 305, holds that a deputy is one who, by appointment, exercises an office in another's right.

The case of Carter v. Hornback, 139 Mo. 238, holds that a deputy is one who, by appointment, exercises an office in another's right, having no interest in such office, but doing all things in his principal's name, and for whose misconduct the principal is answerable.

In the absence of any constitutional or statutory requirements in regard to age, we believe that the general rule as found in 43 C.J.S., Infants, Section 24, page 85, would apply and infancy would not be regarded as a disqualification. Said rule is stated as follows:

"At common law infants are eligible to offices which are ministerial in their character and call for the exercise of skill and diligence only, but they are not eligible to offices which are judicial or concern the administration of justice, nor should offices imposing duties to the proper discharge of which judgment, discretion, and experience are necessary be entrusted to infants. In accordance with these rules it has been held that an infant may be an appraiser of land to be sold on execution, an overseer of a public road, or a deputy county clerk. * * *"

In the case of Harkreader v. State, 33 S.W. 117, the court of criminal appeals of Texas considered a similar question as the one here proposed under statutory provisions substantially the same as ours and involving a deputy county clerk. In their opinion the court reviewed pertinent authority upon the subject and stated as follows:

"The principal ground of contention on the part of appellant * * * is because the deputy clerk, * * * was not at the time 21 years of age; * * *. There is no statute defining the qualifications of deputy clerks; or what character of persons may be appointed

to said office. * * * Looking into the decisions of the courts of other states as to this and kindred subjects, we find the rule stated to be this: If the office is ministerial, such calls for the exercise of skill and diligence only, minors may legally hold the same, and execute the duties thereof; * * *

"It is to be observed, as before stated, that neither our constitution nor laws on the subject prescribe any qualification such as would render a minor ineligible or disqualified from holding the office of deputy county clerk. As to the clerk himself, there might be some question, as he is required to execute a bond, which might involve the capacity to so contract, but there is no such requirement as to deputy county clerks. The authorities cited establish the doctrine that, if the duties of deputy county clerk, under the provisions of our statutes, are ministerial, a minor can receive the appointment, and execute the duties required of said deputy. duties of county clerks in our state are regulated by statute, and they appear to be purely ministerial; and, in addition to their other functions, as has been seen, they have the general power to administer all oaths and affirmations, and to take affidavits and depositions to be used as provided by law in any of the courts. Sayles' Civ. St. art. 1149. Deputies are authorized to act in the name of their principal, and to do and perform all such official acts as may be legally done and performed by such clerk in person. By virtue of his office the county clerk is impowered to administer oaths and affidavits generally. power appertains to his office, and belongs to his official duties, and his deputy, in this regard, has such power and authority as he can exercise; and, in our opinion, the appointment of O.L. Bishop, by the clerk of the county court of Johnson county, as his deputy, was a legal and valid appointment."

Since a deputy acts for and through his principal (Springer v. McSpadden, 49 Mo. 299, supra) and since the principal is responsible for the acts of his deputy, we see no reason under our law to preclude a minor from being appointed deputy county clerk. Certainly, the duties of the office of county clerk are

ministerial and would therefore fall within the above cited rule.

CONCLUSION.

It is the opinion of this department that there are no minimum age requirements for a deputy county clerk of a fourth class Missouri county.

Respectfully submitted,

HUGH P. WILLIAMSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR

Attorney General

HPW:sw

TAXATION:

MANUFACTURERS:

Mining corporation not a "manufacturer" within meaning of Section 150.300, RSMo 1949. Stock-piled ore owned by mining corporation subject to tax as personal property in county where situated as provided in Sections 137.095 and 137.140, RSMo 1949.

JOHN M. DALTON

April 22, 1953

John C. Johnsen

Honorable J. B. Schnapp Prosecuting Attorney Madison County Fredericktown, Missouri

Dear Mr. Schnapp:

This is in response to your request for opinion dated March 30, 1953, as supplemented by your letter of April 7, 1953. Your request reads, in part, as follows:

"The question is, is a lead mining company, engaged in the extraction of ore from the ground and then separating the lead ore from the various rocks at a mill to get the raw lead, which is not manufactured or refined or processed in this county a manufacturer as set out in chapter 150 of the Mo. R.S. 1949 and thus subject to the manufacturer's assessment. If they are not subject to the manufacturer's tax, could the corporation be taxed on the property as the personal property of the corporation?

"One of the companies which the Assessor has in mind has a stock-pile of a large amount of copper and other ores, extracted from the various mines in this county."

Upon inquiry your request was supplemented as follows:

"The Mining Company is not licensed in my County. The Mining Company takes the ores from the ground, crushes and separates the lead from the copper and other rock. After the lead is separated from the rock and copper, it is then shipped out of the county

for further processing and refining. This first goes to the smelter and then from the smelter to the various manufacturers.

"Actually there are no refined ores stored in this county. The process merely being the separation of the various ores and the separated ores are shipped to some other county. I have been informed, the Mines have stock-piled a considerable amount of copper; this copper being in its natural state with the exception that it has been separated."

The first portion of your request is whether the mining corporation in question is subject to a manufacturer's license and tax as provided in Sections 150.300-150.370, RSMo 1949. To be subject to such a license and tax the corporation must come within the definition of a manufacturer, defined in Section 150.300, supra, as follows:

"Every person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials, shall be held to be a manufacturer for the purposes of sections 150.300 to 150.370."

It was stated in State ex rel. Compton v. Buder, 308 Mo. 253, 271 S.W. 770, that (Mo. 1.c. 260): "Citation of authority is entirely unnecessary in support of the well recognized rule that taxing statutes must be strictly construed." Apparently Section 150.300, supra, has not been construed by the Missouri courts with reference to a corporation engaged in mining operations, but bearing in mind that a strict construction must be placed on that section, we are of the opinion that a mining corporation does not fall within its terms and does not constitute a manufacturer.

A corporation engaged strictly in mining operations does not either "hold or purchase personal property for the purpose of adding to the value thereof" by any of the methods set out in Section 150.300, supra. When the corporation purchases either the fee simple title to land, or a lease on land, or the mineral rights to certain land, it is not purchasing personal

property but rather in each instance an interest in realty. Upon severance from the soil the ore becomes personal property which is held by the corporation but, if it is engaged strictly in mining, it is not held for the purpose of adding to the value thereof by any method of "manufacturing, refining, or by the combination of different materials."

Inasmuch as the statutory definition uses the word defined, i.e., "manufacturing," it might be well to set out what the popular definition of the word is.

In Ward Baking Co. v. City of Ste. Genevieve, 342 Mo. 1011, 119 S.W. (2d) 292 (1938), the court said (S.W. 1.c. 293):

" * * * A manufacturer is one engaged in making materials, raw or partly finished, into wares suitable for use. * * *"

It is stated in 55 C. J. S., Section 3, page 685:

"The word 'manufacture' ordinarily applies to artificial products of human industry, and is not usually applied to the appropriation of an article which is furnished by nature or to the liberation of a natural product.

"A 'manufacture' is something made by hand. as distinguished from a natural growth. 'Manufacture' ordinarily refers to artificial products of human industry, so that the mere appropriation of an article which is furnished by nature is not manufacture, nor is the mere liberation of natural products. Ordinarily the term does not include such industries as have for their object the obtaining of possession of material products in the state in which they are fashioned by nature. However. the term may include the appropriating of materials or elements as they exist in a state of nature if there is also some form of processing whereby they are rendered more subject to man's control, or more serviceable to his use."

And again in 55 C. J. S., Section 4, page 695:

"Mining alone is not regarded as manufacturing, but smelting is usually so considered.

"Under the rule, as discussed supra Sec. 3 c (2), that the mere appropriation of an article that is furnished by nature is not manufacture, mining alone is not manufacturing; but smelting may be manufacturing. However, it has been held that milling and reducing ore does not come within the commonly accepted meaning of the word 'manufacturing.'"

The distinction between smelting and mining with regard to whether a corporation engaged in those enterprises was a manufacturer within the meaning of the bankruptcy law was determined by the District Court for the Southern District of California in the case of In re Tecopa Mining & Smelting Co., 110 F. 120, 121. There that court said:

" * * Has the corporation here, by smelting, made or formed anything useful? It has changed the form of the ore, by eliminating useless matter, into that which is useful; and the product has another name, being ore no longer, but 'pig' or bullion, and having a market value depending upon its assay. In a strict sense, man can create nothing. He can only alter the form of existing things. The ore, when taken from the mine by the process of mining, is changed neither in form nor in substance, unless breaking may be termed a change of form. It is ore, still. But when smelted it is ore no longer, in form, and the substance is altered by taking away some of its component parts. There has been alteration, and that by human hands and machinery. To my mind, it comes clearly within the popular definition of 'manufacturing. "

See, also, In re Rollins Gold & Silver Min. Co., 102 F. 982 (Dist. Ct., S.D. New York).

In Cowling v. Zenith Iron Co., 65 Minn. 263, 268, the Supreme Court of Minnesota said:

" * * * The only business actually carried on was that of mining.

"We cannot hold that mining is a 'manufacturing' business, in any proper sense of the word. * * *"

For other cases holding substantially the same, see Byers v. Franklin Coal Co., 106 Mass. 131; Appeal of Commonwealth, 18 Atl. 133 (Pa. Sup.).

Considering the distinction between smelting and mining as set out in the Tecopa Mining & Smelting Co. case, supra, we do not believe that a corporation engaged solely in mining would fall within the Missouri court's definition of a manufacturer as set out in the Ward Baking Co. case, supra. The process of mining does not convert any raw or partly finished material into wares suitable for use. Rather, after the process of mining is complete, the end product remains raw ore.

It might be contended that the process of mining constitutes "refining" as that term is used in the statutory definition of a manufacturer in Section 150.300, supra. Such a contention was made to the Tax Commissioner of Ohio in the case of Cleveland-Cliffs Iron Co. v. Glander, 145 Ohio St. 423, 62 N.E. (2d) 94 (1945). Section 5385, Ohio General Code, defines a manufacturer as a "person who purchases, receives or holds personal property, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing."

In that case the plaintiff was engaged in mining iron ore. During the mining operations foreign material, lean ore and rock were sorted out, some ore was crushed and screened by machinery, and by a washing process some free silica was removed. The court asked itself this question (N.E. l.c. 96): "Under the facts presented by the record in this case, is the appellant a manufacturer within the purview of these statutory provisions?" The court went on to answer the question in the negative as follows:

"This court has heretofore considered a similar question in the case of Schumacher Stone Co. v. Tax Commission, 134 Ohio St. 529. 18 N.E. 2d 405, 120 A.L.R. 1199. The Schumacher Stone Company was engaged in quarrying stone and preparing the stone for sale by successive processes of crushing and screening. Purchasers from the stone company required different sizes of stones and this process prepared the stone to meet the various specifications. This court there held that the 'Machinery, used in crushing and screening limestone into various merchantable sizes without the application of any art or process to change the form or appearance of the broken pieces of stone, each grade being designated according to size and use, mostly for road construction but also for other minor purposes, is not, and should not be assessed as, personal property used in manufacturing, within Sections 5385, 5386 and 5388, General Code.

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"The similarity between the process involved in that case and the operations of the appellant herein is apparent. In neither instance was the product substantially altered. The ore produced by the appellant is still iron ore when sold to the steel manufacturing companies, and it was sold to them as such. Numerous cases were cited in the opinion in the Schumacher case which show the rule to be well established that such operations as above set forth are not deemed to be manufacturing. Neither do the processes performed by the appellant constitute 'refining, rectifying, or by the combination of different materials' within the meaning of Section 5385. General Code. Those words have clearly defined meanings and do not include such operations. The mere separation and removal of free silica from the iron ore, which thereby leaves the ore higher in iron and lower in silica, does not constitute either rectifying or refining as those terms are defined. The supporting cases cited in

the opinion in the Schumacher case are applicable to this case, as is also the discussion of the term 'manufacturing.'"

Therefore, we do not believe it could be successfully asserted that a corporation engaged solely in mining operations constitutes a manufacturer by virtue of the use of the word "refining" in the statutory definition of a manufacturer contained in Section 150.300, supra.

Your first question having been answered in the negative, the next question is whether the ore which has been stock piled by the mining corporation in your county can be taxed as personal property.

It is fundamental, of course, that when ore has been severed from the soil, it becomes personal property. 50 C. J., Section 14, page 768.

Section 137.120, RSMo 1949, in specifying what the property list of the assessor shall contain, says:

"Such lists shall contain:

* * * * * *

"(6) * * * every other species of tangible personal property not exempt by law from taxation."

Section 6 of Article X of the Constitution of Missouri, 1945, reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit, and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100, RSMo 1949, is the legislative enactment following the Constitution and in which we are unable to find anything which would relieve a mining corporation such as you describe from the tax burden as it is placed on others.

It was said in State ex rel. v. Gehner, 320 Mo. 1172, 11 S.W. (2d) 30, 34:

"'As the burden of taxation ordinarily should fall upon all persons alike, when one claims an exemption therefrom he must be able to point to the law granting such immunity and it must be clear and unambiguous.' Kansas Exposition Driving Park v. Kansas City, 174 Mo. loc. cit. 433, 74 S.W. 981."

We call your attention, also, to Sections 137.095 and 137.140, RSMo 1949, which read, respectively, as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

"The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

CONCLUSION

It is the opinion of this office that a corporation engaged exclusively in a mining operation is not a "manufacturer" within

Honorable J. B. Schnapp

the meaning of Section 150.300, RSMo 1949, and hence is not subject to the manufacturer's license and tax provided for in Sections 150.310, et seq., RSMo 1949. It is the further opinion of this office that stock-piled ore owned by such a mining corporation may be taxed by the county in which the ore is situated as provided in Sections 137.095 and 137.140, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml



TAL ROAD DISTRICTS: Commissioners of Special Road Districts organized under Secs. 233.170 to 233.315, inclusive, RSMo 1949, have the exclusive control over the property and funds of such districts. Such funds cannot be used for any purpose other than that for which such funds are collected. Prevention of deviation in the use of such funds may be invoked by owners of real estate in such district. The County Courts have no statutory authority in such matters. Courts do have authority to dissolve Special Road Districts.

September 5, 1953

Honorable Frank Schanzmeyer Honorable Joe Stock Honorable Paul H. Haslag Judges of the County Court of Osage County Linn, Missouri

Gentlemen:

This will be in response to your request, in writing, for the opinion of this office respecting some named incidents to the government of Special Road Districts in your county. Your letter requesting an opinion states the following:

> "Our proposition is that Osage County, Missouri, has a number of Special Road Districts in the county. One of said Special Road Districts in Osage County is spending some of the money collected for that Special Road District on (private roads leading from the privately owned homes out to the main road) popularly called by-roads, although it has a state approved but no public county roads within such district. The County Court wants to know whether such expenditure by the Special Road District of its funds for such 'by-roads' is lawful and proper.

"The Court wishes to know whether before funds derived from taxes assessed against property located within the boundaries of a Special Road District may be lawfully and properly spent on such by-roads is it necessary for the Special Road District to be dissolved? The Court also desires to know what proceedings must be had to dissolve a Special Road District?

"The Court also wishes to know where some of the property owners conveyed right of way voluntarily at an agreed figure and others required their right of way condemned, whether it is proper for a

special road district to pay the property owners who conveyed their right of way voluntarily, additional sums after the right of way was conveyed and the original agreed price paid; the additional payments being over and above the agreed price for the right of way; the payments being made to whom and for what amounts that the commissioners in the district desired to pay. The Court desires to know whether a special road district can voluntarily refund to the taxpayers in a special road district moneys collected for the roads; without expending the said moneys upon the roads."

Your letter requests the opinion of this office on each of the five separate questions as follow:

- QUESTION 1: May funds of a Special Road District be lawfully expended on private roads commonly called "by-roads", leading from privately owned homes out to a public road.
- QUESTION 2: Before such funds of a Special Road District may be expended on such "by-roads" is it necessary for such Special Road District to be dissolved.
- QUESTION 3: What proceedings must be had to dissolve a Special Road District.
- QUESTION 4: May the Commissioners of a Special Road District pay property owners, who have voluntarily conveyed their respective rights-of-way to the district for public roads for an agreed price as compensation, additional sums after such rights-of-way have been conveyed and the compensation agreed upon has been paid to such persons.
- QUESTION 5: May Commissioners of a Special Road District refund to taxpayers in such district funds of the district.

You recite in your letter that there are several Special Road Districts in Osage County, Missouri. These districts, we understand, are organized, incorporated and maintained as Special Road Districts -- Benefit Assessments --Counties Not Under Township Organization, as authorized under Sections 233.170 to 233.315, inclusive, RSMo 1949. Under Chapter 233, when the procedure before a County Court, provided by the statute for the incorporation of Special Road Districts, has been carried out, the County Court shall make an order incorporating a Special Road District, as provided in Section 233.175 of said chapter and such road district shall thereupon become by the name mentioned in such order, a political subdivision of the State for governmental purposes with all powers mentioned in said section, and such other powers as may be conferred by law. At the term of Court in which such order is made, or at any subsequent term thereafter, the Court shall appoint three Commissioners who shall be residents of the district, and owners of land therein, who shall hold their office until the first Tuesday after the first Monday in January thereafter. On said date the voters of the district at the hour and place to be fixed by the Commissioners, shall elect three Commissioners, one of whom shall serve one year, one for two years, and one for three years, and on the first Tuesday after the first Monday in January of each year they shall elect a Commissioner to take the place of the one whose term is about to expire, who shall serve three years.

pointed and qualified shall meet at such time and place within such district as fixed by the County Court at the time of their appointment or as they may, in writing, agree upon, and organize by electing one of the number President, one Vice President and another Secretary. The Treasurer of said Board shall be the County Treasurer and shall be responsible on his bond for the faithful keeping of all money deposited with him by reason of this law. All money paid to the County Treasurer and placed to the credit of the district, shall be paid out only on warrants signed by the President or Vice President and attested by the Secretary, except as may be otherwise authorized by law. The President of the Board shall sign all warrants that may be drawn upon the treasury for the payment of any money out of the treasury on account of the funds belonging to said district, and in a general way do all the acts and things that said Board may empower him to do, and such others as may be authorized

by law.

Section 233.190 of said chapter provides that upon the organization of such Commissioners, the County Court shall cause all tools and machinery used for working roads belonging to the districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said Commissioners, for which such Commissioners shall give a receipt, and such Commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. Said section, in subsection 2, further empowers the Commissioners as follows:

"2. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work; provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

Subsection 2 of said Section 233.190, clearly implies, we believe, that the Board has the power to use district funds to pay the cost involved in the performance of such duties.

There is, however, express authority and direction that the district shall be the owner of funds set apart to the district and for the expenditure by the Board of district funds. Subsection 3 of said Section 233.225 so providing, reads as follows:

"3. The county treasurer shall receive payments of such special tax bills and keep a

> record of each payment and of the name of the party making same, and shall cancel such special tax bills as they are paid, and shall give such district credit for the amount of each payment to him on a special account kept with said district of payments to him on account of such tax bills, indicating therein the amounts paid as principal of such special tax bills and the amount paid as interest. Whenever any of such tax bills has been canceled by the county treasurer and is exhibited to the clerk of the county court. or the county treasurer reports payment of any such special tax bills to the clerk of the county court, he shall note the payment thereof in said record book."

Subsection 4 of Section 233.235 of said Chapter 233, respecting district monies, states the following:

"4. The county collector shall pay to the county treasurer all money collected on said special tax bills and the county treasurer shall give such district credit therefor on a special account kept with said district on account of collections on said tax bills, indicating therein the amount paid as principal, and the amount paid as interest and penalties."

Section 233.195 of said chapter identifies another source of money which contributes in part to the funds of a Special Road District provided for in Section 137.555. Said Section 233.195, in that particular, and providing for the exclusive use of such identical funds on roads, bridges and culverts within any such district, reads as follows:

"County courts shall cause to be set aside and placed to the credit of each road district so incorporated four-fifths of such part or portion of the tax arising from and collected and paid upon any property lying and being within any such district, by authority of section 137.555. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges

and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law."

Subsection 6 of Section 233,225, defining the only purpose for which district money may be used, reads as follows:

"6. All money collected on special tax bills and all money the commissioners may so borrow, and all interest that may accrue thereon while on deposit in any county depositary, shall be used, and warrants drawn on the treasurer therefor, for the following purposes only: To pay the cost and expense incurred by the commissioners, as found by the court, in the preparation of such plans, specifications, estimate, map and profile, and said list of lands, and a reasonable attorney's fee, as found by the court, for such petitioners, and to pay the cost of improving said public road or part of a public road in accordance with the plans and specifications so filed with the clerk of the county court, and such working, administrative and incidental expenses, not otherwise provided for by law, as may be incurred in making such improvement and in procuring, collecting and paying the cost of such improvement, and the balance, if any, shall be used in paying expenses of maintaining such improvement; but if any money should be borrowed by the commissioners, it shall be repaid, with interest thereon, out of the collections of such special tax bills as were unpaid at the time such money was borrowed."

We have seen by the terms of the sections of the chapter of the statutes on Special Road Districts cited and quoted herein, that Commissioners of Special Road Districts have complete and exclusive control over the property and funds of the

district and have express directions as to how and for what purposes—and none other—such district funds shall be expended. Nowhere does any of such sections give the County Court in counties having the benefit assessment special road districts any authority over the property, the funds of such districts or the expenditure thereof. Such funds may be used only for the purposes and by the means provided by the statutes. Such funds may not be diverted to other uses than prescribed in such statutes. Eminent textwork authorities and our Appellate Courts, construing such statutes, so hold. 29 C.J. 739, under the subject "Highways", speaking on this principle states the following text:

"Taxes collected must be paid over to the officers designated by statute to receive and disburse highway funds. Such funds must be used in the manner provided by the constitution or statutes, or designated by the voters, and cannot be diverted to any other purpose. * * *."

Our Supreme Court in the case of Platte City Assessment Special Road District of Platte County vs. Couch, 8 S.W. (2d) 1003, was considering the validity of the expenditure of Special Road District funds where the plans, including the length of a highway under construction, were changed from the plans and specifications filed with the County Court, so that the highway when constructed would be a part of the state highway system and a part of the costs thereof, it was agreed, was to be paid out of the Special Road District funds. The Court held this could not be done, because it would be a diversion of the funds of the Special Road District from the use for which they were assessed and collected and that that use was for the construction of Special Road District roads. The Court, 1.c. 1006, 1007, so deciding, said:

"Now, it stands conceded in this case that, before the tax bills had been issued, and perhaps even before the improvement had been ordered by the court, and the assessment made, the commissioners of the road district entered into a private verbal arrangement with the state highway commission, whereby the original project was cast aside and another improvement substituted. The purpose was commendable, and the parties are not subject to criticism; but from a legal standpoint the departure was so glaring that

we cannot by any stretch of the imagination say the law was followed, or that the improvement agreed upon was substantially the same as that provided for in the prior proceedings, which are the foundation for the tax bills. Not only was the length of the road materially shortened, the course changed, and the construction cost multiplied by 2½ (nearly), but the road substituted was a state highway, which the law says shall be built at the expense of the state, and we are asked to sustain tax bills issued to pay over a third of the cost of that road."

Reference also was made in that decision to Section 10897, R.S. Mo. 1919, which provided that: "'Any county or other civil subdivision having funds of its own arising from a road tax or bond issue may expend said funds in the building of the state road system' therein." The Court, in holding that the terms of said Section 10897 could not justify the expenditure of a Special Road District's funds on the state road system, under the statutes relating to assessment and the collection of such district funds, l.c. 1007, in said Platte City case, further said:

"But the Legislature evidently did not intend, by this or any of the other sections mentioned, to authorize the diversion of funds raised by special assessment under article 8, c. 98, for one purpose, and their application to another under different auspices. If such were the intention, it could not stand. * * *."

The Kansas City Court of Appeals held to the same effect in the case of Wheat vs. Platte City Benefit Assessment Special Road District of Platte County et al., 59 S.W. (2d) 88. In that case there was also a change in the original plan for the construction of a highway. In that case the funds of the district were borrowed under a statute permitting the borrowing of funds for building a road by the road district under plans already adopted. In holding that such funds of the district could not be used in the construction of a highway under such changed plans the Court, 1.c. 90, 91, said:

"It is, therefore, proper to inquire into the reason the statute provides that the money loaned should be used in the construction of

the road that had been planned. The primary purpose, of course, of this is for the protection of the land owners against whose land the Road District had issued the tax bills, which were liens upon the land. The statute, under which the road was originally projected, shows that the scheme of building the road is always initiated by the land owners themselves. Of course, the law protects them against diversion of the money raised by liens created upon their lands by providing that the money should be spent for the purpose intended."

We believe questions 1, 2, 4 and 5 may be considered and determined in one answer, since they all refer to the disposition, in one particular or another, of Special Road District funds.

We have seen from these statutes that where taxes are collected on tax bills against property in a Special Road District, or from any source, it must be deposited with the County Treasurer who shall place such funds to the credit of that district in a separate fund and such districts thereby become absolute owners, respectively, thereof. We have seen also that such fund may only be used for the establishment and maintenance of roads, bridges and culverts in such Special Road Districts and incidental expenses, and that the diversion of the use thereof from such purposes is contrary to the sections of said Chapter 233 and the decisions of our Courts construing such statutes.

We have also seen that the Commissioners of a Special Road District incorporated as benefit assessment districts in counties not under township organization, have the entire and exclusive control over roads, bridges and culverts and their maintenance, and the funds of their respective districts. The County Courts of counties having such Special Road Districts have no statutory authority to take any official steps to prevent the Commissioners of a Special Road District from using the funds of the district, even if any district funds may have been diverted by using them on roads in such districts other than for the use of which such taxes are collected, or for other purposes mentioned in questions 1, 2, 4 and 5 in your letter. The remedy to prevent the unauthorized expenditure, if any, of district funds must be invoked by the owners of land in such districts against whose lands tax bills are issued

for the collection of funds belonging to such district. The Commissioners of a Special Road District are not accountable to the County Court for the property or funds of the district or for the management or expenditure of the funds of the district. The County Court has no power to question any of the acts of such Commissioners, in any way. The owners of property in the district only may do that. This will, we believe, fully answer questions 1, 2, 4 and 5 in your letter.

Question number 3 submitted in your letter and hereinabove copied, asks what proceedings must be had to dissolve a Special Road District. The Special Road Districts in Osage County, Missouri, are Benefit Assessment Special Road Districts and Osage County is a county not under township organization. Such districts are governed and controlled by Sections 233.170 to 233,315, inclusive, RSMo 1949, respecting their organization and establishment, the conduct of the business of such Special Road Districts, and the procedure for dissolution, set out in the sections above-numbered. While it is true, as we have observed from the statutes hereinabove cited, that the property and management of such districts are within the exclusive control of the Commissioners of such districts and the County Court of any county containing such Special Road Districts has no governing authority over such districts after their organization and after the order has been made constituting such districts, respectively, subdivisions of the State for governmental purposes, yet the County Court of any such county does have the exclusive right and duty to dissolve any such Special Road District, upon compliance being had with the sections of Chapter 233, RSMo 1949, pointing out the procedure to be followed to dissolve any such Special Road District. The County Courts are given no authority to initiate a proceeding to dissolve a Special Road District. The procedure for the dissolution of any such district is contained in Sections 233.290 and 233.295, RSMo 1949. Each of these sections provides a separate method for placing in motion proceedings to dissolve such Special Road Districts. Section 233.290 provides that, whenever an owner of land within any such road district shall file with the County Court of the county in which such district may be located, a petition, verified by an affidavit, alleging that such road district has no Commissioners and has failed to elect Commissioners at any regular election of the district, or has failed to hold a special election to fill any vacancy in the office of Commissioner, or that such road district has ceased to perform the functions for which it was created, the County Court shall give notice, by posting up five notices in conspicuous places in said district,

of the filing of such petition, and that unless cause be shown to the Court on a day to be named in said notices, not less than thirty nor more than sixty days from the time of posting such notices, why the said road district should not be dissolved, that the same will be dissolved. The section further provides that if on the day named in the notices no person appears who has an interest in the matter and shows that said district is performing the functions for which it was created or that it has Commissioners or that good cause exists why the said road district should not be dissolved, the Court shall, on the next court day, make its order of record that such road district be dissolved. The section further provides that if any party in interest does appear and show cause, as is in said section provided, the County Court shall proceed to hear evidence on the matter, and if it appears to the satisfaction of the Court that no good cause exists why such road district should not be dissolved, it shall enter its order of record that such road district be dissolved, but, if the contrary appears, the said petition shall be dismissed. This section further provides that upon such dissolution of any such Special Road District the land therein shall be divided into road districts under the provisions of Sections 231.010 to 231.030, 231.050 to 231.100 and 137.555 to 137.575, RSMo 1949, and any money that may be on hand to the credit of such Special Road District that is not needed to satisfy any liabilities of any such Special Road District, shall, by order of the County Court, be turned over to such new road districts in proportion to the number of acres allotted to each such new district.

Section 233.295 provides a separate and different method from said Section 233.290 respecting the putting in motion, proceedings to dissolve a Special Road District and the dissolution of such district. Said Section 233.295 reads as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land, within a road district organized under the provisions of sections 233.170 to 233.315 shall be filed with the county court of any county in which said district is situated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced to

disincorporate such road district. No such road district shall be disincorporated until notice be published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

This section provides that after the petition required by the section is filed with the County Court, notice shall be published in some newspaper published in the county where the same is situated for four weeks successively, prior to the hearing of said petition, and thereupon the Court shall have power, if in its opinion the public good will be thereby advanced, to disincorporate such road district. This section does not in detail describe the steps and proceedings to be had in the hearing of the petition filed under the terms of said Section 233.295, but it is clear that the Court must have a hearing after the notice required is given to determine if, in the Court's opinion, the public good will be thereby advanced in dis-incorporating such road district. This section requires that the petition to dissolve must be signed by the owners of a majority of the acres of land with-in such road district. This provision itself, when complied with. would be persuasive evidence to the Court that the wishes of the property owners in the district would be best served by dissolving the district. But there might be other interests of a public nature that would demand that said public road district be not dissolved and that said petition be dismissed. The Court must determine under said section whether the public good will or will not be advanced by the dissolution of such district. The Court would be authorized in the formulation of its opinion one way or the other to take evidence on what does constitute the public good and should give all persons who may appear an opportunity to be heard on the question.

We have seen from the terms of said Sections 233.290 and 233.295 that exclusive power is given to the County Court to dissolve a Special Road District located in its county. The district cannot automatically dissolve itself. We have observed that the majority of property owners within the district cannot alone accomplish a dissolution of the district. They must file their petition for dissolution required by the statute with the Court. Full compliance with the terms of each of said sections must be had in order to dissolve a Special Road District under either of such sections. Upon such compliance the County Court of any such county under either section may make an order of record dissolving a Special Road District.

CONCLUSION

Considering the premises, it is, therefore, the opinion of this office that:

- 1) The Commissioners of Benefit Assessment Special Road Districts incorporated under Sections 233.170 to 233.315, inclusive, RSMo 1949, have exclusive control over roads, bridges and culverts and their maintenance, and the funds and the use thereof in their respective districts. The County Courts of counties having such Special Road Districts have no statutory authority to take any official steps to prevent the deviation, if any, in the expenditure of such funds for purposes other than those for which such funds were collected. The remedy to prevent any unauthorized use of such funds must be invoked by the owners of land in such districts whose lands are affected by tax bills issued for the collection of funds for any such district;
- 2) That proceedings to dissolve a Benefit Assessment Special Road District in this State are set forth in Sections 233.290 and 233.295, respectively, RSMo 1949, which must be followed and fully complied with to dissolve any such Special Road District initiated under either of such sections before such district may be legally dissolved.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

COMMERCIAL MOTOR VEHICLES:

JOHN M. DALTON

(1) That a farmer operating his truck a local commercial motor vehicle license may transfer beyond the twenty-five mile limit when he has no load on his truck and is on a pleasure trip. (2) That a farmer operating on a local commercial motor vehicle license may not make a "for hire haul." (3) That a man, not a farmer, operating on a local commercial motor vehicle license, may not go beyond the twenty-five mile limit on a pleasure trip. (4) That a person, not a farmer, operating on a local commercial motor vehicle license, may not legally move from job to job in excess of the twenty-five mile limit.

February 20, 1953

J. C. JOHNSEN

Honorable D. W. Sherman, Jr. Prosecuting Attorney Lafayette County Courthouse Lexington, Missouri



Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I should like very much your opinion and interpretation of Section 301.010 Paragraph (10) which defines a local commercial motor vehicle, as follows, to wit;

"'Local commercial motor vehicle, a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confirmed solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm;

"Specifically in view of this section I should like to know whether 1. a farmer may operate his truck on a local license and travel beyond the 25 mile limit as

THE STATE OF

Honorable D. W. Sherman, Jr.

a farmer, and when he has no load on said truck and it is a pleasure trip? 2. I should like to know further in view of this section whether a farmer may make a 'for hire haul' within the 25 mile limit and operate on a farm local license as defined? 3. Further may a man operate on a local license as defined in Paragraph (10) Section 310.010, 'not a farmer', go beyond the 25 mile limit on a pleasure trip? 4. May a man on said local license 'not a farmer' move from one job to another in excess of the 25 mile limit and still be not guilty of violation to aforesaid section.

It will be noted that paragraph 10 of Section 301.010, Cumulative Supplement 1951, subparagraph 9, Laws of Missouri, 1951, page 696, gives two separate and distinct definitions of a local commercial motor vehicle. One of these definitions is that such a vehicle is one whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom. The other definition is that a local commercial motor vehicle is one whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease, provided that any such property transported to any such farm is for use in the operation of such farm.

It is obvious that there are sharp differences between the powers of owners of motor vehicles operating on a local commercial motor vehicle license depending upon which of the two above definitions such owners come under. These we shall indicate as we proceed.

Your first question is: May a farmer operate his truck on a local license (local commercial motor vehicle license) and travel beyond the twenty-five mile limit as a farmer, and when he has no load on said truck and it is a pleasure trip?

We believe that he may do so. It is clear that a farmer would come under the second definition given above in paragraph 10. In that definition nothing whatever is said about a twenty-five mile limit, and since the twenty-five mile limit was expressly stated in the first definition it must have been the intention of

Honorable D. W. Sherman, Jr.

the legislature that no limit should apply to a farmer. Furthermore, it will be noted that the second definition places a restriction only upon the "property carrying operations" of such farmer vehicles.

Since no mileage limits are imposed upon a farmer operator, and since, while on a pleasure trip he would not be transporting "property" we hold that the answer to your first question is, as we stated above, in the affirmative.

Your second question is: May a farmer make a "for hire haul" within the twenty-five mile limit and operate on a farm local license (local commercial vehicle license) as defined?

We believe it to be clear that he may not do so. As we stated above, we do not believe that the twenty-five mile limit comes into consideration in the case of a farmer operator, but the second definition of paragraph 10 clearly states what a farmer who obtains a local commercial motor vehicle license, under the second definition, may (and by implication may not) do. His property carrying operations are confined solely to the transportation of property "owned by a person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease, provided that any such property transported to any such farm is for use in the operation of such farm."

Your third question is: May a man, not a farmer, operate on a local license (local commercial motor vehicle license) and go beyond the twenty-five mile limit on a pleasure trip?

We believe that he may not do so. Such a person, "not a farmer," would come under the first definition given in paragraph 10, supra, and that definition states, in reference to a local commercial motor vehicle; that it is one "whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom."

It will be noted that this definition limits operations solely to a municipality and a twenty-five mile area extending therefrom.

It will also be noted that the limitation is to "operations" and not, as in the second or farmer definition, to "property carrying operations."

We believe that it was the intention of the legislature to strictly limit the operation of a motor vehicle operating under a

Honorable D. W. Sherman, Jr. local commercial motor vehicle license, which vehicle comes under the first definition given in paragraph 10, supra, to a municipality and an area not more than twenty-five miles therefrom. Your fourth question is: May a man, not a farmer, on said local license (local commercial motor vehicle license) go from one job to another in excess of the twenty-five mile limit and still not be guilty of a violation of the section? We do not believe that he may do so. What is now paragraph 10 of Section 301.010, Cumulative Supplement, 1951; paragraph 9, Laws of Missouri, 1951, page 699, supra, appears in the Revised Statutes of Missouri, 1949, as paragraph 8 of Section 301.010. That paragraph reads: "'Local commercial motor vehicle, 'includes every commercial motor vehicle as defined in paragraph (1) of this section while operating within this state and used for the transportation of persons or property "(a) Wholly within any municipality or urban community: "(b) Wholly within any municipality or urban community and a zone extending twenty-five air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community; or "(c) In making hauls not exceeding twentyfive miles in length; or "(d) When controlled or operated by any person principally entaged in farming when used exclusively in the transportation of agricultural products or livestock to or from a farm or farms or in the transportation of supplies to or from a farm or farms:" (Emphasis ours.) Local commercial motor vehicle includes every commercial motor vehicle as defined in the first paragraph of this section while operating in this state and used for the transportation of - 4 -

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persons or property "(a) wholly within any municipality or urban community * * * * *

It will be noted that the reference there is to "any" municipality or urban community. As paragraph 10 now reads, since its amendment, the word "any" is changed to "a".

We believe that prior to its amendment, when paragraph 10 (then paragraph 8 of Section 301.010, RSMo 1949), used the word "any" in regard to a municipality or urban community, that it might have been held that a person, not a farmer, holding a local commercial motor vehicle license, could move from job to job beyond the twenty-five mile limit. But we further believe that when the legislature changed "any" to "a" it did so for some purpose, and that such purpose could only have been to prevent precisely what your fourth question contemplates, and to confine a person who comes under the first definition of paragraph 10, supra, to one municipality and the twenty-five mile area radiating therefrom.

We feel that there are also numerous practical reasons why this should be so, and why this must have been the intention of the legislature in making the change in wording noted above. A local commercial motor vehicle license is much less expensive than a state-wide commercial license. When the legislature termed such a license as "local" we believe that it must have meant what it said, namely, local, and limited.

It must also be apparent that if a person coming under the first definition of paragraph 10, supra, could move from job to job and from one location to another location, he could operate throughout the state and so could, on a low price license, do, practically speaking, what he could properly and legally do only under a much more costly license, and so defeat the legislative intent and place himself in competition with other haulers who had complied with the law by securing the more costly and extensive operating license.

CONCLUSION

It is the opinion of this department:

- (1) That a farmer operating his truck on a local commercial motor vehicle license may travel beyond the twenty-five mile limit when he has no load on his truck and is on a pleasure trip.
 - (2) That a farmer operating on a local commercial motor

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vehicle license may not make a "for hire haul."

- (3) That a man, not a farmer, operating on a local commercial motor vehicle license, may not go beyond the twenty-five mile limit on a pleasure trip.
- (4) That a person, not a farmer, operating on a local commercial motor vehicle license, may not legally move from job to job in excess of the twenty-five mile limit.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

OFFICIAL BOND: BREACH: Every person injured by the breach of the bond of a public official is entitled to share in funds recovered for the breach of such bond.



February 25, 1953

Honorable Gordon C. Shaffer, Jr. Assistant Prosecuting Attorney and Legal Advisor to the County Court Buchanan County St. Joseph, Missouri

Dear Mr. Shaffer:

This will be the opinion you requested with reference to the disposition of funds derived from the collection of the penalty of a bond given by the Clerk of one of the Magistrate Courts of Buchanan County, Missouri, growing out of the alleged failure of such Magistrate Court Clerk to account for all of the monies coming into his official custody. Your letter requesting the opinion of this office on the question reads as follows:

> "Shortages have appeared in the funds of the Clerk of the Magistrate, Second District. These shortages appear to effect both State and County funds. The practice has been for the Clerk of the Court to collect the total amount of the fine and court costs in the case of misdemeaners. The Clerk in turn would send the State its fees and turn the balance over to the Sheriff for distribution, taking a receipt for same.

"The bonding company has contacted this office with reference to the amount of liability. It appears that the shortage will exceed the amount of the bond, i.e. \$1,000.00, which was entered into pursuant to Section 483.485, Revised Statutes of Missouri, 1949.

"Would you please advise as to whether or not the above mentioned bond covers both the County for its! fines and court costs collected by the Magistrate Clerk, or just the fees collected pursuant to Section 483.610, Revised Statutes of Missouri, 1949, which are paid directly to the State.

"In the event it is the opinion of your office that both County and State funds are covered, can we settle with the bonding company and send the Director of Revenue the proportionate part of the shortage?"

Section 483.485, RSMo 1949, under the title of Magistrate Courts, respecting the bond of the clerks of such courts reads, in part, as follows:

"* * * Each clerk of the magistrate court shall take the oath required of other clerks of courts in this state. Before entering upon the duties of his office, the clerk and deputy clerk shall enter into a bond to the state of Missouri, with good and sufficient sureties, to be approved by the magistrate, in the sum of one thousand dollars, conditioned that he will faithfully discharge all of the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county. * * *."

It is disclosed in your letter that the Clerk of the Magistrate Court, Second District of your county in compliance with the terms of said Section 483.485, supra, entered into a bond to the State of Missouri for the faithful performance of the duties of his office in the sum of \$1,000.00. Your letter further states that the shortage or defalcation of said clerk will exceed the amount of his bond. The questions you submit are, first, whether said bond covers both the county for fines and court costs collected by the Magistrate Court Clerk and State funds, or just the fees collected pursuant to Section 483.610, RSMo 1949, and, second, in the event that both County and Sta

funds are covered by the bond may the County Court settle with the bonding company and send the Director of Revenue the proportionate part of the shortage due the State, the county retaining the balance for the loss of its funds to the exclusion of other persons who may have suffered loss or damage by reason of such shortage.

Section 483.610, RSMo 1949, defining the duties of Clerks of Magistrate Courts reads as follows:

"l. There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services as follows:

- "2. In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto.
- "3. All such fees shall be charged on behalf of the state or county paying salary of such clerk or magistrate and chall be paid and accounted for in the same manner as magistrate fees."

It appears from the terms of said Section 483.610, supra, and the terms of said Section 483.485, supra, requiring the clerk to enter into a bond to the State of Missouri for the faithful discharge of the duties of his office, and Section 483.615 when read together, as they must be, that the Clerk of the Magistrate Court has, and in this case had, duties to perform involving both State

and the county funds, and, as well, fees of officers of the Magistrate Court, witnesses and jurors who may have been upon attendance and performed duties in the administration of the business of said Court in its orderly sessions. It may be, from the recitals in your letter, that the State of Missouri, the County of Buchanan and individuals, such as officers, witnesses and jurors, if any such individuals there be, are injured beneficiaries of the bond, on account of the delinquencies of the clerk, under Section 522.010, RSMo 1949. Section 522.010, permitting persons injured by the neglect or misfeasance of any officer to proceed against such officer and his sureties for such injury, reads as follows:

"Persons injured by the neglect or misfeasance of any officer may proceed against such principal or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury."

It is clear, we believe, under the terms of said Section 522.010, supra, that it should be definitely determined who are the injured persons, if any, along with the State and County, including witnesses, officers and previously serving jurors, if any, who may be beneficiaries of this bond before a settlement with the bonding company and a distribution of the funds collected from the surety may be made, and then only after due notice to and the consent of all of such injured beneficiaries is obtained. Under the terms of said Section 483.485, the bond in this case is a penal bond. In the case of Goffee vs. National Surety Company, 9 S.W. 929, the Supreme Court of this State defined a penal bond, 1.c. 939, where the Court said:

"* * * A penal bond is 'a bond promising to pay a named sum of money (the penalty) with a condition underwritten that, if a stipulated collateral thing, other than the payment of money, be done or forborne, as the case may be, the obligation shall be void.' * * *."

The question as to who are the real beneficiaries under a penal bond and who may sue the principal and surety for damages for a breach of such bond was before our St.Louis Court of Appeals in the case of State ex rel. Dale vs.

Ashbrook, et al., 40 Mo. App. 64. The bond in that case was an attachment bond. That case holds that the beneficiaries of a penal bond may be officers of the Court, witnesses, and others, including, as in this case, the State and County for loss of fees and fines due the State or County, respectively, collected and held in the official custody of said clerk at the time of the occurrence of the shortage. The Court holding that the real beneficiaries under a bond are those to whom funds are due, and are held by the officer for which the bond is liable, l.c. 67, said:

"* * * According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust -- so dry that he is not allowed to handle any of the trust fund. His name in the judgment and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others.

We believe the rule thus established by the Court in the Ashbrook case is applicable to the conditions we are advised exist in this case with respect to who are and may be the injured parties by reason of the alleged breach of the bond.

The bond given by the clerk in this case is, under said Section 483.485, for the faithful "discharge of all the duties of his office." 46 C.J. 1067, respecting the liability on such a bond, states the following text:

"A bond conditioned for the discharge of the duties of an office covers not merely duties imposed by existing laws, but duties belonging to, and naturally connected with, the office, as from time to time, fixed and regulated by law, * * *."

The same volume of the same work, page 1068, states the further applicable text, to-wit:

"Where an officer, acting in a matter in which he is authorized to act, is guilty of official misconduct, he is not faithfully performing his official duties, and he and his surety are liable on his official bond for resultant damages. * * *."

It may be readily observed, we believe, that by the terms of Section 483.610, supra, and the terms of Section 483.615 (not quoted here in the interest of reducing the length of this opinion) that the Clerk of a Magistrate Court is required to perform, and does perform, duties respecting monies belonging to both Buchanan County and the State of Missouri. We believe this will answer the first question you submit.

If any person injured by default of a public officer under his bond desires to sue for redress as is authorized under Section 522.010, supra, he must then proceed under Section 522.020, RSMo 1949, which reads as follows:

"In all cases where, by the law of this state, any person is authorized to prosecute a suit to his own use, on any official bond, he shall sue in the name of the state, or other obligee named in the bond, stating in the process, pleadings, proceedings and record in such action, that the same is brought at the relation and to the use of the person so suing."

If such suit is instituted by the parties injured in their own individual capacities, respectively, according to the decision in the Ashbrook case, supra, such action would then proceed to a final determination under Sections 522.130 and 522.140, RSMo 1949. These two sections, while not undertaking to limit the right of an injured person to sue within three years after the breach of a bond as is provided in Section 516.030, do, as a matter of procedure, require each of the injured parties suing on the breach of the bond to be diligent, and specifically provide that, if several judgments be obtained at the same term upon an official bond for damages amounting to more than the amount of the bond, the Court shall order the money levied upon such judgments to be distributed to the relators, respectively, according to the amount of the recovery of each, and if executions be issued upon such several judgments obtained at the same time and sufficient money shall not be made to satisfy all the executions, the Court shall distribute the money collected thereon to the relators, in proportion to their respective recoveries. This means, as we understand these sections, that if some injured beneficiaries sue and obtain judgments at one term of Court, but others, or the remaining injured beneficiaries do not sue and obtain judgments at the same term of Court they would not be able to participate on execution in the distribution ordered by the Court if sufficient money be not recovered to satisfy all executions. We here give the further consideration to your second question respecting the right of settlement by the county with the bonding company as set forth in your letter.

There was a breach of the bond of the Clerk in the Magistrate Court in this instance. It was a duty he should faithfully perform to pay over to each and all entitled to the same, monies collected by him and held in his official capacity. This, we are advised, he failed to do. In the early case of Marney, et al. vs. State Use of Vance, 13 Mo. 7, the Supreme Court held upon a suit against a sheriff and his bondsman that failure to pay over monies in his hands due different persons, constituted a breach of a bond given for the "faithful discharge of the duties of his office." The beneficiaries of the bond recovered judgment in the Circuit Court. Upon an appeal, l.c. 10, the Court asked its own question, to-wit:

"Was it the duty of the sheriff, in virtue of his first election, to complete the business of collecting the money and transferring the land? If so, he did not 'faithfully discharge all duties imposed on him by his office,' and his securities are liable for his default. * * *."

The Court answered the question by affirming the judgment of the Circuit Court for damages against the bond of the sheriff for such derilection of duties. We believe there is no question but that the injured parties, all of them participating, may settle the controversy over the distribution of the funds recovered for the breach of this bond like any other controversy may be settled. The law itself encourages settlements of disputes in order that litigation may be avoided, but all parties interested as injured beneficiaries must participate in and agree to a settlement. Under no circumstances would it be lawful for the county, through the County Court in this case, to distribute the funds recovered for the breach of this bond to the State and Buchanan County to the exclusion of any other injured beneficiaries who may be covered by the bond.

It is well settled by both text and judicial decisions that no person who has a just cause of action may be precluded from the recovery of his rights in a settlement of a controversy in which he has a claim and no settlement of such controversy may preclude his claims if he did not participate in and consent to such settlement. On this well established principle of law 15 C.J.S. 747, 748, states the following text:

"The parties and those who claim under them with notice cannot go behind a compromise made in good faith as a settlement of prior disputes but they are bound thereby, * * *.

"On the other hand, such an agreement is not binding on those not parties thereto, or in privity with some party to it; * * *."

In the case of Burnham vs. Williams, et al., 198 Mo. App. Rep. 18, the St. Louis Court of Appeals in a case involving the settlement of a claim against an insurance company ignoring Burnham who had an interest in the controversy, holding that the settlement was invalid so far as Burnham was concerned, 1.c. 26, said:

"* * * We therefore hold that the settlement made between Quinn and the insurance company--which under the evidence Burnham had no hand in, being in fact forbidden

by his contract to interfere with negotiation for settlement of claims-cannot bind him and estop him from asserting a claim for damages to his property, * * *."

We believe under the facts here considered and the above-cited authorities that the County Court of Buchanan County may not order the distribution of funds collected growing out of the breach of a Magistrate Clerk's bond to the State and the County of Buchanan to the exclusion of any other person who may be injured by the breach of such bond.

CONCLUSION.

It is, therefore, the opinion of this office that all persons who may be covered by the bond of a public official given for the faithful performance of his duties have the legal right and may maintain an action to enforce such right to share in the distribution, according to their interests, of funds collected from a breach of a bond given by the clerk of a magistrate court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

GWC:irk

JOHN M. DALTON Attorney General EXTRADITION: (1) Rule 21.08 of the rules of criminal procedure is valid and should be followed.

- (2) The sheriff, the prosecuting attorney or other officers can sign a complaint on the basis of information obtained in the course of investigation. Such complaint justifies the issuance of a warrant for the arrest of the accused.
- (3) An affidavit based on information and belief only is not a sufficient basis for extradition.

August 31, 1953

Hon. W. D. Settle Prosecuting Attorney Howard County Fayette, Missouri

Dear Mr. Settle:

We have before us your letter in which you request an opinion of this department. Your letter is as follows:

"I hereby request an official opinion from your office to clarify a situation which recently arose.

"By letter dated March 20, 1953, your office refused to approve extradition papers submitted to Governor Donnelly by which this County sought to return John Hayes from the State of Louisiana.

"The reason given was that the affidavit (a copy of which is enclosed) was 'not sufficient to charge the person sought to be extradited with a crime in the State of Missouri, for the reason that there is language in said affidavit which indicated that it is made on "information and belief".' Your letter further stated that an affidavit must be by one who had personal knowledge of the facts that constitute probable cause for believing that the crime was committed and by the person charged.

"In this connection I would call your attention to Rule 21.08 of the Rules of Criminal Procedure adopted by the Supreme Court of Missouri, April 14, 1952. As you will note, this rule specifically provides for a complaint on 'information and belief' and such complaint is sufficient to charge a felony and is sufficient basis for issuing a warrant.

"I am unable to see how this results in any qualification or limitation" of the charge. I further see no language in the quoted federal statute that requires any different procedure than that required by the laws of the state seeking to extradite.

"In view of the above I respectfully request an opinion whether your office believes Rule 21.08 is invalid and should not be followed. I also would like an answer on whether the sheriff, prosecuting attorney, or other officer can sign a complaint when such officer is not a witness with personal knowledge but is acting on his investigation of the alleged crime, both where extradition is sought and where the defendant is arrested within the state."

You refer in said letter to our refusal to approve the papers submitted in support of your petition for the extradition of John Hayes, from the State of Louisiana, which refusal as your letter states was based upon the proposition that the affidavit submitted was not sufficient to charge the person sought to be extradited with the commission of a crime in the State of Missouri, for the reason that the said affidavit was made on information and belief.

You state in your letter that you are unable to see how the recital in the affidavit, to the effect that the accused to the best of affiant's knowledge and belief did the things charged, results in any qualification or limitation of the charge.

You also cite Rule 21.08 of the "Rules of Criminal Procedure" which rule we quote as follows:

"Whenever complaint shall be made in writing, verified by oath or affirmation (including an oath or affirmation on information and belief by a prosecuting attorney) and filed in any court having original jurisdiction to try criminal offenses, charging that a felony has been committed by a named accused, or if his name is unknown, by any name or description from which he can be identified with reasonable certainty, it shall be the duty of the judge or magistrate thereof, and, upon complaint made by the prosecuting attorney, it shall also be the duty of the clerk thereof to issue a warrant

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reciting the accusations and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such judge or magistrate to be dealt with according to law. If such warrant is issued under the hand of the judge or magistrate, it need not be sealed but if it is issued under the hand of the clerk of the court, the seal of the court shall be attached thereto."

You accurately comment that said rule specifically provides for a complaint "on information and belief" and that such complaint is sufficient to charge a felony and is sufficient for issuing a warrant.

You desire our opinion as to the validity of said Rule 21.08. ART. V, Section 5 of the Constitution of Missouri is as follows:

"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Rule 21.08 is quoted above. It is apparent from a mere reading of the aforesaid section of the constitution that the Supreme Court may establish rules of practice and procedure for all courts subject to the provision however, that such rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury or the right of appeal. An examination of the above quoted rule reveals that there is nothing therein that is violative of any of the limitations on the rule making power of the court. In view of this fact and in view of the fact that the court has promulgated the rule pursuant to the authority vested in it by ART. V, Section 5, of the Constitution of Missouri, we are of the opinion that said rule is absolutely valid.

We desire to suggest the fact, however, that while the aforesaid rule authorizes the inclusion in the complaint of an oath or affirmation on information and belief by a prosecuting attorney, it does not provide that there must be such an oath or affirmation stating that the complaint is made on information and belief. We are, therefore, of the further opinion that a complaint not made on information and belief may be in entire compliance with the provisions of said rule.

We shall next discuss the question as to whether or not a prosecuting attorney or other officer has authority to execute a complaint when he is acting on the basis of his investigation and not on the basis of direct personal knowledge. We are of the opinion that the above quoted rule plainly authorizes the following of such a course by a prosecuting attorney or other officer by reason of the fact that said rule starts with the all inclusive word "Whenever" and says that, "Whenever complaint shall be made in writing * * * * verified by oath or affirmation or filed in any court having original jurisdiction to try offenses charging that a felony has been committed by a named accused, * * * * it shall be the duty of the judge or magistrate thereof * * * * *, to issue a warrant * * * *."

While it is true that in some jurisdictions the complaint or affidavit must state facts on complainant's positive knowledge and that where a statement is made upon hearsay or upon information and belief a warrant cannot be issued, such is not the law in Missouri.

We suggest the fact that the above quoted language of the rule does not limit the authority of any officer or any person to file a complaint charging a felony and makes no provision prohibiting the practice of making and filing a complaint based upon investigation rather than on first hand knowledge.

In this connection we quote Section 544.020, RSMo 1949 as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding

the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

This section provides substantially the same procedure as is provided by the Rule 21.08 above quoted except that said rule specifically includes among the complaints pursuant to which a warrant may be issued, an oath or affirmation made on information and belief by a prosecuting attorney, and except that said rule makes provisions as to when and under what circumstances the seal of the court shall be attached to the warrant and as to when and under what circumstances the seal of the court need not be attached which said last mentioned provisions are not contained in the statute.

The question as to whether a complaint may be made based on hearsay only and whether such complaint is a proper basis for the issuance of a warrant is discussed in the case of State v. Layton, 58 S.W. (2d) 454, 332 Mo. 216, 221 in the following language which comprises a paragraph of the court's opinion (S.W. (2d) 1. c. 457):

"(3) As to the complaint's being based on hearsay evidence, Mr. Chalender admitted he had no first-hand knowledge of the facts attending the assault; and that he obtained the information on which he filed the complaint from parties present thereat. But the complaint is not expressed to be verified on information and belief; it contains a positive recital of the facts, unconditionally sworn to. We know of no reason why this is not entirely sufficient to meet the requirements of section 3467, R.S. Mo. 1929 (Mo. St. Ann. Sec. 3467). See 16 C.J. Sec. 504, p. 292; State v. Carey, 56 Kan. 84, 42 P. 371."

We are of the opinion that the decision of the Supreme Court of Missouri in the above quoted paragraph clearly establishes the proposition that a complaint based upon findings made in an investigation and not on personal knowledge can be a proper basis for the issuance of a warrant. This proposition was again upheld in State v. Frazier, 98 S.W. (2d) 707, 339 Mo. 966, 1. c. 974:

In the last mentioned case the complaint was made by the Sheriff of Madison County who had no knowledge of the crime except such as he had obtained by hearsay. The following is a quotation from the Court:

"This assignment is without merit. affidavit was unconditionally sworn to. not simply verified on information and belief; and this was held to be sufficient in State v. Layton, 332 Mo. 216, 221, 58 S. W. (2d) 454. The statute, Section 3467, Revised Statutes 1929 (Mo. Stat. Ann., p. 3110), merely provides that 'whenever complaint shall be made, in writing and upon oath, . . . ' the preliminary hearing shall be held. Appellant refers us to 16 corpus juris, section 504 page 292, which says: 'In some jurisdictions the complaint or affidavit must state the facts on complainant's positive knowledge; where it states them upon hearsay or upon information and belief, a warrant cannot be issued; and among the cases cited in support of the text are State v. Hayward, 83 Mo. 299, and State v. Downing, 22 Mo. App. 504. However, an examination of these decisions will show they dealt with a different statute, Section 1762. Revised Statutes 1879, now Section 3504, Revised Statutes 1929 (Mo. Stat. Ann., p. 3126), prescribing requirements for the making and verification of informations filed for the prosecution of offenses in the trial court. That statute does say the information shall be verified by the oath of the prosecuting attorney. or by the oath of some person competent to testify as a witness in the case.' But the verified complaint to be filed under Section 3467, the statute here involved, does not constitute the formal charge for a prosecution. It merely launches the preliminary examination held to determine whether the accused shall be bound over or committed for trial, and the statute does not

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require that kind of complaint to be made by a person having first-hand knowledge."

It is quite apparent from the above quoted opinions of the Supreme Court of Missouri that a prosecuting attorney or other officer has authority to make a complaint based upon the results of his investigation rather than on direct personal knowledge.

Nevertheless, neither this rule nor Section 544.020, RSMo 1949 purport to define the characteristics and essential features of an affidavit sufficient to form the basis of an extradition proceeding and since the process of interstate extradition is based on ART. IV, Section 2 of the Constitution of the United States, and, since that constitutional provision is not self-executing, we must, when considering the question of the sufficiency of an affidavit, for extradition purposes, look to the legislation enacted by Congress pursuant thereto, which is embodied in Section 3182, Title 18, USCA, and to the court decisions construing said section:

Said section is here quoted as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured. and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

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This brings us to the consideration of the question as to whether or not an affidavit made on information and belief only comes within the meaning of the affidavit provided for in the alternative in said section as an essential document in the course of an extradition proceeding, and in this connection we call attention to certain court decisions which hold such affidavits insufficient to form the basis for extradition and we shall quote from some of them.

In the case of Ex parte Cheatham, 95 SW 1077, 1. c. 1080, the following language appears in the opinion of the court:

"Now, the question is made as to this: First, that it was made on information and belief, and not directly predicated upon facts within the knowledge of the affiant, Robert L. Hubbard. An inspection of the paper shows such to be the case; that is, that the affidavit was made on information and belief only. We hold that this was not sufficient. Ex parte Rowland, 35 Tex. Cr. R. 108, 31 S.W. 651; Ex parte Morgan (D.C.) 20 Fed. 307; Ex parte Hart, 63 Fed. 259, 11 C.C.A. 165, 28 L.R.A. 801. In the latter case, this question was thoroughly discussed, and we quote from that opinion, as follows: requiring such an affidavit, the liberty of the citizen is to a great extent protected, and the executive upon whom the demand is made is thereby enabled to determine if there is cause to believe that a crime has peen committed. To authorize the removal of a citizen of Maryland to the state of Washington for trial on a charge of crime, something more than the oath of a party, unfamiliar with the facts, that he believes the allegations of an information to be true, should be required and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subject to their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest and imprisonment and removal of innocent persons on papers regular in character, but without merit and fraudulent in fact. " * * *."

In Ex parte Morgan, 20 Fed. 298, 1.c. 307 and 308 the following language occurs:

"* * * In the affidavit in this case the affiant says 'that he has reason to believe, and does believe, from information received, that one Frank Morgan did commit the crime of wilful murder.' This is a charge upon suspicion, and the constitution of the United States and the law of congress are not satisfied with such a charge. The affiant, Patten, swears to his belief. Suspicion does not warrant the arrest of a party that he may be sent from a state where he may be found to another, and it may be a distant state. All legal intendments in a case of this kind are to avail the prisoner. Ex parte Smith, 3 McLean, 126."

In Ex parte Rowland, 31 SW 651, 1.c. 652, the following is a quotation from the court's opinion:

"It will be seen by an inspection of the complaint that H. M. Carr, who swore to same, does not pretend to have personal knowledge of the facts or charge contained in the complaint. He is informed and believes that relator has committed acts therein named, -- namely, 'guilty of fraudulent breach of trust, or larceny'; informed and believes that 'he secured the use of the name of G. B. Carr in order that he might be able to buy said hogs on a credit, and convert the proceeds to his own use.' The contention of the relator is correct, the rule being that 'the affidavit required in such cases shall set forth the facts and circumstances relied on to prove the crime, under oath or affirmation of some person familiar with them whose knowledge relative thereto justifies the testimony as to their truthfulness, and should not be the verification of a person who makes no claim to personal information as to the subject matter of the same.' See, for an exhaustive discussion of this matter, Ex parte Hart, 11 C.C.A. 165, 63 Fed. 249. See also, Ex parte Smith, 3 McLean, 121 Fed. Cas. No. 12,968. The judgment below is reversed, and relator ordered discharged."

COMCLUSION

We are accordingly of the opinion, first, that Rule 21.08, is valid and should be followed. Second, a sheriff, prosecuting

Hon. W. D. Settle attorney or other officer can sign a complaint when such officer is not a witness with personal knowledge, but is acting on facts derived as a result of his investigation of the alleged crime. Third, an affidavit which recites that the elements of the offense charged are true according to the information and belief of the affiant is inadequate for the purpose of extradition and does not meet the requirements of Section 3182, Title 18, USCA, supra. The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Samuel M. Watson. Yours very truly JOHN M. DALTON ATTORNEY GENERAL SIA :A

TRAINING SCHOOLS: CRIMINAL LAW: DISCHARGE: Any person lawfully committed to the Missouri Training School for Boys may be discharged from legal custody thereof by the State Board of Training Schools.



September 8, 1953

Mr. W. E. Sears, Director Board of Training Schools Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this office, and reading as follows:

"On March 20, 1944, a boy was sentenced in the Circuit Court of Cass County, to serve twenty (20) years in the Missouri State Penitentiary on a charge of Second Degree murder. Due to the fact that the boy was a minor, fourteen years of age, the sentence was commuted to the Missouri Training School for Boys at Boonville, Missouri.

"The commitment accompanying the boy, points out that certain procedure should be followed. The circumstances of this procedure is outlined in the following notation taken from the official commitment:

"The superintendent of said training school is required to receive and safely keep, the said defendant, in the training school aforesaid, until the said defendant becomes of age, at which time it is ordered that he then be committed to the penitentiary of the State of Missouri, there to be kept, confined, and treated in the manner directed by law, until the sentence of this Court be complied with,

or until the said defendant shall be otherwise discharged by due course of law.

"On or about September 12, 1946, the Attorney General's office issued an opinion in answer to a question as to whether or not the boy could be placed on parole. The conclusion as given in that opinion is as follows:

"'Therefore, it is the opinion of this department that a boy confined in the Missouri Training School for Boys at Boonville, Missouri, who has met the requirements of the institution for parole, is entitled to be considered for the same even though his sentence may be for such a term that he could be confined in the State Penitentiary.'

"On May 9, 1950, an inquiry was made of the Attorney General's office, which asked, in part, the following two questions:

- "1. Is the boy in question entitled to discharge at the time he reaches the age of twenty-one or is the Board required to turn over the custody of the boy to officials of the Missouri State Penitentiary?
- "2. May the Board of Probation and Parole, who supervises adults, if they see fit to do so, parole the boy and accept supervisory responsibility without the boy being delivered into actual custody and confinement?

"An opinion dated June 29, 1950, from the Attorney General's Office, gave the following conclusion:

"'It is, therefore, the opinion of this department that a boy under the age of seventeen years who in 1944 was convicted and sentenced to twenty years in the penitentiary and was committed by the court to the Missouri Training School for Boys remains subject to the control and jurisdiction of the Board of Training Schools until the expiration of his term or until otherwise discharged by due course of law, and said

boy upon reaching his twenty-first birthday should not be transferred to the Missouri State Penitentiary.

"The boy was released on placement July 30, 1947, and since that time has made excellent adjustment to community living. He has been steadily employed, has graduated from high school, and is married and maintaining a fine community relationship and attitude.

"The Board desires to be advised as to whether or not the boy may be discharged by board action due to his fine adjustment and the knowledge that the person is now twenty-four (24) years of age as of June 16, 1953.

"Another question pertains to interpretation of Section 219.250 RSMo, Volume I, Page 1901, as to whether or not the Board of Training Schools may discharge a boy or girl from legal custody even though this person might have been sentenced for a period of time which will not expire until after their twenty-first birthday (Section 219.160, page 1900)."

Section 219.250, RSMo 1949, provides, in part, as follows:

"The board of training schools is hereby authorized to release on parole juveniles committed to institutions under its control; to impose conditions upon which such paroles are granted; to revoke and terminate such parole; and to discharge from legal custody.
* * *" (Emphasis ours.)

It is our view that the quoted portion of Section 219.250 authorizes the Board of Training Schools to discharge from legal custody any person committed to such school. It follows, therefore, that the person about whom you inquire, and who now is on parole at the State Training School may be discharged from legal custody by the Board of Training Schools.

CONCLUSION

It is the opinion of this office that any person lawfully

Mr. W. C. Sears, Director

committed to the Missouri Training School for Boys may be discharged from legal custody thereof by the State Board of Training Schools.

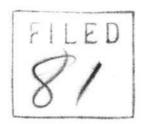
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

CBB:lw

MISSOURI TRAINING SCHOOLS: JUVENILES, PAROLEES; SHERIFFS: Information as to parolees from Missouri State Training Schools not to be furnished to sheriffs for posting.



December 4, 1953

Honorable W. E. Sears, Director Board of Training Schools, Jefferson City, Missouri.

Dear Sir:

This is in answer to your letter of recent date, requesting an official opinion of this office, and reading as follows:

"Senate Bill #404 as passed by the 67th General Assembly was signed by Governor Donnelly on June 19, 1953 and will, I believe, become active August 29, 1953.

"This bill relates to sheriffs in counties of the third and fourth class compiling each month a list of all known parolees in his county, giving the name, the nature of the conviction, and duration of parole. The original list to be posted in the sheriffs office with a duplicate copy furnished to the prosecuting attorney and clerk of the circuit court.

"The enacted legislation requires all county and state officers to furnish the sheriff information from their files about any parolees and juvenile delinquents, upon request of the sheriff, except confidential information required by law to be kept confidential by any county or state officer.

"Within recent days, several sheriffs have requested the preparation of such information so that such a list could be made available as of August 29, 1953.

"Section 219.180 RS Mo. Volume I, Page 1900, is to the effect that disclosure of information contained in the records of the Board of Training Schools relating to any child committed to it shall be made only in accordance with regulations prescribed by the board. "The Board of Training Schools in its copy of rules and regulations, on file with the Secretary of State, sets up the manner in which this confidential information shall be made available. This board rule and regulation does not provide for the issuance of information for any official or agency to post publicly the name, the nature of the conviction, or the duration of a person on placement (parole) through board action.

"It is respectfully requested therefore, that clarification be made by your office as to the board's responsibility to make such information available for public posting in the sheriffs office, with duplicate copies being furnished to the prosecuting attorney and the clerk of the circuit court as provided for in Senate Bill #404. This question also involves not only those individuals released by the institution but those children being supervised by the Board of Training School representatives in cooperation with proper courts -- said children never having been at the institution originally.

"The Board of Training Schools is complying with Senate Bill #227 (effective date March 18, 1952) in making available to the clerk of the circuit court of class three and four counties, the names of all persons sentenced from his county who have been paroled by said board, together with a record of revocation, termination, or final discharge. It is noticeable, however, that the file and records so presented to the circuit clerk of the third and fourth class counties shall be open to inspection only on order of the circuit court.

"Your early consideration and official opinion regarding the question pertaining to Senate Bill #404 is respectfully solicited."

Senate Bill #404 of the 67th General Assembly, effective August 29, 1953, provides as follows:

"Section 1. In all counties of the third and fourth classes, having neither a county super-intendent of public welfare nor a probation officer, the sheriff shall investigate all cases arising under sections 211.310 to 211.510, RSMo 1949, and shall furnish the court such information and assistance as the judge may require.

"2. In all such counties having a county superintendent of public welfare or a probation officer, the sheriff shall be designated as assistant probation officer and as such shall assist the probation officer or the county superintendent of public welfare in all investigations.

"Section 2. The sheriff shall compile each month a list of all known parolees in his county, giving the name, the nature of the conviction, and duration of parole. The original list shall be posted in the sheriff's office and a duplicate copy shall be furnished to the prosecuting attorney and clerk of the circuit court. Each month the sheriff shall add new names to the list of all parolees and delete the names of all persons whose parole has expired. All county and state officers shall furnish the sheriff information from their files about any parolees and juvenile delinquents upon request of the sheriff, except confidential information required by law to be kept confidential by any county or state officer. (Underscoring ours).

"Section 3. For the performance of the additional duties required by this law the sheriff in fourth class counties shall receive in addition to his regular compensation the sum of seven hundred twenty dollars per year, and the sheriff in third class counties shall receive the sum of twelve hundred dollars such sums to be paid in twelve equal monthly installments."

Section 219.180 RSMo 1949, provides as follows:

"Disclosure of any information contained in the records of the board relating to any child committed to it shall be made only in accordance

with regulations prescribed by the board; provided that such regulation shall provide for full disclosure of such information to the parents, grandparents, brothers and sisters, guardian, or if there be none of the aforementioned, or they be out of this state, to the mearest immediate relatives of such child upon reasonable notice and demand."

"Any employee or officer of the board who shall communicate any such information in violation of any such regulation shall be subject to immediate discharge or removal from office by the board."

It is a fundamental rule of statutory construction that statutes must be harmonized, and each statute given full effect, if possible. When Senate Bill #404 and Section 219.180, supra, are both given effect, we see that if a rule of the State Board of Training Schools prohibits the posting of the names of parolees from such school, such information should not be released.

Section 12B, Rules and Regulations of the Missouri Training Schools Board provides as follows:

"Information or data in a girl or boy's file, at one of the schools or after said child is released on parole (placement) shall be held in confidence and not be made available for release or posting for public information -- exception being that information or data could be used in open court proceedings after file had been properly subpoensed by court order."

Since the rule of the Missouri Training Schools Board prohibits the disclosure of information regarding parolees for posting or for public information, it is our view that the Board of Training Schools should not disclose any information regarding parolees from the Missouri State Training Schools.

CONCLUSION

It is the opinion of this office that the Missouri State Training Schools Board should not disclose for purposes of postHonorable E. W. Sears

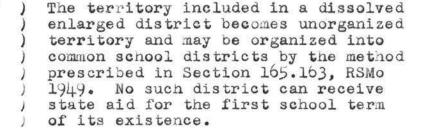
ing or for public information, information concerning parolees from such school.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

CBB/ld

JOHN M. DALTON Attorney General SCHOOLS, DISSOLUTION OF REORGANIZED DISTRICTS:





April 29, 1953

Hon. Paul Simon Missouri House of Representatives Jefferson City, Missouri

Dear Mr. Simon:

We have given careful consideration to your request for an opinion, which request is as follows:

"We have in our county (Ripley) a reorganized School District which expects to petition for and hold an election to disorganize.

"We should like an opinion as to what effect this would have on their STATE AID, and whether or not they would automatically return to their original districts without reorganization?"

The act providing for the reorganization of school districts, to be known as enlarged districts, was enacted by the Missouri Legislature in 1948. Laws of Missouri, 1947, Vol. II, p. 370.

The final section of this law is Section 165.707, RSMo 1949, which is as follows:

"Changes of boundary lines and disorganization of enlarged districts may be effected as now or hereafter provided by sections 165.263 to 165.373."

Hon. Paul Simon

The procedure provided herein for the dissolution of an enlarged district is defined in Section 165.310, RSMo 1949, which is as follows:

"Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under sections 165.163 to 165.260."

The status of the territory included in a dissolved district is defined by the Supreme Court of Missouri in State ex inf. McGinnis v. School Dist. No. 3, 277 Mo. 28. In the course of that opinion, on page 34, the court says:

" * * * If the present consolidated school district was legally established (which is the basic allegation of relator's suit) then its dissolution, even if validly decreed, would not, per se, restore the corporate franchises of the previous school districts, nor restore its directors to their former offices and functions. Neither

was it within the judicial power of the circuit court after dissolving the consolidated district, to recreate and restore the former districts or their officers even if such issue had been within the pleadings, for when the former districts ceased to exist as such, the terrain comprehended within them became a part of the new consolidated district formed thereof, and upon a valid dissolution of the latter, such terrain would become 'unorganized territory' (R.S. 1909, sec. 10776), and could thereafter be organized into school districts only by the method prescribed in the statute and upon the votes of its inhabitants. * * * "

The court herein makes it clear that the dissolution of an enlarged district does not automatically restore the original districts. The ruling in State ex inf. McGinnis v. School District No. 3 heretofore cited, has been quoted approvingly and restated as late as 1949 by the St. Louis Court of Appeals in the case of Hydesburg Common School District of Ralls County v. Rennselaer Common School District of Ralls County, 218 S.W. (2d) 833. The territory involved becomes unorganized territory and may be organized into school districts only by vote of the inhabitants as prescribed by the statute.

The statute referred to is Section 165.163, RSMo 1949, which is as follows:

"Whenever there shall be in this state any territory not organized into a common school district, and containing within its limits twenty or more pupils of school age, three or more taxpayers of such territory may call a meeting of the qualified voters of such unorganized territory, or such part thereof as they desire to organize into a school district, by first giving fifteen days' notice of the time, place, purpose of the meeting and boundary lines of the territory proposed to be organized. The qualified

voters, when assembled, may organize such territory into a school district, a majority of the qualified voters residing in such territory proposed to be organized into a school district voting therefor, who shall approve of a plat defining the boundaries thereof, and elect three directors, who shall serve until the next annual meeting, when one director shall be elected to serve for one year, one director for two years and one director for three years -- said directors to serve until their successors are duly elected and qualified; provided, that any territory not organized into a school district, and containing less than twenty pupils of school age, may be attached to an adjoining district, upon petition by the qualified voters of such unorganized territory, or such part thereof as may wish to be attached to such adjoining district, directed to the board of directors of such adjoining district; and it shall be the duty of such board, on receipt of the petition, to meet forthwith and consider same, and if a majority of the board are in favor thereof, such territory shall become a part of such district."

Districts established under this procedure are common school districts and must function as such. Any such district, however, may at any time thereafter be organized into a town or city school district if qualified under Section 165.263, RSMo 1949.

The granting of state aid to school districts, as provided in Chapter 161, RSMo 1949, is based upon the records of the school for the previous year, and there is no way to establish any such records for a district newly carved out of unorganized territory. There is no law under which any such district can claim state aid for the first school term of its existence.

CONCLUSION

It is the opinion of this office (1) that the territory included in a dissolved enlarged school district becomes

Hon. Paul Simon

unorganized territory and may be organized into school districts only by the method prescribed in Section 165.163, RSMo 1949; (2) that no district established in this manner can receive state aid for the first school term of its existence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

CRIMINAL LAW: CRIMINAL SEXUAL PSYCHODATH MAY BE PROSECUTED; WHEN: One found to be a criminal sexual psychopath within meaning of Sec. 202.700 RSMo 1949, of Criminal Sexual Psychopath Act and committed to State Hospital No. 1, against whom a criminal charge is pending cannot be prosecuted on said charge during probationary period or subsequent to final discharge from hospital.

January 19, 1953



Honorable George A. Spencer Representative Boone County Columbia, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department, which request reads as follows:

"Because there is some interest in the criminal sexual psychopath law, Section 202.700 and particularly whether or not the commitment in the Fulton Hospital is the only punishment or if such a person has been released they can be still prosecuted.

"The only case that I know of that is close in point is State ex rel. Sweezer v. Green, 3232 S.W. 2d 897, 360 Mo. 1249.

"I would appreciate an opinion from your department as to whether or not the criminal court jurisdiction continues and a person would be subject to prosecution after being released from the Hospital, first on probation and second, by final discharge."

The opinion request relates to Sections 202.700 to 202.770, RSMO 1949, inclusive, and which sections have been designated the

"Criminal Sexual Psychopath Act." For the purpose of our discussion herein we find it necessary to call attention to the methods outlined in said sections for the treatment of criminal sexual psychopathic persons charged with violations of the criminal laws of the state, or to quote certain sections of said Act verbatim, which are particularly applicable to the inquiries found in the opinion request.

Section 202,700, defines the term "criminal sexual psychopath," and we quote said section:

"All persons suffering from a mental disorder and not insane or feeble-minded, which mental disorder has existed for a period of not less than one year immediately prior to the filing of the petition provided for in section 202.710 coupled with criminal propensities to the commission of sex offesnes, and who may be considered dangerous to others, are hereby declared to be 'criminal sexual psychopaths.'"

Section 202,710, in effect provides that when any person charged with a criminal offense appears to be a criminal sexual psychopath, within the meaning of the statutory definition, it then becomes the duty of the prosecuting or circuit attorney of the county in which the person is accused of being such psychopathic person to file a petition with the clerk of the court in which said person is charged with a criminal offense, and the petition shall state the facts showing the person to be a criminal sexual psychopath. Such petition may also be based upon facts constituting acts which indicate that the person accused may be a criminal sexual psychopath, as known by one who informs the prosecutor of such facts.

Upon the filing of the petition, a copy must be personally served upon the person accused, together with written notice that on a date specified in the notice (not more than 20 days), the court shall conduct a hearing to determine whether the person shall be given a medical examination, at a time and place fixed by the court.

Upon the hearing, if prima facie proof of the criminal sexual propensities to the commission of sex offenses be made, the court shall appoint two qualified physicians to examine the person accused of being a criminal sexual psychopath.

The details regarding what physicians may be appointed to make the examination, the time and place fixed for same, the compensation which shall be allowed said physicians, and a few other details of such procedure, are also provided by said section, but since we are not here primarily concerned with such details, we find it unnecessary

Honorable George A. Spencer

to mention them further, except to state that the judge, may in his discretion dismiss the petition in the event he is of the opinion the facts do not justify further action. However, in the event the facts are sufficient to justify the appointment of the physicians to make the examination, and it appears from the written report of at least one of the physicians the facts are sufficient to establish the mental disorder and the criminal propensities of the person examined to commit sexual offenses, the court shall order a hearing to determine whether or not the person charged is a criminal sexual psychopath, and the issues may be determined either by the court or a jury. The rights of the accused are fully protected by the section which provides the kind of evidence that shall be admissible at the hearing, the privilege of representation by counsel, and full rights of appeal from a finding which the accused believes prejudicial to his interests.

Upon the finding having been made by the court or jury that the person accused is a criminal sexual psychopath, within the meaning of Section 202.700, supra, Sections 202.730 and 202.740 outline the procedure to be followed thereafter in properly disposing of said person.

Section 202.730, RSMo 1949, reads as follows:

"If the person is found by the court or the jury to be a criminal sexual psychopath, the court may commit him to State Hospital No. I at Fulton where he shall be detained and treated until released in accordance with the provisions of sections 202.700 to 202.770 or may order such person to be tried upon the criminal charges against him, as the interests of substantial justice may require. The hospital staff shall make periodic examinations of any such persons committed, with the view of determining the progress of treatment, and shall report to the court not less than once each year."

(Underscoring ours.)

Section 202.740 provides the procedure for the release of those detained in the state hospital, and reads as follows:

"At any time after the commitment an application in writing setting forth facts showing that such criminal sexual psychopath has improved to the extent that his release will not be incompatible with the welfare of society, may be filed with the committing court. Whereupon the court shall issue an order returning the person to the jurisdiction of said court for hearing. This hearing shall in all respects be like the original hearing to determine the

mental condition of the defendant. Following such hearing, the court shall issue an order which shall cause the defendant either to be placed on probation for a minimum period of three years, or returned to the hospital; provided that upon the expiration of said probationery period and after further hearing by said court to be held in accordance with the other provisions of sections 202.700 to 202.770, said psychopath may be discharged."

From a careful reading of the provisions of the act it is apparent that the procedure provided therein for the detention of criminal sexual psychopaths in the state hospital is one which can be instituted only in connection with a pending criminal case against such person, since the act makes no provision for the institution of said procedure independent of a criminal case.

Under such circumstances the questions are presented as to whether the proceeding is a part of the criminal case; if the detention imposed upon the psychopathic person is a punishment for conviction of the crime with which he is charged; if such detention, is additional punishment for conviction of such crime, or whether such proceeding is civil in nature and the detention thus imposed is for some other purpose. We believe that these questions must be carefully considered, since they bear upon the subject matter of the opinion request, and the inquiries found therein.

In this connection we call attention to the only Missouri case involving the subject of the Criminal Sexual Psychopath Act, and in which above questions, as well as others regarding the act, are fully discussed and answered. We refer to the case of State ex rel. Sweezer v. Green, 232 S.W. (2d) 897. At l. c. 900, the court said:

"Is the inquiry and proceeding provided by the Act civil or criminal in character? As to that we can reach but one conclusion. Ordinarily a criminal proceeding is some step taken before a court against some person or persons charged with a violation of the The purpose of a criminal criminal law. proceeding is to punish. But this Act is but a civil inquiry to determine a status. It is curative and remedial in nature instead of punitive. One of its purposes is the treatment and cure of a present and existing mental disorder. It recognizes and classifies a criminal sexual psychopath as one suffering from 'a mental disorder* * * with criminal propensities to the commission of sex offenses'. The public policy of the

State (as expressed in this Act) is to treat and cure such persons, not to punish them. Under the Act sex deviators are merely made subject to restraint and treatment because of their condition and their acts. One of the evident purposes of the enactment is to prevent persons suffering from this mental disorder, though 'not insane or feebleminded', from being punished for crimes they commit during the period of this mental ailment. In character the Act is not unlike statutes which provide for a civil inquiry into the sanity of a person. In principle an application it is not unlike our Juvenile statutes wherein certain minors, when charged with crime, are made a class apart and certain remedial substitutive procedures are provided for in lieu of their being prosecuted under the criminal laws. One purpose of the Act is to protect, treat and cure, and the State here is concerning itself with the future well being and return to normal living of a person so charged. Proceedings under the Act have none of the elements of a criminal proceeding. It is our conclusion that the Act is not criminal in character.

* * * * * * * * * * * * * * *

"But this Act is not criminal in nature and any detention thereunder is not a punishment. And the Act provides that if one so charged is adjudicated a sexual psychopath the court may either commit him for detention and treatment. or the court may order him tried upon the pending criminal charge 'as the interests of substantial justice may require. The act specifically provides, Mo. R.S.A. Sec. 9359.7. that Nothing in this act shall be construed as changing in meaning any portion of the criminal code, nor shall a finding of criminal sexual psychopathy under the provisions of this act constitute a defense in any criminal action. The Act is curative, remedial and civil in character. Any proceeding thereunder, not being punitive in character, could not enlarge or increase a punishment."

(Underscoring ours.)

Honorable George A. Spencer

From the holding in above cited case, particularly the quoted portion of the opinion, it is evident that the procedure relating to the charge of criminal psychopath characteristics of a person, his examination, the finding by the court or jury that he actually is such a person, and his ultimate incarceration in the State Hospital at Fulton, is a procedure civil, and not criminal in nature. Such detention in the state hospital is not imposed as punishment for the conviction of crime (since the person has not been convicted of any crime), but that he might be given treatment for a mental disorder not amounting to insanity and be finally rehabilitated when he has become sufficiently well of the mental disorder as not to constitute a menace to society by his continual violation of the criminal laws of the state relating to sex offenses, if he were allowed to go unrestrained.

It is also noted that the act contains no provision to the effect that when one charged with a criminal offense has been found to be a criminal sexual psychopath and committed to the State Hospital at Fulton for treatment, that such finding, detention, parole or discharge from that institution shall, or shall not be a bar to further prosecution on the criminal charge pending against him. After having carefully studied the act in detail, and the opinion of State v. Green, we conclude the intention of the legislature was that a person could not be prosecuted on the criminal charge after having been committed to the state hospital, paroled or finally discharged therefrom, and to construe the act in any other manner would serve to defeat the purpose for which it was passed.

CONCLUSION

It is therefore, the opinion of this department that one found to be a criminal sexual psychopath within the meaning of Section 202.700, RSMo 1949, of the Criminal Psychopath Act, and committed to State Hospital No. 1 at Fulton, and against whom a criminal charge is pending at the time of his commitment, cannot be prosecuted on said criminal charge during his probationary period or subsequent to his final discharge from said hospital.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON Attorney General AGRICULTURE: MILK PLANTS: LICENSE REQUIRED; WHEN:



Plants receiving milk, testing for butter-fat, paying producer on basis of test, filtering, cooling and transporting milk to other plants are "milk plants" within the meaning of Par. 20, Sec. 196.520, RSMo 1949. Filtering and cooling is "processing" within meaning of law. Such plants required to secure one or more types of licenses provided by Paragraph 6, Sec. 196.605, RSMo 1949, to engage in such business.

January 26, 1953

Honorable Joseph T. Stakes Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"A request for an official opinion is made as follows:

"Section 196.520, paragraph 20 defines a dairy products manufacturing plant as any commercial creamery, cheese factory, milk plant, milk condensery, dried milk plant, or any other commercial dairy products or processing plant; excepting ice cream manufacturing plants, where milk or cream is delivered by two or more persons for commercial manufacturing or processing for human food purposes.

"Section 196.605, paragraph 3, sets up the license schedule fee which is based upon the annual butterfat purchases during the previous 12-month period.

"There are in operation in this state several plants that receive milk from producers, test the milk for butterfat content, and pay the producer for the same. The milk is generally filtered, cooled, and transported to other plants in the state.

"An opinion is requested as to whether such an operation--which receives milk from one or more producers and which plants process the milk by way of cooling it--are eligible to be licensed under the afore mentioned section?"

Paragraph 20, Section 196.525, RSMo 1949, of the Missouri Dairy Law fails to define the term "process" and we are unable to find any decisions interpreting the term as used in connection with the Dairy Law. Webster defines the word process as follows:

"To subject to some special process of treatment. Specif.: (a) To heat, as fruit, with steam under pressure, so as to cook or sterilize. (b) To subject (esp. raw material) to a process of manufacture, development, preparation for the market, etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and packing."

In the case of Gordon v. Paducah Ice Mfg. Co., 41 F. Supp. 980, none of those things specifically mentioned in above quoted definitions were done, yet it was held that the icing of refrigerator cars containing fresh strawberries shipped in interstate commerce comes within the meaning of said definition of the word "process."

Above cited case was an action brought by employees to recover overtime wages and damages alleged to be due under the provisions of the Fair Labor Standards Act. The court held that the icing operations by defendant's employees fell within the exemption of Section 7 (c) of the Act, which provides that the Act was not applicable in those instances when an employer was engaged in the "first processing" of perishable or seasonable fresh fruits during a period of not more than fourteen weeks in the aggregate in any one calendar year.

At 1. c. 987, the court said:

"* * *Icing and cooling are but a different degree of freezing and in any event would seem to fall within the general meaning of the term preserving when applied to the icing of strawberries for the purpose of transporting them while in the course of such transportation. It may be true that the defendant's employees at no time actually handled the strawberries, but. as pointed out above, the icing of the cars in question are not to be considered as merely isolated acts on the part of defendant. The evidence clearly showed that they were essential and integral parts of the marketing of the strawberries in distant states. The operations of the defendant accordingly fall within the exemption provided by Section 7(c) of the Act."

While the opinion in this case did not specifically state that the icing operation of the cars of strawberries was a "first process" in so many words, yet the reference to Section 7(c) of the Act providing exemptions, and making the provisions of the Act inapplicable to those engaged in "first processing" of perishable or seasonal fruits during the period mentioned, is such that we believe it was the intention of the court to treat the icing of the strawberries as a "first process," within the meaning of the Act. The icing of the strawberries in no way changed the form or chemical content of the berries as a hûman food, but was essential to their preservation until they could be marketed in distant states.

Likewise in the instant case, the filtering and cooling of the milk by the receiving milk plants did not in any way change the form or chemical content of the milk, yet, in view of the fact that milk is a perishable food and must be preserved by artifical means while intransit to other plants for further processing before it can be offered for sale as a human food either in its original liquid, or in other forms, such filtering and cooling operations are as much essential to its preservations as the icing of the strawberries, treated as "first processing," in the quoted portion of above opinion.

It is our thought that the filtering and cooling operation would therefore constitute a "process," within the meaning of the Missouri Dairy Law, and that the plant receiving and "processing" the milk in this manner, would be a "milk plant" within the meaning of Section 196. 525, Par. 20, supra.

Paragraph 1, Section 196.605, RSMo 1949, makes it unlawful to operate a milk plant without a license, and reads as follows:

Honorable Joseph T. Stakes

"1. It shall be unlawful for any person to operate a dairy products manufacturing plant, or a cream station, within this state, unless licensed under the provisions of sections 196.520 to 196.690. Each license issued under said sections must be conspicuously posted in the place of business to which it applies."

Paragraph 6, provides that no one shall operate a milk plant for buying milk or cream on a butterfat basis without securing one or more of the three types of licenses mentioned therein. Said paragraph reads as follows:

> "No person shall operate a cream station or milk plant for the purpose of buying milk or cream on a butterfat basis, or operate a Babcock tester or other equipment for establishing the value of milk or cream or test or grade or sample milk or cream, without having made satisfactory application for and received the proper license, which must be either the 'Form A' license for a 'buyer-tester-grader-sampler,' or the 'Form B' license for a 'buyer,' or the 'Form C' license for a 'tester-grader-sampler,' as provided in this subsection, the annual fee for each such license being two dollars for the license year or unexpired portion thereof, and no person shall be required to have more than one license at any one location under this section."

It is stated that the milk plants mentioned in the opinion request buy the milk, test it, pay the producer (which we assume to be on the basis of the butterfat test) filter the milk, cool, and then transport it to other milk plants.

It is our further thought that all of these operations by the milk plants in question are of the same character as those described in paragraph 6, Section 196.605, supra, and that one or more of the three types of licenses authorizing them to operate a business of the nature mentioned in the opinion request are required.

CONCLUSION

It is therefore the opinion of this department that plants which receive, test for butterfat, and pay the producer of milk on the basis

Honorable Joseph T. Stakes

of the test; filter, cool and transport the milk to other plants for processing, are "milk plants" within the meaning of Paragraph 20, Section 196.525, RSMo 1949, of the Missouri Dairy Law, and that filtering and cooling is "processing" of the milk within the meaning of said law. Such milk plants are required to secure one or more of the linceses provided by Paragraph 6, Section 196.605, RSMo 1949, authorizing them to engage in business of the nature referred to therein.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Respectfully submitted,

JOHN M. DALTON Attorney General

PNC:hr

COMMISSIONER OF AGRICULTURE: FOODS AND DRUGS: SKIMMED MILK CHEESE:

Product failing to conform to statute definition of Par. 11, Sec. 196.525, RSMe 1949, is not cheese, and cheese labeling statutes are inapplicable to product, and product cannot be manufactured, sold, or offered for sale as "cheese" or "filled cheese". Manufacture and sale of such product not prohibited in Missouri.

JOHN M. DALTON



February 19, 1953

John C. Johnson

Mr. Joseph T. Stakes Director of Dairy Division Department of Agriculture Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion which reads in part as follows:

- "1. Is it permissible under existing statutes to manufacture choose from milk, the milk fat content of which has been reduced to less than three and one-fourth per cent, and to which has been added oils derived from vegetable or animal sources, as distinguished from milk fat as defined in paragraph 38, Section 196.525, RSMo 1949?
- "2. Providing it is your opinion that a product as named in the preceding paragraph is not in violation of existing statutes, would such a product have to comply with those statutes relating to the labeling and/or branding of skimmed milk cheese?
- "3. Would such a product as named in paragraph No. 1 be properly branded and labeled if the product was labeled only by the words 'Filled Cheese'?
- "4. Do existing statutes prohibit the manufacture and sale of a product labeled 'Filled Cheese', or the use of the word 'cheese' in connection with a product made from skimmed milk to which

has been blended or combined oil foreign to milk fat? Cheese is defined by statute. Does the use of the word 'filled' convey to the potential consumer that the milk fat has been removed and vegetable or other animal fat substituted for the same?"

Since the opinion request refers to milk, skimmed milk, skimmed milk cheese, and milk fat, it will be necessary to quote from various paragraphs of Section 196.525, RSMo 1949, defining each of the words referred to.

Paragraph 37, defines milk as follows:

"(37) 'MILK' is the whole lacteal secretion obtained by the complete milking of one or more health cows, excluding that obtained within fifteen days before and five days after calving or such longer period as may be necessary to render the milk practically colostrum free, and contains not less than eight per cent of solids not fat and not less than three and one-fourth per cent milk fat. The term 'milk' shall include milk which is standardized to comply with such standards. The term 'milk' unqualified, means cow's milk."

Paragraph 56, defines "skimmed milk" and reads as follows:

"(56) 'SKIMMED MILK' is milk from which a sufficient portion of milk fat has been removed to reduce its milk fat percentage to less than three and one-fourth per cent;"

Paragraph 57, defines skimmed milk cheese, and reads as follows:

"(57) 'SKIMMED MILK CHEESE' is the sound and ripened product made from skim milk by coagulating the casein thereof with rennet or lactic acid, with or without the addition of

ripening ferments and seasoning.
The addition of harmless coloring matter is permitted. When offered for sale or sold it must be correctly labeled.

The product referred to in the first inquiry of the opinion request simply mentions the manufacture of "cheese" without any qualifying words or statements as to the particular kind of cheese the writer had in mind, yet from the description of the milk used in the cheese we assume that the reference to "cheese" was intended to refer only to skim milk cheese as defined by paragraph 57, Section 196.525, supra.

We understand the first inquiry to be whether or not existing statutes permit the manufacture of cheese (meaning skim milk cheese) from milk having a milk fat content of less than three and one-fourth per cent, to which has been added oils derived from vegetable or animal sources as distinguished from milk fats, defined by paragraph 38, Section 196.525, supra.

From the language used in paragraph 57, Section 196.525, supra, it is apparent that it was the intention of the legislature to enact a law giving an exact definition of skim milk cheese, and to set up a standard by which all food products known as skim milk cheese were to be measured, and to protect the public from fraud or deception in the manufacture, sale, or offer to sell any such cheese which failed to meet that standard of quality. As an added measure of protection to the public, said section further provides that such cheese must be correctly labeled when offered for sale, or is sold.

Section 196.680, RSMo 1949, provides the specifications for the labeling of cheese, and the conditions under which cheese shall be deemed to be misbranded. Said section reads as follows:

"Cheese shall be deemed to be misbranded:

"(1) If its label is false or misleading in any particular;

- "(2) If it is offered for sale under the name of any other food;
- "(3) If it does not contain the common name of the product;
- "(4) If in package form unless it bears a label containing:
 - "(a) The name and place of business, of manufacture, packager or distributor, or an equivalent symbol or identifying number imprinted on or attached to it; and
 - "(b) An accurate statement of the quantity of the contents in terms of weight and measure:
- "(5) If it does not conform to the definitions or standards of quality as required by the Missouri dairy law and all amendments thereto:
- "(6) If it does not contain the word 'pasteurized';
- "(7) If it contains a symbol or identifying code number which has not been filed with the department of agriculture."

Paragraph 57, Section 196.525, supra, gives an exact definition and standard of the product known as skim milk cheese, and such product can only contain the ingredients named and is to be manufactured under the conditions therein provided. Vegetable or mineral oils are not one of the ingredients of such cheese, and their addition is not authorized by this or any other section of the statutes. The product made from ingredients other than those authorized would not in our opinion constitute skim milk cheese.

In this connection we call attention to the case of Libby, McNeill & Libby v. United States, 148 Fed. (2d) 71.

In this case the facts involved tomato catsup conforming to government standards, except for the presence of sodium benzoate, which had been added as a preservative, and the product "purported" to be tomato catsup although it had been truthfully labeled "tomato catsup" with preservative. It was held that the product was misbranded and subject to condemnation under the provisions of the Federal Food, Drug and Cosmetic Act. The court's holding, among other matters, was to the effect that the product did not comply with the regulations defining tomato catsup.

At 1.c. 73, the court saids

"The district court found the product under seizure to conform in all respects to the definition and standard promulgated by the Administrator, except for the addition of the small quantity of benzoate of soda, but held that it purported to be catsup, and so, since it did not conform to the standard, was misbranded. Decision therefore turns upon the meaning of the word 'purport' as used in Section 403(g). The appellant contends that the label is controlling, that its product does not thereby purport to be catsup, even though it conforms in all respects to the standard, except It is a for the added ingredient. specific article, namely, tomato catsup with preservative, and since its label truthfully so indicates, there is no misbranding. The label may be disregarded only if it is assumed that Section 403(g) expresses an intent on the part of the Congress to outlaw the manufacture of foods not conforming to applicable standards which, but for the standard, would be sold under the same common and usual name.

"It is impossible for us, in the light of controlling authority, to accept the

contention. The condemned food is tomato catsup, and purports to be tomato catsup. If producers of food products may, by adding to the common name of any such product mere words of qualification or description, escape the regulation of the Administrator, then the fixing of a standard for commonly known foods becomes utterly futile as an instrument for the protection of the consuming public. Here is no arbitrary or fanciful name, neither representative or misrepresentative' of a common food product, as in Judge Geiger's unreported case of United States v. 24-7/8 Gallons of Smack, D.C., E.D. Wis. 1926. Such designations invite inquiry as to what the food really is. The present product is intended to satisfy the demand and supply the market for -catsup. Emphasis is laid on its conforming to standard except for the preservative. The argument defeats itself, for if it is an article of food, distinguished from the standard by the qualification, then other ingredients may be added or defined ingredients or processes omitted without conflicting with the regulation, if containers are truthfully labeled.

"In Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 63 S. Ct. 589, 87 L. Ed. 724, it was said that the statutory purpose to fix a definition of identity of an article of food sold under its common or usual name, would be defeated if producers were free to add ingredients, however wholesome, which are not within the definition, and so it was not an unreasonable choice of standards for the Administrator to adopt one which defined the familiar farina of commerce without permitting vitamin enrichment, and at the same time a standard for 'enriched' farina which permitted a restoration of vitamins removed from whole wheat by milling. The respondent

in that case had marketed 'Quaker Farina Wheat Cereal, Enriched with Vitamin D.' Since this did not conform either to the standard adopted for farina, or to the standard adopted for enriched farina, it was held to be misbranded, although the label there as truthfully described the product as does the present label. The district judge was unable to distinguish the present case from the Quaker Oats case, and neither can we.

"In reviewing the text and legislative history of the present statute, Mr. Justice Stone, in the Quaker Oats case, pointed out that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had already been prohibited by the 1906 Act. The remedy chosen was not a requirement of informative labeling, rather, it was the purpose to authorize the Administrator to promulgate definitions and standards of identity under which the integrity of food products could be effectively maintained, and to require informative labeling only where no such standard had been promulgated; where the food did not purport to comply with the standard; or where the regulations permitted optional ingredients, or required their mention on the label, and that the provision for such standards of identity reflect a recognition by Congress of the inability of consumers to determine, solely on the basis of informative labeling. the relative merits of a variety of products superficially resembling each other. court was unable to say that such standard of identity, designed to eliminate a course of confusion to purchasers, will not promote honesty and fair dealing within the meaning of the statute.

"Neither the decision nor its rationalization in the Quaker Oats case, can be escaped by a product that looks, tastes, and smells like catsup, which caters to the market for catsup, which dealers bought,

without reference to the preservative, and which substituted for catsup on the tables of low priced restaurants. The observation in the opinion that it was the purpose of the Congress to require informative labeling, 'where the food did not purport to comply with a standard' is not to be lifted out of its context, given a meaning repugnant to the decision, so as to limit 'purport' to what is disclosed by the label and to that alone."

As stated above, it is our thought that a product containing, in addition to the other ingredients provided by paragraph 57, Section 196.525, supra, vegetable or animal oils, would not be skim milk cheese, and that the sale of such a product as or for skim milk cheese would be a violation of said section, and a criminal offense, the punishment of which is fixed by Section 196.690, RSMo 1949, which section reads as follows:

"Any person, or any officer, agent, representative, servant or employee of such person, who violates any of the provisions of sections 196.520 to 196.690 shall be deemed guilty of a misdemeanor and punished as provided by law, and in addition thereto his or their license shall be subject to suspension or revocation by the commissioner as provided in these sections."

In the event the products were labeled as skim milk cheese, and sold or offered for sale as such, paragraph 5, Section 196.680, RSMo 1949, would be violated, the punishment of which is fixed by Section 196.690, supra.

Such product may be manufactured and sold in this state so long as it is not sold as cheese. We call attention to the case of Dairy Queen of Wisconsin v. McDowell, 51 N.W. (2d) 34, in which the Department

of Agriculture sought to prohibit the sale of a semifrozen food product similar to ice cream, but containing less butterfat, on the ground that the public needed to be protected. The product was a healthful food and was not sold as ice cream, the court held that the public did not need any protection, and that the sale could not be prohibited. At l.c. 37 the court said:

> "Under ch. 93, Stats., the department of agricult ure has the power to establish standards for food products and to prescribe regulations governing marks and tags upon such products. Those standards shall not affect the right of any person to dispose of a food product not conforming to the standards, sec. 93.09(4), Stats., but such person may be required to mark or tag such product, in such manner as the department may direct, to indicate that it is not intended to be marked as of a grade contained in the standard and to show any other fact regarding which marking or tagging may be required under this section. The purpose is The legislature does not intend to deny any person the right to make and sell a food product so long as its consumption does not endanger public health and welfare. It does intend, however, to so regulate its sale that the public is not subjected to the injury of buying a product different from that which is intended to be bought. See City of New Orleans v. Toca, 1917, 141 La. 551, 75 So. 238, L.R.A. 1917E, 761."

The purpose of statutes regulating the manufacture and sale of food products is to protect the public from the sale of unhealthful or sub-standard foods, and such statutes have many times been legally upheld as a proper exercise of the police power of the state. However, no such statutes prohibit the sale of a healthful human food product which fails to comply with a statutory definition of a particular product so long as the product is not manufactured, sold, or offered for sale as the one defined by statute.

We believe this to be the import of the Dairy Queen of Wisconsin case, and since we have no Missouri statutes prohibiting the manufacture and sale of a food product which fails to comply with a statutory definition of that product, we believe the holding in this case is fully applicable to the facts involved in inquiry number one of the opinion request.

It is therefore our thought, and in answer to your first inquiry, that a product containing the ingredients listed in Paragraph 57 of Section 196.525 and containing less milk fat than three and one-fourth per cent, to which has been added vegetable or animal oils, is not skim milk cheese within the meaning of said section. The manufacture of said product is not prohibited under existing Missouri statutes, but such product cannot be sold or offered for sale as skim milk cheese.

Paragraph 57, Section 196.525, supra, defining skim milk cheese provides that when such cheese is sold or offered for sale it must be correctly labeled. We have also referred to Section 196.680, supra, which states the conditions under which cheese shall be deemed to be misbranded.

Since we have stated that in our opinion the product referred to in the first inquiry of the opinion request is not skimmed milk cheese within the meaning of the statutory definition, such a product could not be legally labeled as skim milk cheese, and the labeling statutes have no application to the labeling of such a product.

Paragraph 11, Section 196.525, supra, defines cheese as follows:

"(11) 'CHEESE' is the product made from the separated curd obtained by coagulating the casein of milk, skimmed milk, or milk enriched with cream. The coagulation is accomplished by means of rennet or other suitable enzyme, lactic fermentation or by a combination of the two. The curd may be modified by heat, pressure, ripening ferments, special molds, or suitable seasoning. Certain varieties of cheese are made from the milk of animals other than

the cow, and any cheese defined in sections 196.520 to 196.690 may contain added coloring matter. The name 'cheese,' unqualified, means Cheddar cheese (American cheese, American Cheddar cheese.)"

It is noted that this definition and description of the process of making cheese makes no reference to the addition of vegetable or animal oils, and it appears that a product to which such oils have been added would not be cheese within the meaning of said section, therefore, in answer to your third and fourth inquiries the words cheese or "filled cheese" cannot be used to describe the product mentioned above, which is not cheese.

CONCLUSION.

It is therefore the opinion of this department that a product containing vegetable or non-milk animal fats, which fails to conform to the definition of cheese provided by paragraph 11, Section 196.525, RSMo 1949, is not cheese, and cheese labeling statutes are inapplicable to such product, and it cannot be manufactured, sold, or offered for sale as "cheese", or "filled cheese". There is no prohibition against the manufacture or sale of such a product in this state.

This opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,

'JOHN M. DALTON Attorney General

PNC:sw

GENERAL ASSEMBLY:
HOUSE OF REPRESENTATIVES:
OFFICERS:
FEES, COMPENSATION
AND SALARIES:

Under provisions of Section 16a, Article III of the Constitution, representative entitled only to maximum of Ten Dollars per day reimbursement for actual expenses of such day.

JOHN M. DALTON

February 9, 1953



J. C. JOHNSEN

Hon. Christian F. Stipp Majority Floor Leader House of Representatives Jefferson City, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"I respectfully request an opinion concerning the construction and interpretation of Constitutional Amendment No. 1 adopted at the General Election on November 7, 1952.

"Your attention is invited to House Resolution No. 30 found on page 149 of the Journal of the House of Representatives.

"I desire to know whether or not, in your opinion, said House Resolution complies with the provisions of said Constitutional Amendment No. 1.

"I offer the following example:

"In the event a representative incurs expenses of \$30.00 on Monday and answers roll call on that day and then incurs expenses of \$5.00 on Tuesday and answers the roll call on that day, the question is: under the provisions of Constitutional Amendment No. 1, is such representative entitled to receive \$20.00 or is he entitled to receive \$15.00?"

Hon. Christian F. Stipp

Section 16a of Article III of the Constitution of Missouri, adopted November 4, 1952, as part of Constitutional Amendment No. 1, submitted at the election held on that date, provides as follows:

"Each senator or representative shall be reimbursed from the state treasury for the actual and necessary expenses incurred by him in attending sessions of the General Assembly and which do not exceed the sum of ten dollars (\$10.00) per day for each day on which the first roll call, following the opening prayer, in the Journal of the Senate or House respectively, shows the presence of such senator or representative. Upon certification by the president and secretary of the Senate and by the speaker and chief clerk of the House of Representatives as to the respective members thereof, the state comptroller shall approve and the state treasurer shall pay monthly such expense allowance without legislative enactment. No such reimbursement shall be paid to any senator or representative for any day of a regular session after May 31 following the convening of the General Assembly in regular session on the first Wednesday after the first day of January following each general election, nor for any day after the sixtieth calendar day following the date of its convening in special session."

(Emphasis ours.)

House Resolution No. 30, to which you refer in your letter, as appearing on page 149 of the House Journal, reads as follows:

"BE IT RESOLVED, that, in order to comply with the provisions of Constitutional Amendment No. 1 adopted on November 7, 1952, each member of the House of Representatives of the Sixty-Seventh General Assembly of the State of Missouri certify to the Speaker and Chief Clerk of the House, at the

Hon. Christian F. Stipp

conclusion of each calendar month during the session of the Legislature, that he or she has incurred actual and necessary expenses on each day on which he or she answered the first roll call of the House following the opening prayer in excess of ten dollars, or such amount as is actually and necessarily incurred if less than ten dollars, and that the Speaker and Chief Clerk of the House make such certification as is required by said Constitutional Amendment."

We believe that provisions of Section 16a of Article III of the Constitution, quoted supra, to be clear in providing that the actual and necessary expenses of a representative are to be allowed him for each day he answers the first roll call, but that a limitation of Ten Dollars expenses for each day is to be allowed.

Therefore, we believe that each day's expense must stand by itself and that a representative cannot carry over from one day to another as a credit the difference between his actual expenses and Ten Dollars when such actual expenses are less than Ten Dollars.

CONCLUSION

It is the opinion of this department that under the provisions of Section loa of Article III of the Constitution of Missouri that a representative who answers the first roll call is to be reimbursed for his actual and necessary expenses in a sum not to exceed Ten Dollars for each day he so answers, and that a representative whose expenses are less than Ten Dollars for any one day cannot add the difference between Ten Dollars and his expenses on such day to the amount he is allowed for any other day, that is, he cannot add such an amount to the sum of Ten Dollars for some other day.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. C. B. Burns, Jr.

Yours very truly,

JOHN M. DALTON Attorney General ROADS: County court may establish public road under Section 228.180, RSMo 1949, and need not comply with Sections 228.010 through 228.100, RSMo 1949, if it does so.

JOHN WAXXXXX LTON



May 26, 1953

John CxxXXXXXX

Honorable H. K. Stumberg Prosecuting Attorney St. Charles County St. Charles, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would appreciate an official opinion from your office on the following:

"Is a County Court of a County of the third class under Section 228.180 authorized to establish and construct with public road and bridge funds a new road to which the right of way has been donated without going through the procedure of Petition for Establishment, Notice of Application and Hearings as provided for in Sections 228.010 through 228.100 Missouri Revised Statutes, 1949."

Section 228.020, RSMo 1949, provides for a petition, to be signed by twelve freeholders, to be filed with the county court for the establishment of a public road.

Section 228.030, RSMo 1949, requires notice of such intended application to be posted in three or more public places in the township.

Section 228.040, RSMo 1949, provides:

"When the petition required by section 228.020 is presented, and upon proof of

notice having been given as required in section 228.030, if no remonstrance is filed and if the petitioners give the right of way for the proposed road or pay into the county treasury an amount of money equal to the whole amount of damages claimed by land owners through whose land the proposed road would run, the county court, without discretion to do otherwise, must open said road and thereupon the court shall proceed as in sections 228.010 to 228.190 provided in cases where upon a hearing the court find it necessary to establish a road."

Section 228.050, RSMo 1949, provides for the filing of remonstrances and a hearing before the county court on the question of establishment of the road.

Section 228.060, RSMo 1949, requires a survey to be made by the county engineer if the court finds the establishment of such road necessary.

Section 228.070, RSMo 1949, provides that no road shall be established until it has been examined and approved by the county highway engineer.

Section 228.080, RSMo 1949, provides for the order establishing a road to be entered by the county court when the right of way has been secured.

Section 228.090, RSMo 1949, provides for the filing of deeds and relinquishments for the right of way.

Section 228.100, RSMo 1949, provides for condemnation proceedings.

Section 228.180, RSMo 1949, provides:

"1. The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon.

- "2. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sections and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes.
- "3. Claims for damages for the taking of any such land or property may be filed in the county clerk's office by the owner of said property or by the guardians or curators of insane persons or minors owning said property, within twenty days after the last day of said publication. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid.
- "4. If the county court and the land or property owner be unable to agree on the amount of the damages, or if persons owning land or property sought to be taken or the

guardian or curator of any insane person or minor owning such property shall fail to file a claim for damages, the county court shall make an order reciting such fact, or facts, as the case may be, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation, shall make an order setting the cause for hearing within thirty days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk and the clerk shall cause copies of said orders to be served on owners of the property or material to be taken, and also the guardians and curators of insane persons or minors having any interest in such property or material, not less than ten days before the date of said hearing.

- "5. The court, or judge in vacation, shall cause to be impaneled a jury of six free-holders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other property, proposed to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be impaneled.
- "6. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

In the case of Petet v. McClanahan, 297 Mo. 677, 249 S.W. 917, the Supreme Court discussed the afore-mentioned statutory provisions as they appeared in the Revised Statutes of 1919. At that time what are now Sections 228.010 to 228.100 appeared as Sections 10625-10630, and what is now Section 228.180 appeared as Section 10636. In discussing these statutory provisions the court stated (297 Mo. 1.c. 685):

"1. Under this head it is contended that the county court was without jurisdiction to make the findings and order of April 21, 1919. with respect to the relocation of the St. Joseph-Halls-Rushville-Winthrop Road because no application therefor had been filed and notice given in accordance with Sections 10625 and 10626, Revised Statutes 1919. A reading of the entire article (Art. 1, chap. 98) makes it plain, however, that two separate schemes wholly independent of each other are provided for establishing and relocating public roads. Under the first (Secs. 10626-10630) the proceeding must be initiated by the petition of freeholders of the municipal township or townships through which the proposed road will run; under the second (Sec. 10636) the county court may in the first instance act of its own motion. By Section 10636 the power of eminent domain in connection with the establishment of public roads is vested directly in the several counties of the State to be exercised by them in their several capacities as quasi-municipal corporations and the county court is made the agent through which the power is to be exercised. Whenever the county court is of the opinion that a public necessity exists for the establishment of a public road, regardless of the source of its information or of the considerations that may move it thereto, it may by an order of record so declare and direct the county highway engineer to survey, mark out and describe the road, etc. No antecedent or preliminary steps are necessary to give it jurisdiction to take these proceedings. This section of the road law was plainly intended to invest the county court with the power to

establish and open public roads whenever and wherever public necessity requires it, without waiting upon the tardy and uncertain action of individual land owners or communities." (Emphasis ours.)

Thus it appears from the decision in this case that two alternatives are presented for the establishment of a public road. One is under the procedure outlined in Sections 228.010 to 228.100 and the other under Section 228.180. Under Section 228.180 no petition for establishment is required to be filed, although notice of the establishment of the road must be published in a newspaper in the county. There is no provision under Section 228.180 for remonstrances and hearings as provided in Section 228.050, and therefore such procedure would not be required under that section.

Compliance with the statutory provisions for the establishment of public roads has been held to be jurisdictional.

Mitchell v. Nichols, 330 Mo. 1233, 52 S.W. (2d) 885. Therefore, if the county court proposes to establish a public road and expend public funds thereon, one of the two statutory methods must be complied with. If the county court sees fit to order the establishment of the road under Section 228.180, it would need only to follow the requirements set forth in that section. If, on the other hand, the establishment is not to be made by the court on its own order, the provisions of Sections 228.010 to 228.100, RSMo 1949, must be followed, with the provision of Section 228.040 to be taken into consideration when, as in the present case, the landowners propose to donate the right of way for the road.

CONCLUSION

Therefore, it is the opinion of this department that under Section 228.180, RSMo 1949, a county court may establish and construct with public funds a public road without complying with the provisions of Sections 228.010 through 228.100, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

MISSOURI STATE SCHOOL: Director of Division of Mental Diseases. with approval of Director of Department of Public Health and Welfare, will determine site for erection of new building for Missouri State School.

JOHN M. DALTON XXXXXXXX



August 18, 1953

John C. Johnsen

Honorable Christian F. Stipp Member, House of Representatives Carrollton, Missouri

Dear Mr. Stipp:

We have received your request for an opinion of this office, which request is as follows:

> "I would appreciate it very much if you would advise me as to the person or board who will be responsible for the selection of the site on which will be constructed the building or buildings provided for in Section 5.150 of House Bill 383, 67th General Assembly.

"We in Carrollton are particularly interested, of course, in doing whatever we can to see that this building or buildings is or are constructed at Carrollton, Missouri. We have been advised by someone that the Board of Public Buildings will be the body which selects the site for these buildings. and we have been advised by others that the Director of the Department of Health and Welfare together with the Director of the Division of Mental Diseases will be responsible for the selection of such

"Your opinion in this matter will be appreciated."

The appropriation found in House Bill No. 383 of the 67th General Assembly, to which you refer, is for the use of the Missouri State School, and reads as follows:

"Additions:

Section 8.010, RSMo 1949, provides as follows:

"The head of the division of public buildings shall be 'The Board of Public Buildings.' The governor, attorney general, lieutenant governor and their successors in office shall constitute the board of public buildings. The governor shall be chairman and the lieutenant governor, secretary. The board shall have general supervision and charge of the public property of the state at the seat of government and such other duties as may be imposed on it by law."

The Board of Public Buildings has been given no duties relative to the buildings of the Missouri State School, and, inasmuch as the building or buildings in question will not be located at the seat of government, we are of the opinion that the selection of the site of such buildings is not a matter for the determination of that Board.

Section 202.020, RSMo 1949, gives the Division of Mental Diseases of the State Department of Public Health and Welfare administrative control of the Missouri State School at Marshall, Missouri State School No. 2 at Carrollton, and the St. Louis Training School. Paragraph 2 of said section provides:

"2. With the approval of the department of public health and welfare, the division of mental diseases shall make all necessary orders for the government, administration, discipline and management of all such institutions."

Section 202.030, RSNo 1949, provides, in part, as follows:

"The chief administrative officer of the division of mental diseases shall be a director of the division of mental diseases, who shall be a citizen of the state of Missouri and also known for his business and executive ability. He shall receive an annual salary of seven thousand five hundred dollars. Said director of the division of mental diseases shall have supervision and direct care over the business management of the several institutions under control of the division, over the buildings, farm lands, livestock, equipment, machinery, and other facilities of the institutions. * * * "

Under Section 191.010, RSMo 1949, the Division of Mental Diseases is established as a division of the Department of Public Heelth and Welfare. Section 191.020, RSMo 1949, provides, in part: "The department of public health and welfare shall be controlled and administered by a director of public health and welfare." Section 191.060, RSMo 1949, provides, in part, as follows: "It shall be the duty of the governor, by and with the advice and consent of the senate, to appoint a director for each of the three divisions of the department of public health and welfare, namely: The division of health, the division of mental diseases, and the division of welfare. Each division director shall, subject to the supervision of the director of the department, be the chief administrative officer of his division respectively."

In view of the foregoing statutory provisions, it is our opinion that the Director of the Division of Mental Diseases being the person primarily charged with the government of the Missouri State Schools is the person who will decide, subject to the approval of the Director of the Department of Public Health and Welfare, the place or places at which the building or buildings contemplated by Section 5.150 of House Bill No. 383 will be erected.

CONCLUSION

Therefore, it is the opinion of this office that the site of buildings for the Missouri State School, for which

Honorable Christian F. Stipp

appropriation is made by Section 5.150 of House Bill No. 383 of the 67th General Assembly, will be determined by the Director of the Division of Mental Diseases subject to the approval of the Director of the Department of Public Health and Welfare.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:ml

DIVISION OF WELFARE: COUNTY WELFARE OFFICE: A PUBLIC RECORD:

Section, 208.120 Laws of 1953 requires. county velfare office to keep report of . MONTHLY REPORT OF RECIPIENTS: names, addresses, and amount paid each beneficiary of old age ssistance, ald to dependent children and permanently and

totally disabled persons during preceding month. Report is public record and open to public inspection at all times during business All information regarding applicants or hours of welfare office. recipients other than names, addresses and amount of grants whether in monthly reports or other records of welfare office is confidential and cannot be revealed to public. Employees of office who require persons to execute affidavit, that if permitted to examine monthly reports they will keep information confidential is illegal, as procedure is not provided for by any Missouri statutes.

October 28, 1953

Honorable B. H. Stone Representative of Madison County Route No. 3 Predericktown, Missouri



Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department calling for a construction of House Bill No. 45 of the 67th General Assembly. The particular inquiry of your opinion request reads in part as follows:

> "The question envolved is that they are requesting a form of affidavit in the welfare office here in Madison County, before anyone can scan the records of those receiving assistance. This is not intended to happen as the purpose of the bill was to make it possible for anyone who cared to do so, may scan these records, but shall not use them for political, commercial reasons or for publication."

Section 208,120, RSMo 1949, as amended by Laws of 1951, page 754, relating to old age assistance, aid to dependent children and aid to permanently and totally disabled persons. records and information relating to that subject was repealed by House Bill No. 45 of the 67th General Assembly and a new section was enacted in lieu of same to be known as Section 208.120. Said section reads as follows:

> "For the protection of applicants and recipients, all officers and employees of the State of Missouri are prohibited, except as hereinafter provided, from disclosing any information obtained by them in the discharge of their official duties relative to the identity of applicants for or recipients

of benefits or the contents of any records, files, papers and communications, except in proceedings or investigations where the eligibility of an applicant to receive benefits, or the amount received or to be received by any recipient, is called into question, or for purposes directly connected with the administration of old age assistance, aid to dependent children, and aid to the permanently and totally disabled. In any judicial proceedings, except such proceedings as are directly concerned with the administration of these programs, such information obtained in the discharge of official duties relative to the identity of applicants for or recipients of benefits, and records, files, papers, communications and their contents shall be confidential and not admissible in evidence.

"The Division of Welfare shall in each county welfare office maintain monthly a report showing the name and address of all recipients certified by such county welfare office to receive old age assistance, aid to dependent children and aid to the permanently and totally disabled benefits, together with the amount paid to each recipient during the preceding month, and each such report and the information contained therein shall be open to public inspection at all times during the regular office hours of the county welfare office; provided, however, that all information regarding applicants or recipients other than names, addresses and amounts of grants shall be considered as confidential.

"It shall be unlawful for any person, association, firm, corporation or other agency to solicit, disclose, receive, make use of or authorize, knowingly permit, participate in or acquiesce in the use of any name or list of names for commercial or political purposes of any nature; or for any name or list of names of recipients secured from such report in the county welfare office to be published in any manner. Anyone willfully or knowingly violating any provisions of this section shall be guilty of a misdemeanor. If the violation is by other than an individual, the penalty may be adjudged

against any officer, agent, employee, servant or other person of the association, firm, corporation or other agency who committed or participated in such violation and is found guilty thereof."

The inquiry of the opinion request calls for a construction of the above quoted section which we shall endeavor to give in our present discussion.

The decisions of the appellate courts of this state have long held that the primary rule of statutory construction is to give effect to the intention of the lawmakers, and, if possible, to ascertain such legislative intent from the words used in the particular statute. This rule is so well established and so elementary in nature that we believe it is unnecessary to cite any court decisions on this phase of statutory construction. However, it must be remembered that such primary rule of statutory construction is applicable only in those instances when the statute under construction is ambiguous and of uncertain meaning. When the language used in the statute is not ambiguous, or of uncertain meaning, then such rule of statutory construction is not to be applied. The rule to be applied in such latter instances is stated in the case of State ex rel. Bell v. Phillips Petroleum Co., 349 Mo. 360. At l.c. 370, the court said:

"* * *We find no ambiguity or uncertainty in this statute. * * * If
Section 6437, supra, is clear and unambiguous, it must be construed in accordance with its manifest intent and we may not search for a meaning beyond the statute itself. (State ex rel. Cobb v. Thompson, 319 Mo. 492, 5 S. W. (2d) 57, 59.) * * *."

(Underscoring ours.)

The provisions of Section 208.120, supra, have not been expressed in ambiguous terms or terms of uncertain meaning, but rather said provisions have been expressed in language of plain, clear, and ordinary meaning; therefore, the primary rule of statutory construction is inapplicable in construing the provisions of said section.

The statement of facts given in the opinion request is not clear to us. As we understand such facts, it appears that the employees of the County Welfare Office of Madison County, require, as a condition precedent to granting permission to examine the records of those receiving assistance, the making of an affidavit, which procedure the writer seems to question.

No description of the records in the welfare office which are allowed to be examined by the public is given except "the records of those receiving assistance," and no statement is made as to the nature of the contents of the affidavit required.

Since the opinion request calls for a construction of Section 208.120, supra, contained in House Bill No. 45, of the 67th General Assembly, it is assumed that "the records of those receiving assistance" mentioned in the opinion request, has reference to the monthly report required to be maintained in each county welfare office in the state under the provisions of the above mentioned statute, showing the name and address of all recipients certified by such county welfare office to receive old age assistance, aid to dependent children and aid to the permanently and totally disabled, together with the amount paid to each recipient during the preceding month.

It is also assumed that the affidavit mentioned in the opinion request is to the effect that the affiant, if allowed to examine the monthly reports of the county welfare office will keep any information obtained therefrom, relating to the recipients of the different benefits confidential, and will not disclose, receive, make use of, permit, participate in, or acquiesce in the use of any name or list of names obtained from said records for commercial or political purposes of any nature, and will not publish said name or list of names.

The information contained in said monthly reports is not confidential, but a public record which any person has a legal right to examine at all times during the regular office hours of said welfare office.

However, all information regarding applicants or recipients other than names, addresses and amounts of grants, whether contained in the monthly reports or other records of the county welfare office, is confidential, which the employees of the county welfare office cannot legally disclose to the public.

If these are the records referred to in the opinion request, then the employees of the welfare office annot require any person to execute the particular form of affidavit referred to in such opinion request before said person is permitted to examine the monthly report of recipients for the preceding month. Said employees are acting without any legal authority in making such requirements, since such a procedure is not provided for under the provisions of any Missouri statute.

CONCLUSION

It is therefore the opinion of this department that under the provisions of Section 208.120, Laws of 1953, the Division of Health shall in each county welfare office maintain a monthly report showing the name and address of each applicant certified by such county welfare office to receive old age assistance, aid to dependent children and aid to the permanently and totally disabled, together with the amount paid to each recipient for the preceding month. That said reports are public records and shall be open to public inspection at all times during the regular office hours of the county welfare office. However, all information regarding applicants or recipients other than names, addresses and amounts of grants, whether contained in the monthly reports or other records of the county welfare office, is confidential, which information the employees of said office cannot legally That when employees of the county welfare disclose to the public. office require, as a condition precedent, the making of an affidavit by one, that if permitted to examine the monthly reports of recipients receiving the respective benefits on file in that office, he will keep any information obtained therefrom confidental, that said employees are acting without any legal authority, as such a procedure is not provided for under the provisions of any Missouri statutes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PHC/lw

SHERIFFS:

It is the duty of a sheriff to collect and account for all fines, penalties, forfeitures and other sums of money accruing to the state or any county in virtue of any order, judgment or decree of a court of record.

January 26, 1953

FILED

Honorable O. J. Taylor Assistant Prosecuting Attorney Greene County Courthouse Springfield, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

"I have been requested by the sheriff of this county to secure an opinion from your office with regard to his responsibility for the collection of fines. Under section 57.130 of the Revised Statutes of Missouri the sheriff is required to collect and account for all fines accruing to the county or state by virtue of any court order. Also under section 55.240 he is required to submit monthly statements to the county auditor regarding such collections.

"It has been a practice of long standing in this county for the clerks of the circuit and magistrate courts to collect all fines and costs and to transfer them to the county treasurer.

"We would appreciate an opinion as to whether or not the present practice followed in this county is permissible and whether under this present arrangement the sheriff is responsible for all such fines even though they are collected by the clerks of the courts."

Section 57.130, RSMo 1949, to which you refer, reads as follows:

"57.130. Sheriffs to collect fines, penalties and forfeitures.--The sheriffs of the several counties shall collect and account for all the fines, penalties, forfeitures and other sums of money, by whatever name designated, accruing to the state or any county in virtue of any order, judgment or decree of a court of record."

From the above it seems to us to be clear that it is the duty of the sheriff to collect and account for all fines, penalties, forfeitures and other sums of money accruing to the state or county by virtue of any order, judgment or decree of any court of record.

CONCLUSION

It is the opinion of this department that it is the duty of a sheriff to collect and account for all the fines, penalties, forfeitures and other sums of money accruing to the state or any county in virtue of any order, judgment or decree of a court of record.

Respectfully submitted,

HUGH P. WILLIAMSON Assistant Attorney General

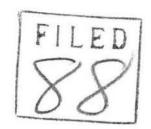
APPROVED:

JOHN M. DALTON Attorney General

HPW: sw

CRIMINAL LAW: MAGISTRATES:

Duty of magistrate to issue a warrant upon a felony complaint filed by a person other than the prosecuting attorney.



February 10, 1953

Honorable Stewart E. Tatum Prosecuting Attorney of Jasper County Joplin, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office, which request reads in part as follows:

"This is an inquiry into the construction by your office of Sec. 21.08 of the 1953 Rules of Criminal procedure adopted by the Missouri Supreme Court. The query is this: Is it mandatory for the Magistrate Judge to issue a warrant for arrest in the instance a private citizen files a verified complaint (felony) before the Magistrate; or, is the Magistrate justified in withholding a warrant and requiring the Prosecuting Attorney to file a felony complaint under this rule."

Section 5 of Article V, Constitution of Missouri 1945, authorizes the Supreme Court to establish rules of practice and procedure for all courts. Under the authority of this provision the Supreme Court has adopted certain rules of criminal procedure. These rules became effective January 1, 1953. Rule 21.08, to which you refer and at which your inquiry is directed, provides as follows:

"Whenever complaints shall be made in writing, verified by oath or affirmation (including an oath or affirmation on information and belief by a prosecuting attorney) and filed in any court having original jurisdiction to try criminal offenses, charging that a felony has

been committed by a named accused, or if his name is unknown, by any name or description from which he can be identified with reasonable certainty, it shall be the duty of the judge or magistrate thereof, and, upon complaint made by the prosecuting attorney, it shall also be the duty of the clerk thereof to issue a warrant reciting the accusations and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such judge or magistrate to be dealt with according to law. If such warrant is issued under the hand of the judge or magistrate, it need not be sealed but if it is issued under the hand of the clerk of the court, the seal of the court shall be attached thereto."

You inquire whether under this rule it is mandatory for a magistrate to issue a warrant where a private citizen files a verified felony complaint or is the issuance of the warrant in such instance discretionary.

We would first like to direct your attention to Section 544.020, RSMo 1949, which reads as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law."

You will note that Rule 21.08 is substantially the same as Section 544.020 where a complaint is filed by someone other than the prosecuting attorney, for it reads that "Whenever a complaint shall be made in writing, verified by oath or affirmation * * * charging that a felony has been committed by a named accused, * * * it shall be the duty of the * * * magistrate * * * to issue a warrant reciting the accusations and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such * * *magistrate to be dealt with according to law." The provisions are, consistent, clear and unambiguous and we are of the opinion that the magistrate is vested with no discretion, but must issue the warrant.

CONCLUSION

Therefore, it is the opinion of this office that under the provisions of Section 544.020, RSMo 1949, and Supreme Court Rule 21.08 where a person other than the prosecuting attorney files with a magistrate a complaint in writing, verified by oath or affirmation, charging that a felony has been committed by a named accused, it is the duty of said magistrate to issue a warrant of arrest, and he may not exercise a discretion in the matter.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

ELECTIONS:

Same persons may serve as judges and clerks of special election to fill vacancy in of-JUDGES AND CLERKS: fice of representative, municipal election, and election of school directors.

April 1, 1953

Honorable Stewart E. Tatum Prosecuting Attorney Jasper County Carthage, Missouri

Dear Mr. Tatum:

In your letter of March 23, 1953, you requested an official opinion of this office as follows:

- "(1) There is a presently existing vacancy in the office of the House of Representatives by the death of Ray Harvey, who was the First Legislative District of Jasper County, Missouri representative, and on the 20th day of March, 1953, the Missouri governor issued a Writ of Election directing an election to supply such vacancy to be held on April 7, 1953, within the limits of the First Legislative District of Jasper County, Missouri;
- "(2) The city of Carthage, located in the First Legislative District of Jasper County, is going to have a regular municipal election on the 7th day of April, 1953; possibly other cities of the third and fourth class in the First Legislative District will have municipal elections on that same date;
- "(3) On April 7, 1953, there will be a county wide election for school directors (all districts) and in some districts, there will be a vote on school levys.

"The Jasper County Court has today inquired of me whether or not the same Judges and Clerks in each precinct in the First Legislative District may not handle all three propositions above, with the County Court paying one-third, with the school district paying onethird, and the city paying one-third of the salaries of the Judges and Clerks. I have advised the County Court that the same Judges and Clerks may handle proposition No. 1 and proposition No. 3, but that proposition No. 2, which is a municipal election, must be handled by a separate panel of Judges and Clerks in accordance with the respective city law and ordinances, but that both panels may occupy the same location of voting in the precinct with the municipality paying one-half of the rental, if any, and the County Court paying the other half.

"In the interests of economy and to eliminate duplication of Judges and Clerks on the same date, the County Court has requested that I obtain from you an opinion as to the proper way of handling these three items at the very earliest possible moment. The County Court further states that in some of the rural precincts and towns of the First Legislative District there may not be enough available personel to make up a duplicate panel of Clerks and Judges, and it seems there cannot be different election dates set at this time. * * *."

An examination of the Missouri Constitution, statutes, and court decisions has disclosed no prohibition against a person serving as a judge or as a clerk in the three elections you mention. There appears no inconsistency or incompatibility in such dual service.

Thus, for example, Section 165.330, 1951 Supp., RSMo 1949, specifically authorizes the use of the same judges and clerks in certain municipal and school elections as follows:

- The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at six o'clock a.m. and closing at seven o'clock p.m. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records.
- "2. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; provided that in all cities and towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants, said elections may at the option of the board be held at the same time and places as the election for municipal officers with the judges and clerks of such municipal election serving as judges and clerks of said school election, but the ballots for said school

election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose.

"3. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory; provided, that in any year in which a county superintendent of public schools is to be elected that the qualified voters of such town, city or consolidated district where registration of voters is required, must vote in the ward or precinct of which they are residents, if the place of voting has been so designated by the board of education; provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding two thousand and not exceeding seventy-five thousand inhabitants.

"4. All school districts in cities, towns and villages in this state which are now or which may hereafter be under special charter shall hereafter hold their annual school elections on the first Tuesday in April, and the members of the boards of education now serving in such districts shall continue to serve until the first Tuesday in April next following the expiration of the terms for which they were elected or appointed, and until their successors are elected and qualified." (Italics ours.)

However, Section 111.310, RSMo 1949, which designates the qualifications of judges and clerks, may prevent, in some instances, a person from serving as judge or clerk for more than one election. Said section reads as follows:

"No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election, and shall moreover be able to read and write."

Therefore, it may be that a judge or a clerk may be eligible to vote in one of the elections you mentioned, and not be entitled to vote at one or more of the others. If such person is not entitled to vote in all three elections, he is not qualified to serve as judge or clerk for those elections in which he is not entitled to vote.

It would be necessary for the appointing body to examine the qualifications of all prospective judges and clerks to determine whether they are legally entitled to vote at the elections in which they are to serve.

Although the same judges or clerks may serve in different elections on the same day, they are entitled to compensation for each separate election. Compensation for judges and clerks is provided for in Section 111.350, RSMo 1949:

"All judges and clerks of election shall be allowed such compensation for their services in conducting elections and returning the poll books and ballots to the county clerk's office, as the county courts of their respective counties may deem reasonable, not to exceed six dollars per day, except in townships or precincts where the vote at any election is in excess of six hundred votes the county courts may at their option pay at the rate of fifty cents per hundred for each additional one hundred votes or major fraction thereof, not to exceed ten dollars for any election, to be paid out of the county treasury."

Fach appointing body should determine what compensation is desirable and allowable for services performed in their election, and provide compensation accordingly.

CONCLUSION.

It is, therefore, the opinion of this office that a person, otherwise qualified, may serve as a judge or clerk for a special election to fill a vacancy in the office of representative, a municipal election and an election of school directors, all being held on the same day.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:lrt;irk

COUNTY HEALTH PLAN -PETITION: COUNTY COURT: ISSUANCE OF BONDS: Mandatory upon county court to call if 10% or more of qualified voters of county request it for the purpose of issuing bonds to establish a county health center. Sec. 205.010, Laws Mo. 1951, does not provide for any protest period after filing of petition.

JOHN M. DALTON



May 20, 1953

XXXXXXXX

John C. Johnsen

Honorable Joe Taylor Representative, Newton County Neosho, Missouri

Dear Mr. Taylor:

This will acknowledge the receipt of your opinion request of May 6, 1953, which request reads as follows:

"I am enclosing letter from Mr. A. B. Thomas, Spring Lakes Farm, Anderson, Missouri. I would like for you to read this letter and if possible give us an opinion so that Mr. Thomas would know where he stands in this matter. I believe the letter is self-explanatory."

In the above request you have referred to a letter which you received from Mr. A. B. Thomas, Spring: Lakes Farm, Anderson, Missouri. The letter reads as follows:

"We are having some difficulty down here about this so-called county health plan petition. Seems that the county court does not wish to grant any protest period after the petition was turned over to them last Monday, April 27. I have filed a formal protest, but James Paul tells the Court that no protest can be accepted. That seems vastly wrong on the face of it.

"Anybody should have the right of challenging any initiative petition as to sufficiency, accuracy of count and legality in general and be granted a sufficient length of time to make such checks as seem necessary.

"Will you please check this with the Attorney General and let me know what you can ascertain regarding this petition as well as others that come up from time to time? Would like to know whether petitions have to wait out a protest period? If no protest, then when court can certify for election? If protested, how much time is allowable under our statutes? If found insufficient, can the court allow additional time to get more signatures? How much?"

The question to be answered requires the construction of Section 205.010, Laws Mo. 1951, p. 779, which provides for County Health Centers. This provision reads as follows:

"Any county, subject to the provisions of the constitution of the state of Missouri, may establish, maintain, manage and operate a public health center in the following manner: Whenever the county court shall be presented with a petition signed by at least ten per cent or more of the qualified voters of the county, as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax not in excess of ten cents on each one hundred dollars of the assessed valuation of property in the county, be levied for the establishment, maintenance, man agement and operation of a county health center and the maintenance of the personnel required for operation of the health center, the county court shall submit the question to the qualified voters of the county at the next general election to be held in the county or at a special election called for the purpose, the county clerk giving notice, published once each week for two consecutive weeks prior to such election date, in one or more newspapers published in the county, if any such be published, and if not so published, by posting written or printed notices in each township of the county. fourteen days prior to the election date, which notices shall include the text of the petition and state the rate of tax to be levied annually thereafter upon the assessed property of the county."

The first question you wish answered is whether a protest can be filed against an initiative petition and whether said petition

Honorable Joe Taylor

must be heard during a protest period. A careful reading of the within cited statute will show that there is no provision therein for a protest period. If a petition signed by 10% or more of the qualified voters in the county requesting an annual tax for the establishment of a county health center is presented to the county court it then becomes the duty of said court to call an election for the purpose of issuing bonds for the establishment of such hospital. It will be noted that the word "shall" is used in this statute which makes the calling of an election mandatory upon the County Court. The county court is not required, nor under the wording of the statute would it be permitted to delay the election for the purpose of the signing of a protest.

Another question you wish answered is, should the petition be found insufficient can the court then allow additional time to get more signatures. If the petition is found to be defective or insufficient the court is then under no duty to call an election. It can determine the sufficiency of the petition when it is filed with them and if the petition is sufficient they must call an election and if the petition is insufficient they are not required to do so.

CONCLUSION

Therefore, it is the opinion of this department that if a petition with 10% or more of the qualified voters of any county requesting the calling of an election for the purpose of issuing bonds to establish a county health center is filed, with the county court it is mandatory upon them to call such election. It is further the opinion of this department that Section 205.010 does not provide for any protest period after the filing of a petition.

This opinion which I hereby approve was written by my Assistant, Mr. John S. Phillips.

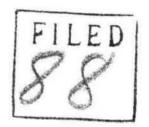
Yours very truly,

JOHN M. DALTON Attorney General

JSP:mw:irk

CHAUFFEUR'S Traveling salesmen operating company cars are not required to have chauffeur's license.

JOHN M. DALTON



July 6, 1953

XXXXXXXX

J. C. Johnsen

Honorable Stewart E. Tatum Prosecuting Attorney Jasper County Joplin, Missouri

Dear Sir:

This will acknowledge your letter of June 22nd, 1953, requesting an opinion of this office concerning whether or not traveling salesmen, and similar employees are required to have chauffeurs' licenses when driving company cars. You submitted the following facts:

"This is an inquiry in regard to the requirement for a chauffeur's license under Sec. 302.010 upon the following facts:

"X Company, a Missouri corporation, owns twentysix two-door sedan automobiles; twenty of these cars are used by the corporation's Sales Department and assigned to the salesmen as transportation through the sales area, however, no sales merchandise is carried by the said salesmen in said car, but samples may be carried, and at infrequent intervals another corporate employee ride with the salesmen on his regular trip. remaining six said cars are assigned to the Production, or Engineering, or Accounting Departments and are used by the personnel thereof for inspection trips from the general office of the company to the various factories of the company, two of which are in Missouri, one in Kansas, and one in Oklahoma, and it is seldom that more than one such corporate employee travels in the automobile at one time.

"The query on the above set of facts is, are the drivers in either of the above instances required to have a chauffeur's license. It is the opinion of this writer that they are not in either instance."

Section 302.010, RSMo. 1949, Laws Mo. 1951, page 679, 680, provides as follows:

"Definitions. - - When used in this chapter the following words and phrases mean:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;

"Commercial motor vehicle" is defined in subsection 3 of the same section as follows:

"(3) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers; * * *

Section 302.020, RSMo 1949, Laws Mo. 1951, p. 679, 680 provides:

"Operation of motor vehicle without license unlawful.--It shall be unlawful for any person to:

"(1) Drive as a chauffeur any vehicle upon any highway in this state unless such person has a valid license as a chauffeur under the provisions of this chapter, or to

From a consideration of the above statutory provisions it appears that the definition of the word chauffeur has three divisions, each containing a different criteria for determining whether or not the operator of a motor vehicle is to be classified as a chauffeur. The first provides that one "who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare" (Emphasis supplied) is a chauffeur. It appears from the facts submitted that the traveling salesmen or similar employees do not come within this provision of the definition, since the compensation they receive is not paid to them for services performed in driving the car, but is paid to them for the performance of their other duties, specifically for the selling of the merchandise vended by the employer. conclusion is buttressed by the fact that in the third division of this definition to be discussed hereinafter, the Legislature when it desired to include driving as an incidental to other employment, used the language clearly indicating such intent.

The second division of this definition provides that a chauffeur is "an operator . . . who as owner or employee operates a motor vehicle carrying passengers or property for hire." It is clear that the drivers in your statement of facts do not carry either passengers or property for hire.

The third subdivision of the definition provides that a chauffeur is an operator ". . . who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

The traveling salesmen about whom you ask would come within this subdivision of this definition, if the vehicles which they operate were commercial vehicles within the definition of the statute. ever, the statute specifically defines commercial vehicle as "a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers." It is clear that the automobiles used by the traveling salesmen were not used or designed for carrying more than eight passengers; we further observe that the company cars operated by these salesmen are twodoor sedans, and it is clear that they are not designed for carrying freight and merchandise. Further, from your statement of facts, it appears that they are not regularly used for carrying freight, and further, that any personal property that is carried by the salesmen is in the nature of samples and would not be classified as merchandise, since by your statement of facts it appears that the property which is for sale is not carried by the salesmen, for delivery at the time of sale. It is, therefore,

concluded that the motor vehicles involved, do not come within the statutory definition of the phrase "commercial motor vehicle," and that therefore the salesmen who drive these cars do not come within the third subdivision of the definition of the term chauffeur.

CONCLUSION

From the above discussion it is the conclusion of this office that the traveling salesmen and similar employees who operate as stated in your submission of facts, do not come within the definition of the word "chauffeur" and that therefore they are not required to procure a chauffeur's license before they may lawfully operate a motor vehicle under the provisions of Section 302.020, Laws Mo. 1951, and that they may lawfully operate such motor vehicles with a license as an operator.

The foregoing opinion which I hereby approve was written by my assistant, Mr. Fred L. Howard.

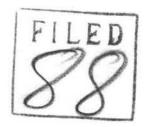
Yours very truly,

JOHN M. PALTON Attorney General

FLH: lw:mw

COUNTY BUDGET LAW:

- County Court in second class county may use unexpended "emergency" fund for remodeling county buildings.
- Surplus funds remaining after payment of current indebtedness to be included in county budget for ensuing fiscal year.



December 2, 1953

Honorable Stewart E. Tatum Prosecuting Attorney Jasper County Joplin, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The County Court is attempting to remodel more suitable quarters for the Western Division of the Circuit Court held in Joplin, Mo. It is anticipating spending \$110,000.00 in completing this work.

"In our present current budget for 1953, \$20,000.00 is immediately available under 'Repairs and Renewals,' and it is anticipated that an additional \$15,000.00 estimated surpluses from various accounts may be transferred after November 1st under provisions of Sec. 50.630, Mo. R.B., to Repairs and Renewals.

"The County has approximately \$75,000.00 accumulated surplus carried over that has not been budgeted from year to year, (allowing the County to operate a portion of the year without borrowing against the anticipated income). This surplus is transferred from year to year from the General Revenue Account into the Tax Anticipation Account for current use.

"QUESTION I

"Are all the provisions of the Statutes being fully complied with in making transfers as outlined in paragraph #2?

"QUESTION II

"In setting up the budget for the fiscal year, 1954, can the surplus account as mentioned and outlined in Paragraph #3, be set up as an anticipated revenue item for that current year and be budgeted out in expenditure items under 'Courthouse repairs and renewals', for 1954?

"We would like an early opinion from the Attorney General's Office on the above questions and conditions."

In further conversation with the Honorable Rolland O. Shadday, Associate Judge of the Jasper County Court, we are informed that it is proposed to enter into a contract during the current fiscal year for the proposed remodeling of the building mentioned in your letter, but that no payments will be made under such contract in excess of \$35,000.00 during the current fiscal period. We are further advised the \$15,000.00 to be transferred is now carried as an "emergency fund."

We note from your letter of inquiry that a sum of \$20,000.00 is incorporated in the current budget for "repairs and renewals." That such an expenditure is proper for the proposal mentioned in your inquiry appears in Section 49.310, RSMo 1949, reading in part, as follows:

"* * * In pursuance of the authority herein delegated to the county courts, said county courts may acquire a site, construct, reconstruct, remodel, repair, maintain and equip said courthouse and jail, and in counties wherein more than one place is provided by law for holding of court, the county court may buy and equip or acquire a site and construct a building or buildings to be used as a courthouse and jail, and may remodel, repair, maintain and equip such building in said place or places. * * *."

We further note that some \$15,000.00 will be available after the payment of all indebtedness chargeable to the current fiscal year and that it is proposed to transfer

such surplus, which is now carried as an "emergency" fund, to "repairs and renewals" for use for the purpose mentioned.

We direct your attention in this regard to a part of Section 50.570, RSMo 1949, which reads as follows:

"* * At any time during the year the county court may, on recommendation of the budget officer, make transfers from the emergency fund to any other appropriation; provided, that such transfers shall be made only for unforeseen emergencies and only on unanimous vote of the county court."

The foregoing seem to be the only statutes relating to making the transfer of funds contemplated.

With respect to the second question which you have propounded, we direct your attention to Section 50.610, RSMo 1949, dealing generally with the question of budgets in counties of the second class and containing the following provision:

"* * * Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. * * *."

It is our thought that this provision not only authorizes inclusion of the unexpended surplus in the budget for the ensuing fiscal year, but mandatorily requires that due regard be given such surplus.

CONCLUSION

In the premises, we are of the opinion:

- 1) That the county court in a county of the second class is authorized to transfer from "emergency" fund to "repairs and renewal" fund any moneys found therein upon the recommendation of the budget officer as provided in Section 50.630, RSMo 1949, provided an "emergency" in fact exists; and,
 - 2) That any surplus moneys remaining in any fund

at the end of a fiscal year are to be carried forward and merged into the budget for the ensuing fiscal year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

WFB:vlw:irk

CORONERS: FEES:

A coroner of a third class county is not entitled to retain fees in addition to salary provided by law.

January 22, 1953



Honorable J. W. Thurman Prosecuting Attorney of Jefferson County Hillsboro, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"Recently we have a disastrous fire involving a Nursing Home at Hillsboro, Missouri, resulting in seventeen fatalities. The inquests on all of those that succumbed were held the following day in the school gymnasium in Hillsboro, Missouri. One Jury heard all of the evidence and rendered seventeen separate verdicts. The Coroner has caused seventeen copies of the transcript of the testimony to be prepared and has submitted seventeen separate bills to the County Court for allowance. The Court takes the position that under Sec. 58.520, R. S. Mo., 1949, that the County is liable for the payment of only one fee. I agree that under this Section the Coroner shall not be allowed fees for his services in each of the individual cases but it seems to me, that the transcripts of the testimony and of the other records should be separately made and indexed and that the County should pay the costs incident thereto.

"Will you please give us your opinion as to whether or not this is the correct construction of the provisions of Sec. 58.520."

Honorable J. W. Thurman

Section 58.520, RSMo 1949, to which you refer, providing for fees of coroners, was originally enacted in 1807 (1 Terr. Laws, page 166, Section 7), and has since been amended to the present form. Said section reads as follows:

"Coroners shall be allowed fees for their services as follows; provided, that when persons come to their death at the same time or by the same casualty, fees shall only be paid as for one examination:

For the view of a dead	oody	•	•	٠	•	\$5.00
For issuing a warrant su	ummor	in	g			
each jury of inquest		٠	•	٠	٠	• 75
For swearing each jury			•	٠	•	•50
For each subpoena for water (all names to be put in	one					
subpoena if possible)		•	•	•	•	.25
For taking each recognize (all names to be put in		:				
recognizance)		•	•	٠	•	•75
For going from his residence of viewing a				,		
and return, each mile						.08

"The above fees, together with the fees allowed jurors, constables and witnesses, in all inquests, shall be paid out of the county treasury as other demands. For performing the duties of sheriff, the coroners shall be entitled to the same fees as are for the time being allowed to sheriffs for the same services."

Prior to 1945, coroners received compensation for their services under the above section or similar provisions. In 1945, the legislature saw fit to place coroners on a salary basis. Section 58.110 specifies that coroners of counties of the third class shall receive for their services an amount specified therein, payable out of the county treasury in equal monthly installments. This provision reads as follows:

"The coroner in all counties of the third class shall receive for his services annually, payable out of the county treasury in equal

Honorable J. W. Thurman

monthly installments the following: counties with a population of less than ten thousand, the sum of one hundred and twenty dollars; in counties with a population of ten thousand and less than fifteen thousand, the sum of one hundred and eighty dollars; in counties with a population of fifteen thousand and less than twenty thousand, the sum of two hundred and forty dollars; in counties with a population of twenty thousand and less than twenty-four thousand, the sum of three hundred and sixty dollars; in counties with a population of twenty-four thousand and less than thirty thousand, the sum of four hundred and eighty dollars; and in counties having a population of thirty thousand and more, the sum of six hundred dollars."

(Underscoring ours.)

Section 58.100 enacted at the same time as Section 58.110, supra, provides that a coroner of a county of the third class shall charge and collect fees accruing to his office, except such fees as are chargeable to the county and shall report and pay such fees to the county treasurer. Said section reads as follows:

"The coroner in counties of the third and fourth classes, shall charge and collect on behalf of the county every fee accruing to his office by law, except such fees as are chargeable to the county, and shall report and pay such fees over to the county treasurer in the manner provided by law."

By enacting Section 58.110 providing for the salary of a county coroner, we are of the opinion that such salary was intended to be full compensation for his services and that he would not be entitled to the fees provided in Section 58.520, RSMo 1949.

In reading and construing Section 58.110 and Section 58.100 together, we note that the county coroner is not required to charge and collect fees chargeable to the county. Section 58.520, supra, specifically provides that the fees therein allowed are to be paid out of the county treasury. Applying the above conclusion to the specific question, we are of the opinion that the county coroner of the County of Jefferson is not entitled to the fees provided in Section 58.520 for making one, or more than one transcript of the testimony or other records in an inquest since such fees as therein provided are chargeable to the county and by Section 58.100 the county coroner is not charged with the duty of collecting and accounting for such fees.

Honorable J. W. Thurman

CONCLUSION

Therefore, it is the opinion of this office that a coroner of a county of the third class is not entitled to fees for performing his services in addition to compensation in the form of a salary as provided by law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Donal D. Guffey.

Yours very truly,

JOHN M. DALTON Attorney General RECORDS:
PUBLIC OFFICERS:

Land patents on file in the office of secretary of state may not be altered or cancelled by said officer.



May 12, 1953

Honorable Walter H. Toberman Secretary of State Capitol Building Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which reads as follows:

"May we have an opinion from you as to the procedure for correcting a patent to the following described Swamp Land, which was issued in error?

"The records in this office indicate that on December 8, 1856, the State of Missouri issued a patent in favor of one David A. Bunch to the following described land:

"The Southwest Quarter of the Northwest Quarter of Section Twenty-eight, Township, Thirtysix, Range Twenty-six, St. Clair County.

"It has now been brought to our attention that David A. Bunch never held title to this land.

"Our records further disclose Certificate No. 58 signed by James W. Beck,

Honorable Walter H. Toberman

County Clerk of St. Clair County, dated November 26, 1856, certifying to the Governor that this same described land was sold to Samuel Clifton and the full purchase price of \$50.00 was paid by him.

"The St. Clair County Abstract Company, Osceola, Missouri who is attempting to perfect title to this land has advised that the records in St. Clair County show that the Sheriff sold this land to Samuel Clifton on October 1, 1855. Indications point to the possibility that the clerk for the State who copied the patent made an error in the description, since David A. Bunch did own land in the northeastern part of the county, according to the record in Mr. Toalson's Abstract Office."

Certain swamp lands were granted to the State of Missouri by Act of Congress, September 28, 1850. After title to this land had thus been vested in the State of Missouri, the State through its General Assembly, by an Act approved March 31, 1851, Laws 1850-1851, page 238, donated its swamp lands to certain counties including the County of St. Clair. Section 3 of that Act provides that:

"Whenever, in the judgment of said county courts, it shall be the interest of said counties so to do, they shall order the sheriff to sell the same in such quantities, at such times and places, and on such terms as they may think proper; * * *."

Section 4 of said Act then provided as follows:

"Whenever full payment shall be made for any of said lands by the purchaser thereof, the county courts shall cause the same to be certified to the governor, who shall thereupon grant to the purchaser, his heirs or assigns, a patent for the same, which patent shall be signed by the governor, countersigned by the secretary of state, and be recorded in the office of the secretary of state." It appears from the facts that you have submitted that during the year 1855, certain described property located in St. Clair County was sold by the sheriff and that the county clerk of said county on November 26, 1856, certified to the governor that full payment had been made. However, the records in your office apparently show that a patent to this same described land was issued on December 8, 1856, to a party other than the person who had made the purchase in 1855 and for what reason, we do not know.

It is noted that the patent of Section 3, supra, was issued by the governor, signed by him and countersigned by the secretary of state. We do not believe that such instrument as issued by the chief executive and now on record for a period of almost ninetyseven years can be altered, changed or cancelled by the secretary of state.

We have examined the statutes relating to the duties of the secretary of state and the records of that office, and find no authority to change, alter or cancel records there on file and not made under the hand of the person now occupying that office, except errors in description which may be corrected as authorized by Section 446.180. The last noted section provides that where there exists errors in the description of land in a patent, the person who has acquired title to land intended to be described in the patent, may have a new patent issued under the method provided, correctly describing such land. This, however, does not appear to be the case here involved, since apparently no patent was ever issued to the person who actually purchased the land.

Changes in public records may be made only by or under official authority and if at the time of the original record, the instrument was correctly copied, the officer cannot subsequently alter the record even though there was a mistake in the original instrument. This rule is stated in 76 C. J. S., Records, page 17 It is further stated that the custodian of the public records ha no right to cancel a record without authority from the same sour which required the record to be made, 76 C. J. S., Records, page 129.

The reason for this rule we believe is obvious. A public record such as here considered, is presumably correct and it should not be overturned or its effect destroyed when such c rection, or alteration might affect vested rights and theref we are of the opinion that the patent to which you refer ca be altered, changed or cancelled by the office of secretar state. Honorable Walter H. Toberman

CONCLUSION

Therefore, in the premise, it is the opinion of this office that a patent on record in the office of secretary of state not made under the hand of the person now occupying that office may not be altered, changed or cancelled or its effect in any way affected, except in cases where there exists an error in the description of land patented, as provided in Section 446.180.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

FENCE LAW:

A School district cannot be required to pay its proportionate share for the erection and repair of a division fence under the provisions

SCHOOL DISTRICT:

of Section 272.060, et seq., RSMo 1949.

September 3, 1953

Honorable Gene Thompson Prosecuting Attorney Nodaway County Maryville, Missouri



Dear Mr. Thompson:

You request an official opinion of this department as follows:

"Some time ago, a controversy came to my office between a common school district in this county and an adjoining land owner, over a partition fence.

"The school district took the position that a landowner had to fence his land if he so desired, if it was along the public road, and in the same manner, a land owner should fence his land if he wanted to use it for pasture if it was adjacent to public school grounds.

"In other words, that the partition fence law did not apply as against a right-of-way owned by a township road district and in the same manner would not apply as to public land of a common school district.

"The Superintendent of School of this County has requested me to write you for an opinion on this question so this is an official request from the Prosecutor and the Superintendent.

"The question is:

Is a common school district subject to the partition fence law, and can an adjoining landowner require the school

Honorable Gene Thompson:

district to maintain one-half of a fence around the public school grounds?"

The "partition fence law" which you mentioned in your letter is assumed to be the following statutes providing for the erection of fences between adjoining lands belonging to two or more different persons. The following sections, all RSMo 1949, deal with the erection and repair of what are referred to in the statutes as division fences:

"272.060. Division fences--rights of parties in, how determined.--Whenever the fence of any owner of real estate, now erected or constructed, or which shall hereafter be erected or constructed, the same being a lawful fence, as defined by sections 272.010 and 272.020, serves to enclose the land of another, or which shall become a part of the fence enclosing the lands of another, on demand made by the person owning such fence, such other person shall pay the owner one-half the value of so much thereof as serves to enclose his land, and upon such payment shall own an undivided half of such fence."

"272.080. Value of fence may be recovered, when.--If the person thus assessed or charged with the value of one-half of any fence, under the provisions of this chapter, shall neglect or refuse to pay over to the owner of such fence the amount so awarded, the same may be recovered before a magistrate, or other court of competent jurisdiction."

"272.090. Fence to be divided for purpose of repair.--If the parties cannot agree to the part each shall have and keep in repair, either of them may apply to a magistrate of the county who shall forthwith summon three disinterested householders of the township to appear on the premises, giving three days' notice to each of the parties of the time and place where said viewers shall meet, and said viewers shall, under oath, designate the portion to be kept in repair by each of the parties interested, and notify them in writing of the same."

"272.110. Division fences to be kept in repair.--Every person owning a part of a division

Honorable Gene Thompson:

fence shall keep the same in good repair according to the requirements of this chapter, and when said division fence is a hedge, shall properly trim the same at least once a year, to a height not greater than four and one-half feet, and to a breadth not greater than three feet, and for the purpose of trimming said hedge as aforesaid, he shall have the right to enter upon any land lying adjacent thereto. Either party owning land adjoining a division fence or hedge may, upon the failure of any of the other parties, have all that part of such division fence belonging to such other parties repaired, upon the failure of such other party to do so, such repairing or trimming to be at the cost of the party so failing to repair or trim his part of such fence; and the party so repairing or trimming such hedge shall always throw the brush trimmed off on his own side of such hedge; and upon neglect or refusal to keep said fence in repair, or to keep said hedge trimmed as provided in this section, such owner shall be liable in double damages to the party injured thereby, and such injured party may enforce the collection of such damages by restraining any cattle or other stock that may break in or come upon his enclosure by reason of the failure of such other party to keep his portion of such division fence in repair and proceeding therewith under the provisions of chapter 270, RS Mo 1949."

For the purpose of this opinion it is assumed that the private landowner has erected a fence between his land and the land of an adjoining public school in full compliance with the requirements of the above statutes, and that if the school grounds were owned by a private person, such person would be liable for payment of his share of the cost of erection and repair of said fence. The question is then resolved whether a school district can be assessed for its proportionate share of said division fence.

There appear to be no cases on this specific point. However, it is a fundamental rule of statutory construction that unless it is clearly indicated that the intent of the Legislature is to include the State and its subdivisions, they will not be considered within the purview of any particular

Honorable Gene Thompson:

statute. This rule of statutory construction is stated by Corpus Juris, Volume 59, Statutes, Section 653, Page 1103, as follows:

"(§ 653) 11. Construction as Including or Binding Government. The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong.

The State and its subdivisions are not mentioned in the statutes providing for division fences. That school districts are agencies of the State within the purview of the above is made clear by School District of Oakland vs. School District of Joplin, 102 S.W. (2d) 909, 1.c. 910:

"* * * The school districts are organized as separate legal entities. School Dist. No. 7 v. School Dist. of St. Joseph, 184 Mo. 140, 156, 82 S.W. 1082, 1086. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. * * *"

It further appears unlikely that the Legislature intended to make it possible for a private individual to usurp the discretion of the School Board in determining whether school grounds should be enclosed, and create an involuntary liability for something which the school board in the exercise of its governmental function may have decided was undesirable.

Honorable Gene Thompson:

CONCLUSION

It is, therefore, the opinion of this office that a school district cannot be required to pay a proportionate share for the erection and repair of a division fence under the provisions of Section 272.060, et seq., RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

COSTS: -

SHERIFFS:

When a complainant filed an affidavit charging a felony, and a warrant was issued and the defendant was arrested, but before a preliminary examination was held complainant dismissed the charge, the magistrate before whom the proceeding was instituted was entitled to a fee of \$2.50; that the arresting officer making the arrest was entitled to a fee of \$1.00; that if the sheriff rendered any other compensable services, these are costs, and that if witnesses had been subpoensed the cost thereof would also accrue.



September 24, 153

Honorable Donald P. Thomasson Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Mr. Thomasson:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I would appreciate an opinion on the following question: When a complainant files an affidavit under cath charging a felony and a warrant is issued and the defendant is arrested, and before a preliminary examination is had complainant dismisses the charge, who, if anyone, is entitled to fees for costs?"

We here direct attention to paragraph 2 of Section 483.610, RSMo 1949, which reads as follows:

"2. In each criminal proceeding and in each preliminary hearing instituted in any magistrate court, a magistrate court fee of two dollars and fifty cents shall be allowed and collected to be in full for the services of the magistrate or the clerk of said court. Such fees shall be charged, collected and disposition thereof shall be made as provided by law applicable thereto."

In the situation which you present a preliminary hearing was "instituted" by a complainant filing an affidavit charging a felony in the Magistrate Court. Upon the basis of this affidavit a warrant for arrest was issued by the

Magistrate Court, and therefore, the charge of \$2.50, as provided above, accrued, even though the claimant dismissed his charge before a preliminary hearing could be held. Therefore, the Magistrate would be entitled to a fee of \$2.50.

Section 57.290, RSMo 1949, states, in part:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

"For serving and returning each capias, for each defendant. . . \$1.00.

Therefore, in the situation which you present, the arresting officer would be entitled to a fee of \$1.00 for making the arrest.

So far as it appears from your letter the above was all that was done. If the Sheriff has rendered any other services in the matter which are, by statute, compensable, including mileage, these are costs. If witnesses have been subpoensed before the charge is dismissed the cost therefor would, of course, accrue.

CONCLUSION

It is the opinion of this department that when a complainant filed an affidavit charging a felony, and a warrant was issued and the defendant was arrested, but before a preliminary examination was held complainant dismissed the charge, the Magistrate before whom the proceeding was instituted was entitled to a fee of \$2.50; that the arresting officer making the arrest was entitled to a fee of \$1.00; that if the Sheriff rendered any other compensable services, these are costs, and that if witnesses had been subpoenced the cost thereof would also accrue.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General SCHOOLS: TAXATION:



An increased tax rate as authorized by a vote of the residents of a school district and certified to the county clerk after taxes have already been extended should be carried in a supplemental tax book.

October 7, 1953

Honorable Donald P. Thomasson Prosecuting Attorney of Bollinger County Marble Hill, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"This past June Mr. Homer F. Williams, former Prosecuting Attorney of Bollinger County, Missouri, wrote to you at the request of the County Clerk concerning a school tax levy which was then being voted upon as to how late a date prior to the thirty-first day of October, the County Clerk might extend the school taxes as certified. At this time the County Clerk of Bollinger County has extended the taxes on the county tax books.

"In your opinion of July 16, prepared by your Assistant, Mr. Will F. Berry, Jr., you state as follows: 'On the other hand, if insufficient time in fact does not remain, or if the prior extension of levies has been made, then we do not think that the County Clerk can be held negligent in the discharge of the duties of his office in failing to extend the duly certified taxes.' "The questions are as follows:

- "(1) Does the County Clerk have a duty to change the already extended levies giving credit to a new levy being passed by a recent vote of a school district if there is sufficient time to extend a new levy?
- "(2) If there is insufficient time to extend the new levy, is the County Clerk authorized to hire additional help to accomplish this prior to October 31?
- "(3) If none of the above may be allowed, is there a means whereby school buses may be provided for children in a reorganized school district where there are insufficient funds as a result of a tax levy being passed too late to be extended prior to October 31 of the current year?

"I would appreciate an answer at your earliest convenience in order that some means of transportation may be provided for the children in this reorganized school district."

You first inquire whether a county clerk is under a duty to change the tax book to show an increased tax rate voted by a school district and certified to the county clerk after he has once extended the taxes based upon an estimate of the board of directors supplied earlier. In other words, the taxes (based upon the board of director's estimates) were extended in the tax books prior to the time that the increased tax rate as voted was received by the county clerk.

Under the provisions of Section 165.077, RSMo 1949, boards of directors of each school district are required annually on or before the fifteenth day of May of each year to make an estimate of the anticipated needs and rate of levy required to produce sufficient income to operate the respective schools for the ensuing year.

The Supreme Court of Missouri, in construing this provision, has held that such an estimate after having been filed may be withdrawn and a new estimate and a new proposed tax levy substituted in lieu thereof, if such action be taken prior to the

original estimate having been acted upon. We direct your attention to the case of Lyons v. School District, 311 Mo. 349, from which we quote:

"* * *The estimate filed under the provisions of section 11142 may be withdrawn, and revised estimates may be substituted, if done before the first estimates were acted upon, and a valid levy may be made upon such revised estimates. State ex rel. v. Phipps, 148 Mo. 31, 49 S. W. 865."

We are of the opinion that the same rule would prevail in the instant case, and since the increased tax rate as directed by the voters of the district was not received by the county clerk until after the prior certification had been acted upon, he is under no duty to change the tax book to show the increased rate prior to the delivery of the book to the collector on or before October 31st. This, of course, would not deprive a district of the additional revenue since we believe that Section 137.300, RSMo 1949, provides for the procedure to be followed when such a situation exists. Said section provides:

"When for any cause there has been a failure to levy the state, county, school or other taxes, or any portion thereof, or to extend and authenticate the same for the use of the collector, or to make out and deliver to the collector a proper tax book for the collection of the same, as required by law, in any county for any year or years, the clerk of the county court of such county for the time being, when so required for such state taxes by the state tax commission, and for such county, school or other taxes by the county court, shall make a supplement tax book for such year or years. Such supplemental tax book shall be made upon the assessments for the year or years for which the taxes should have been levied. or where there has been a failure to assess the property, upon the assessment made as required by section 137.295, the taxes for each year to be in a separate book and to be levied for such state, county, school and other taxes, or portions of the same,



as had failed to be levied and collected at the proper time. In making said supplemental tax book, and in all subsequent proceedings thereon, the county court, clerk of the same and the collector shall be governed by the same law as is now or at the time then being or may be in force for the same duties, and shall receive the same compensation as is now or at the time then being or may be provided by law for similar duties; provided, that whenever such taxes or any portion of them shall have been paid upon defective or illegal tax books, the amounts so paid shall not be charged in such supplemental tax books, and when any such taxes have been paid in full upon any property, the same, with the description of said property and the name of the owner thereof, shall be omitted from such supplemental tax book."

In view of the above noted provisions, the residents of the school district will be liable for the payment of the tax voted, inasmuch as the county clerk of the county would be required to prepare a supplement tax book for the use of a county collector upon which the tax levy voted by the district would be properly and subsequently collected.

Having answered your first question in the negative, we do not deem it necessary to answer the following two questions.

CONCLUSION

Therefore it is the opinion of this office that a county clerk is under no duty to change taxes already extended on the tax book based upon the estimate of the board of directors to show an increased tax voted by the district and submitted to the county clerk subsequent to such extension, but that the increased tax would properly appear in a supplemental tax book prepared by the county clerk under the circumstances and in the method provided under Section 137.300, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General CORPORATIONS:

SECRETARY OF STATE:

Secretary of State may not refuse to issue certificate of incorporation because purpose of corporation might be used in violation of law; should refuse to issue certificate of incorporation to business corporation which uses word "benevolence" as part of corporate name.

December 10, 1953



Honorable Walter H. Toberman Secretary of State Jefferson City, Missouri

> Attention: Jos. W. Mosby Corporation Counsel

Dear Sir:

We have received your request for an opinion of this office on the following questions:

"1. May a corporation be organized under Chapter 351, R.S. Mo., 1949, to conduct the purposes as set out in Article Right of the enclosed proposed Articles of Incorporation of 'Burks United Order of Benevolence of America, Inc. 1?

"Upon request by the Corporation Department of the Secretary of State's Office the attorneys for the above named corporation have supplied the Corporation Department with a copy of a proposed prearranged burial plan agreement, a copy of which is herewith enclosed for your use in determining the true intent of the corporation as expressed in Article Eight of the proposed Articles of Incorporation of 'Burks United Order of Benevolent of America, Inc.'

"2. In view of the fact that Chapter 352, R.S. Mo., 1949, governs the formation of benevolent corporations and Section 351.110, R. S. Mo., 1949 provides that the corporate name shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized

Honorable Walter H. Toberman

under this chapter - may the word 'benevolence' as it appears in Article One of the enclosed Articles be used in the corporate name of the corporation organized under Chapter 351?

"The opinion of the Attorney General to question No. 1 is requested in view of the fact that the proposed purpose of the above named corporation may be an invasion upon the insurance laws of this state.

"The opinion to question No. 2 is requested in view of the fact that this department has been unable to discover legislative or judicial authorization of the use of such word in the name of a business corporation."

The purposes set out in Article Eight of the proposed Articles of Incorporation of "Burks United Order of Benevolence of America, Inc.," are as follows:

"Undertaking, embalming and directing of funerals of deceased persons; the building and maintenance of a funeral chapel, and the dealing in and the selling of coffins and caskets, and all such property and goods, wares, and merchandise as are incidental to and used in the business of undertaking and for morticians, and also the buying, owing holding selling, letting, leasing, and dealing in and with real and personal property of every kind and nature and also the owing and operating of motor vehicles and such other modes or vehicles of conveyance for hire which motor vehicles or other conveyances now or maybe used in the ordinary course of the business of undertaking, embalming and funeral directing, and the selling, renting, letting, leasing of funeral motor vehicles of any kind or make for hire to other morticians, undertaking, embalmers, or other such person or persons who may have or need the use of funeral vehicles, and also entering into pre-arranged burial contracts for deceased persons, provided said contracts are not violative of any of the state insurance law or laws or any law or laws of this state and country; to give all possible moral and material aid to persons holding

policies under the said pre-arranged burial plan; to dispense aid and provide for the mutual assistance of members of the pre-arranged burial plan; to aid in the improvement of health conditions and the ownership of better homes among its policy holder and members."

The enclosed contract provides for the purchase from the corporation of articles and services in connection with funerals. The contract also provides for payment of a sum specified therein in weekly installments. We are enclosing herewith copy of an opinion of this office dated June 7, 1949, addressed to Honorable William Lee Dodd, Prosecuting Attorney of Ripley County. In that opinion this office had under consideration a contract quite similar to that which this corporation proposes to issue. It was concluded that such contract was not illegal on its face although it might be so employed as to be an insurance contract issued without compliance with insurance laws.

Such being the nature of the contract proposed to be issued by this corporation, we feel that the Secretary of State would not be justified in refusing to issue a certificate of incorporation because of the possibility of abuse of a power which it is proposed to confer upon the corporation. The rule regarding the duty of the Secretary of State in such regard is stated in 18 C.J.S., Corporations, Section 59, page 443, as follows:

> "Under some statutes, application must be made to the governor, secretary of state, or other officer for approval by him of the articles, certificate, or charter, or which provide for the filing of the articles. certificate, or charter with the secretary of state or other officer, and expressly or impliedly permit him to refuse to file the same if it is not in proper form or does not come within the statute. Under such a statute, the secretary of state or other officer, although generally a ministerial officer, is clothed with a quasi-judicial judgment, and he may and should refuse to approve articles or a certificate or charter if it is not in proper form and not in accordance with the statutory requirements; if it is for a purpose which is unauthorized by the statute or contains unauthorized provisions; if it is for an unlawful purpose

or contains unlawful provisions; or where it plainly appears from the charter itself that the functions of the proposed corporation are impossible of performance. however, the proposed articles, certificate. or charter is in proper form and is for an authorized and lawful purpose, he generally is bound to approve the same, although there is an apprehension that applicants contemplate doing something in violation of the law, or may perform acts ultra vires. such a case his duties are purely ministerial. and he cannot go outside of the application and proposed charter and determine disputed questions of fact on the evidence, but such questions must be left for the courts after the charter has been granted. * * * (Emphasis ours.)

Under Section 351.060, RSMo 1949, the Secretary of State is required to issue a certificate of incorporation if he "finds that the articles of association conform to law." We do not believe that this would authorize his refusal to approve articles of incorporation on the grounds that powers conferred therein might be abused when such power is not on its face contrary law.

As for your second question, Section 351.110(2), RSMo 1949, provides:

"The corporate name

* * * * *

"(2) Shall not contain any word or phrase which indicates or implies that it is organized for any purpose other than a purpose for which corporations may be organized under this chapter:

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Section 351.020, RSMo 1949, provides:

"Corporations for profit except banking insurance, railroad corporations, building and loan associations, saving banks and safe deposit companies, credit unions, mortgage loan companies, union stations.

Honorable Walter H. Toberman

trust companies and exposition companies may be organized under this chapter for any lawful purpose or purposes."

Chapter 352, RSMo 1949, provides for the organization of benevolent associations or corporations. Section 352,010, RSMo 1949, provides:

"Any number of persons not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation. Such articles of agreement may be organic regulations. or a constitution, or other form of association, and any corporate name, not already assumed by another corporation, may be chosen as the title of the corporation; provided, always, that the purpose and scope of the association be clearly and fully set forth."

Section 352.050, RSMo 1949, provides:

"No association, society or company formed for manufacturing, agricultural or business purposes of any kind, or for pecuniary profit in any form, nor any corporation having a capital stock divided into shares, shall be incorporated under this chapter; provided, that any company formed to erect a building for the exclusive use of a society within the purview of this article, without pecuniary consideration from such society, may become a body corporate under this chapter notwithstanding it has a capital stock in shares, and may receive subscriptions to such stock, to be paid in real estate, in money, property or services rendered to such company."

Under these statutes a wholly different method of organization and operation of profit and not for profit corporations is prescribed. Section 351.020, supra, deals with corporations organized for profit. The corporation here involved is proposed

to be organized under Chapter 351, RSMo 1949, dealing with corporations organized for profit. However, the use of the word "benevolence" in its corporate name definitely connotes an organization for nonprofit purposes. The term is defined in 10 C.J.S., page 341, as follows:

"BENEVOLENCE. According to the etymology and original usage, the word means generally the wishing or willing well to others. The term has been specifically defined as meaning the desire to alleviate suffering or promote happiness; the disposition to promote the moral well-being of man and so increase his happiness; the disposition to seek the wellbeing or comfort of others; kindliness of heart; love to mankind; moral good will to all sentient beings; also, as any act of kindness; the doing of a kind or helpful action toward another, under no obligation except an ethical one; well doing. While sometimes synonymous with 'charity' it covers more ground than charity, * * * *

In view of the meaning of the term "benevolence," we are of the opinion that Section 351.110(2), supra, prohibits the use of such word as a part of the name of a corporation organized for profit under Chapter 351, RSMo 1949. The possibility of misleading the public by the use of such word by a business corporation is obvious, and it is our opinion that the prevention of such misleading effect is the purpose of Section 351.110.

"Statutory regulations as to the name which may be adopted by a corporation must be observed and on failure to comply with such regulations a certificate of incorporation of the filing thereof may and should be refused." 18 C.J.S., Corporations, Section 167, page 563. See State ex rel. Hutchinson v. McGrath, 92 Mo. 355, 5 S.W. 29.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The Secretary of State cannot refuse to issue a certificate of incorporation to a corporation which proposes to engage in the sale of prearranged funerals, it not appearing on the face of said articles of incorporation or the contract which the

Honorable Walter H. Toberman

corporation proposes to issue that said corporation will operate in such a manner as will be in violation of the laws of this state; and

2. The Secretary of State should refuse to issue a certificate of incorporation under the general and business corporation act (Chapter 351, RSMo 1949) to a corporation organized for profit which has the word "benevolence" as part of its corporate name.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW: ml Enc. COURTS:
DISTRICTS:
MAGISTRATE:
STATUTES:

Counties having more than one magistrate judge are to be divided into districts as equal in population as may be determined by the body authorized to make such division; but that the discretion of such body is limited, and subject

to review by the Courts. The division of Jackson County into magistrate districts, the smallest district having a population of 49,105, and the largest district having a population of 99,476 would be so grossly unequal inpopulation as to constitute an abuse of discretion of the body making such division. That portion of Section 482.040, RSMo 1949, requiring redistricting of county into magistrate districts to be done within sixty days after order of the Circuit Court is directory.



December 31, 1953

Honorable Wm. E. Tipton Attorney, Board of Election Commissioners County Courthouse Kansas City 6, Missouri

Dear Sir:

By letter of December 5, 1953, you requested an official opinion of this department as follows:

"Pursuant to our telephone conversation, I am requesting a formal opinion on behalf of the Kansas City Board of Election Commissioners concerning the necessity for redistricting the magistrate districts of Jackson County, Missouri. Pursuant to a court order made by the Honorable John R. James in the Circuit Court in Independence, Missouri on October 10, 1953, an additional magistrate district was created for Jackson County.

"At the present time, there are six magistrate districts; and the appointment of an additional magistrate will increase the number to seven districts.

"Under the provisions of Section 482.010, RSMo. 1949, the Kansas City Election Board and the Jackson County Election Board met in a joint session for the purpose of redistricting the Jackson County magistrate districts. Also

present at this meeting were the magistrates and their constables. It seemed to be the desire of the two Boards, the magistrates and constables that the districts be left the same within Kansas City and that the rest of Jackson County should be divided into two districts. The population in the magistrate districts, one to six inclusive, is as follows: (1) 79,330; (2) 88,590; (3) 99,476; (4) 87,961; (5) 87,468; the preceding districts being within the city limits of Kansas City; and (6) 98,210 being the remainder of Jackson County.

"We would like to know if, under the provisions of the above-quoted section, we would be able to divide the county into magistrate districts as suggested above; or whether we must divide the county into seven districts of equal population.

"The Section 482.010 also provides that this redistricting must be done within 60 days after the order of the court, and we would like to know if it would be possible to delay this for a period of time, taking into consideration that the Boards have already met and are presently working on the problem."

Article V, Section 18, Constitution of Missouri, 1945, provides for the establishment of magistrate courts and provides for increase in number of magistrates in any particular county, by order of the circuit court, as follows:

"Magistrate courts--probate judges--number of magistrates--salaries.--There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magis-trates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction

the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law. (Emphasis ours).

Article V, Section 19, Constitution of Missouri, 1945, provides for division of counties having more than one magistrate into districts:

"Magistrate districts -- jurisdiction of district magistrates -- organized magistrate courts. -- After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. Each of such magistrates shall have jurisdiction coextensive with the county, and the magistrates may organize into a court or courts with divisions." (Emphasis ours).

Section 18 of Article V is implemented by legislative enactment of Section 482.010(3) as follows:

"According to the needs of justice, the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed.

by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

Section 19, Article V, has been implemented by legislative enactment of Section 482.040(3) as follows:

"When the number of magistrates in any county has been increased or decreased by order of the circuit court as provided by law, the board or boards of election commissioners, or if none, the county court, shall within sixty days thereafter redistrict said county into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected. Such districts may be altered after each United States decennial census as the administration of justice requires." (Emphasis ours).

Jackson County is to be divided into seven magistrate districts. Both the Constitution and statutes require such magistrate districts be of compact and contiguous territory, as nearly equal in population as may be. It is proposed to divide Jackson County into seven districts with the following respective population in each district:

Number one, 79,330.
Number two, 88,590.
Number three, 99,476.
Number four, 87,961.
Number five, 87,468.
Districts 6 and 7 having a combined population of 98,210.

If we assume an equal division of population between Districts 6 and 7, each will have a population of 49,105. The question arises: Are these districts as near equal in population as may be. If all the districts were of precisely equal population, the total population of 541,035 divided by seven, equals approximately 77,291 people for each district. It is of course impractical to make such a precisely equal distribution of population, and such precise equality of distribution was not contemplated by the Constitution and statutes. An examination of the comparative

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populations of the proposed districts discloses that District Number 3 will contain a population greater than the combined population of both Districts 6 and 7, and that assuming Districts 6 and 7 to be equal in population, one, or either of such districts, will contain only 64% of the number of people that would be in each district, if there were a precisely equal distribution of the population of Jackson County. The Supreme Court of Missouri in State ex rel. Barrett v. Hitchcock, 241 Mo. 433,457, 146 S.W. 40, declares redistricting to be a legislative matter:

"That the districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority, cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; * * *."

The ability and authority of a legislative body to exercise its own judgment and discretion constitutes the essence, and distinctive character of a legislative body. Whether such legislative discretion can be reviewed by the Courts was decided in the Hitchcock Case, supra. In that case there was an attempt to mandamus the Circuit Judges of St. Louis to compel them to redistrict St. Louis into six senatorial districts of compact and contiguous territory, and of population as nearly equal as may be. The Court denied the Writ on two grounds, one, that the Judges were acting in a legislative capacity and thus were not subject to mandamus, and further, that a previous apportionment of the entire state into senatorial districts, was unconstitutional, null and void. Woodson, J., in discussing the discretion of any particular legislative body in redistricting stated l.c. 474:

"* * " I use the words 'limited discretion,'
for the reason that the Constitution in
express terms limits the discretion, by
providing that the Legislature shall apportion
the State into districts, but in doing so it
shall make each district as nearly equal in
population as may be, and that when a district
is to be composed of more than two counties,
they shall be as compact as may be convenient.

"The words italicized show conclusively that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best. Had the framers of the Constitution intended that the Legislature should apportion the State into districts according to its own free and untrammeled will, then they would not have used the words of restriction before mentioned. This is too plain for argument. Therefore, having seen that the authority and discretion of the Legislature is thus limited, it would be error to treat the proposition upon the theory that the Legislature had unlimited discretion in the matter; * * * * (Emphasis theirs).

In the Hitchcock Case the largest senatorial district proposed was to contain a population of 116,387, while the smallest senatorial district proposed was to contain 63,853 population, leaving a difference of some 52,534 in population between the largest and smallest districts. It should be noticed that these figures are roughly comparable to the population of the largest and smallest magistrate districts proposed. The Court invalidated the entire act of apportionment in the Hitchcock Case saying, 1.c. 501:

"This one defect is sufficient to invalidate the entire act of apportionment; but we are not called upon to rest this opinion upon a single defect, for the record discloses the fact that the Legislature, as previously pointed out, grossly abused its discretion in the same manner as to several other districts, especially regarding the variation between the population of the largest and the smallest districts; also in failing to observe the constitutional requirements regarding the compactness of the districts." (Emphasis ours).

Thus it would appear by analogy with the Hitchcock Case, that it would be an abuse of discretion to have such a great variance in population of the magistrate districts.

Your second question inquires whether the redistricting must be done within sixty days after the order of the Court, as required by Section 482.040. In State ex rel. v. Holmes, 253 S.W. (2d) 402, the Supreme Court of Missouri in declaring that the time limitations in the School District Reorganization Act were directory, instead of mandatory stated, 1.c. 404:

"In determining whether either of the provisions of the schedule with which each relator failed to comply is mandatory or directory, the "'"prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." 25 R.C.L. Sec. 14 pp. 766, 767. State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W. 2d 104, 107.

'As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them will be construed as directory rather than mandatory, especially where such regulation pertains to uniformity, order and convenience, and neither public nor private rights will be injured or impaired thereby. If the statute is negative in form, or if nothing is stated regarding the consequence or effect of non-compliance, the indication is all the stronger that it should not be considered mandatory.' Crawford's Statutory Construction, 1st Ed., 1940, Sec. 266, pp. 529, 530. See also State ex inf. Mc-Allister ex rel. Lincoln v. Bird, 295 Mo. 344, 351-352, 244 S.W. 938, 939.

'For the reason that individuals or the public should not be made to suffer for the dereliction of public officers, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.' 3 Sutherland, Statutory Construction,

3rd Ed., 1943, p. 102. See also St. Louis County Court v. Sparks, 10 Mo. 117; State ex inf. Gentry v. Lamar, 316 Mo. 721, 725, 291 S.W. 457, 458; State ex rel. Acom v. Hamlet, Mo. Sup. 250 S.W. 2d 495."

As the sixty-day time limitation does not relate to the essence of the redistricting, and nothing is stated regarding the consequence, or effect, of non-compliance, it is our opinion that the portion of Section 482.040 requiring redistricting within sixty days after the order of the Circuit Court is directory, rather than mandatory.

CONCLUSION

It is therefore the opinion of this office that, counties having more than one magistrate judge are to be divided into districts as equal in population as may be determined by the body authorized to make such division, but that the discretion of such body is limited, and subject to review by the Courts. It is the opinion of this office that the division of Jackson County into magistrate districts, the smallest district having a population of 49,105, and the largest county having a population of 99,476 would be such gross inequality of distribution of population as to constitute an abuse of discretion of the body(ies) making such division. That portion of Section 482.040, RSMo 1949, requiring redistricting of a county into magistrate districts to be done within sixty days after order of the Circuit Court is directory.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG: vlw

CHAUFFEUR'S AND
OPERATOR'S LICENSE:
PUBLIC RECORDS:

Records of conviction kept by Director of Revenue, of accident reports and Court records of convictions are public records and thus open to inspection by the public.



April 27, 1953

Honorable H. J. Turnbull Supervisor Drivers' License Division Department of Revenue Jefferson City, Missouri

Dear Mr. Turnbull:

In your letter of April 14, 1953, you requested an official opinion of this office as follows:

"I am enclosing a copy of a letter received in this office from the Retail Credit Company which is self-explanatory.

"I would like an official opinion as to whether the records of conviction in our Operator's and Chauffeur's license files are public information and if we would be obligated to give the Retail Credit Company the information they are asking for."

The letter to which you refer is from the Retail Credit Company whose home office is in Atlanta, Georgia. In that letter they refer to themselves as: "an international reporting organization reporting principally to insurance companies" and ask whether they have the right to inspect files kept in your office.

Generally speaking, the public has a common law right to inspect all public records. This common law right is expressed by the Supreme Court of Missouri in State vs. Henderson, 169 S.W. (2d) 389, 350 Mo. 968, where the Court said, 1.c. 392:

"In all instances where, by law or regulation, a document is required to be filed in a public office, it

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is a public record and the public has a right to inspect it. 53 Corpus Juris, Section 1, Pages 604 and 605; Clement v. Graham, 78 Vt. 290, 63 A. 146. Ann. Cas. 1913E, 1208; Robison v. Fishback, 175 Ind. 132, 93 N.E. 666, L.R.A. 1917B, 1179, Ann. Cas. 1913B, 1271; State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W. 2d 28."

However, this common law right of inspection is limited to some extent. The right of the public is not such that they may interfere with the operation of the office where the public records are kept. This limitation is expressed by the Supreme Court of Missouri in State ex rel. Eggers vs. Brown, 134 S.W. (2d) 28, l.c. 32, as follows:

"* * * The special commissioner did not hold, and neither do we, that relator's right to inspect and copy the records is an unlimited right. It is subject to such reasonable regulations as respondents may impose to prevent undue interference with the work of the employees of the office, and to prevent undue interference with members of the public being served at the office."

Having determined that those records which are classed as "public records" are subject to inspection by the general public, except that such inspection may be limited to reasonable times, and as such will not interfere with the operation of the office, we must determine whether the records about which you inquire are, in fact, "public records".

76 C.J.S., Records, Paragraph 1, Page 112, defines "public records" in the following manner:

"* * * All records which the law requires public officers to keep, as such officers, are public records; and whenever a written record of

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the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, and is kept by him as such, it is a public record. * * *."

The files, or records, about which you inquire, are the records of convictions received in connection with violations of motor vehicle laws. The Director of Revenue is required by Section 302.120, RSMo 1949, to keep such records:

"302.120. Applications for license, accident reports and court convictions to be filed, how.--l. The director of revenue shall file every application for a license received by him and shall maintain suitable indices containing, in alphabetical order:

- "(1) All applications denied and on each thereof note the reasons for such denial:
- "(2) All applications granted; and
- "(3) The name of every licensee whose license has been suspended or revoked by the director of revenue and after each such name note the reasons for such action.
- "2. The director of revenue shall also file all accident reports and abstracts of court records of convictions received by him under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the director upon any application for renewal of license and at other suitable times."

Since the Director of Revenue is specifically required by statute to maintain records of convictions of

Honorable H.J. Turnbull:

motor vehicle laws, these records meet the test set forth in Corpus Juris Secundum quoted above, i.e., they are records which a public officer is required to keep.

The Legislature may, of course, limit the right of inspection of any public records, but has not so closed subject records from public view; nor is the matter contained in such files such that should be kept confidential on grounds of public policy, since records of past convictions for violations of criminal laws are already matters of public record in the Courts in which they were obtained.

In your letter you inquire: "if we would be obligated to give the Retail Credit Company the information they are asking for". In the absence of statutory mandate you are not required to give the public any records in the sense that you must furnish copies to them. You are only required to keep such records reasonably accessible to public inspection.

CONCLUSION

Therefore, it is the opinion of this office that the records of convictions of violations of Motor Vehicle Laws which the Director of Revenue is required by Section 302.120, RSMo 1949, to keep, are public records, and thus open to public inspection.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly.

JOHN M. DALTON Attorney General

PMCG:irk

SCHOOLS:

Common school districts may not pay out of school funds for lunches for pupils who are residents of such common school district who are attending a town school.



November 25, 1953

Honorable C. P. Turley Assistant Prosecuting Attorney Wayne County Greenville, Missouri

Dear Mr. Turley:

This will be our reply to your letter requesting the opinion of this office whether a common school district which is sending and transporting its pupils to a town school district operating a lunch program, is authorized to pay for the lunches of its pupils from the incidental funds of such common school district. Your letter requesting an opinion reads as follows:

"The County Superintendent of Schools here has asked that I submit the following question to you for formal opinion:

"District A is a town school with a school lunch program. District B is a common school and is sending and transporting its pupils to the school of District A. District B. wants to know if it is allowed to pay for the lunches of its pupils from the incidental funds of such Dist. B.

"I shall appreciate your early opinion on this, as a former and quite earlier letter on this seems to have been lost."

The authority of the Board of Directors of a school district, applying to all school districts generally in Missouri, to provide lunches for children attending the schools is provided for in Section 165.103, V.A.M.S. 1949,

Honorable C. P. Turley:

of the School Laws of this State. That section in that regard reads, in part, as follows:

"The board of directors, or board of education, shall have the power, in its discretion, to install in the school buildings under its care the necessary apparatus and appliances, and to purchase the necessary food to enable it to provide and sell lunches to children attending the schools; * * *."

We do not find any authority other than as is provided in said Section 165.103, supra, for a Board of School Directors to provide and sell school lunches to such school children at any place other than "in the school buildings under its care."

The question of the extent of the powers of a Board of Directors of a school district was recently construed and defined by our St. Louis Court of Appeals in School District #63, Cape Girardeau vs. Frye, 225 S.W. (2d) 484. The case was a suit by a city school district against a resident of a common school district for tuition because of the attendance at the city district school of defendant's three minor children, residents of the common school district. The defendant resisted the suit on several grounds, one, that the County Superintendent, with the knowledge of the School Board, solicited him to send his children to the city school, advising defendant that there would be no charges for tuition. The Court disallowed this and other defenses and judgment went against him. The defendant appealed the case to the St. Louis Court of Appeals. That Court, on the question of the alleged agreement of the School Board to admit defendant's children without payment of tuition, holding that this could not be done, and defining the powers of school district boards, l.c. 488, said:

> "* * A board of directors is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication

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from the powers that are conferred. State v. Kessler, 136 Mo. App. 236, 240, 117 S.W. 85; Consolidated School Dist. No. 6 v. Shawhan, supra. We have already pointed out that Section 10340 empowers the board to admit pupils not resident within the district and to prescribe the tuition fee which such pupils must pay. The section then goes on to provide that certain classes of children may attend without the payment of tuition; and by thus limiting the privilege to certain definitely specified classes, it necessarily excludes the idea that other nonresident children are entitled to the privilege. * * * *

In the absence of an express statute authorizing a Board of Directors of a school district to provide lunches for pupils at any place other than as provided in the terms of said Section 165.103 under the limited powers of school district boards, as defined in the Frye case, supra, the Board of Directors of the common school district involved in this question would have no authority to provide for the payment for school lunches for the students of said common school district who are transported to and in attendance of the city district school.

We find no statute authorizing the payment by common school districts for lunches for pupils attending approved high schools out of the incidental fund or out of any other fund or in any other way except as is provided in said Section 165.103, supra.

Before a common school district sending pupils to a city district under the authority and for the reasons provided in the statutes hereinabove noted could lawfully pay for lunches for such pupils attending a city school there would have to be in force and effect statutes expressly authorizing the expenditure of the funds of the district for that purpose.

CONCLUSION

Considering the facts recited in your letter and the statute hereinabove cited and quoted applicable to your

Honorable C. P. Turley:

question it is, therefore, the opinion of this office that, in the absence of an express statute authorizing it to do so, a common school district which is sending and transporting its pupils to a town school district with a school lunch program in effect cannot pay from the incidental fund or any other fund from such common school's school funds for the lunches of the resident pupils from such common school district who are attending such town school.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

TERM NOT VIOLATIVE OF CONSTI-TUTION: WHEN:

OFFICERS: CONSTITUTIONAL LAW: When county changes classification from INCREASED COMPENSATION DURING 4 to 3 on Jan. 1, 1953, incumbent officers to receive compensation allowed by statute to officers of 3rd class counties. Greater compensation not an increase during officer's term in violation of Art. VII, Sec. 13, of Constitution.

January 29, 1953



Honorable Curt M. Vogel Prosecuting Attorney of Perry County Perryville, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which has been greatly clarified by the later letter. The inquiry has been restated in said letter, and reads in part as follows:

> "When Perry County became a third class county on January 1, 1953, are the salaries and other compensation of the following officers based on the laws applicable to fourth class counties or third class counties;

- "(1) County Clerk, Circuit Clerk, Treasurer, Collector, and Presiding Judge who took office January 1, 1951.
- "(2) Assessor who began his term 1 August 1949.
- "(3) County School Superintendent who began her term on July 1, 1951.
- "(4) All other county officers (except Probate and Magistrate Judge) who took office January 1, 1953.

"We request your opinion as to whether all these officers will receive compensation as any other third class county officers or whether the officers who took office prior to January 1, 1953, are prevented from receiving any increase in compensation because of the provisions of Article VII, Section 13, of the Constitution of Missouri, 1945."

The constitutional provision referred to above prohibits an increase in compensation during an officer's term, and reads as follows:

"The compensation of state, county, and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Statutes provide the amount of compensation that shall be paid to officers of each of the four classes of counties in Missouri, and while we find it unnecessary to our discussion herein to name the different officers and the amount of compensation allowed to each in third and fourth class counties, it may be stated generally that such compensation varies according to the class of county and its population. The larger the population and the lower the classification the greater will be the amount of each officer's compensation.

In the instant case when Perry County became a third class county on January 1, 1953, the officers whose terms began on that date would unquestionably be entitled to the compensation allowed by law to officers of a third class county. However, with reference to the more important part of the inquiry, a more difficult question is asked, namely, as to whether the incumbent officers of Perry County, whose terms began prior to January 1, 1953, will be entitled to the compensation allowed to officers of third class counties, and whether this greater compensation, if paid to such officers, would amount to an increase in compensation during their respective terms, would be in violation of above quoted constitutional provision.

This question cannot be properly answered without a consideration as to when the terms of such officers began with reference to the effective dates of the statutes regulating the compensation of officers of third class counties. In the event such laws were in existence in their present forms prior to the date when such officer's terms began, and no change allowing greater compensation to be paid has been effected since the beginning of the terms of the Perry County officers, then it would appear that the mere passing from class four to class three would

be immaterial, and that said officers are entitled to the compensation allowed by law to officers of third class counties.

In this connection we call attention to the case of State ex rel. Moss v. Hamilton, 303 Mo. 313, in which a similar question relating to an increase in compensation of a circuit clerk was raised. At. 1.c. 313, the court said:

"Relator's term began on January 1, 1919, and ended on December 31, 1922. No law was passed between those dates which increased his salary. The whole difficulty, if there be difficulty in the case, arises out of the fact that clerks of circuit courts are not elected at Presidential elections, but at what we call the off-year elections, whilst the Act of 1915 fixed the method of determining the salary by Presidential election dates amd data. Were our circuit clerks elected in Presidential years, there would not be before us the peculiar and rather difficult question we have in the instant case. This Act of 1915 was in effect when relator was elected. Under it relator's salary was fixed for his whole term, but not in named dollars and cents for the whole term. The effect of this Act of 1915, was to say to relator, Your salary shall be determined upon the Presidential vote of 1916, until there is another Presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the Presidential vote. The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was fixed, and was fixed before his election, although the change of class might give him a different amount. So too if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a True it was higher, but it was definitely salary. fixed at the date of his election. If the Act of 1915 had said that the Circuit Clerk of Crawford County elected in 1916 shall receive \$1600 per year for the first two years, and \$1950 per year for the last two years of the term, there would be no question. Sec. 8 of Article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the

Act of 1915 as it now stands is no nearer a violation of Section 8 of Article 14 of the Constitution, than the supposed law. The law-makers knew the Presidential elections years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous Presidential vote. The salary of each class was fixed, and, as said, no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not de-prive the holder of the office of the salary fixed by law, and fixed, too, at a time long prior to relator's election. In our judgment Section 8 of Article 14 of the Constitution does not preclude a recovery by relator. This because the salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note. * * *

"The Act of 1915 (Sec. 10995, R.S. 1919) was amended by Act of April 1, 1921, (Laws 1921, p. 607), but as learned counsel for respondents does not treat this amendment as affecting the case, we shall not further note it. We mention it here, because we made reference to a subsequent amendment of the original act in a previous point. It was this amendment in 1921 to which we referred."

(Underscoring ours.)

From a consideration of the statutes concerning the election, compensation, and time fixed for the beginning of the terms of each of the officers of third class counties it appears that all such statutory provisions were in existence prior to the beginning of the terms of the incumbent officers of Perry County mentioned in the opinion request, and that there has been no change in said statutes which attempts to increase the compensation of officers of third class counties during their terms of office.

In the absence of such statutory changes, and in view of the holding in Moss v. Hamilton, it is our thought that the officers of Perry County, whose terms began prior to January 1, 1953, when the class of the county passed from four to three, would be entitled to the compensation allowed by statute to officers of class three counties, and that such increased compensation would not be an increase during the terms of such officers in violation of Article VII, Section 13, of the Missouri Constitution of 1945.

Honorable Curt M. Vogel

CONCLUSION

It is therefore the opinion of this department that when the classification of a county changes from four to three on January 1, 1953, the incumbent officers are entitled to the compensation allowed by the statute to officers of third class counties and that such greater compensation is not an increase in compensation during the terms of such officers in violation of Article VII, Section 13 of the Missouri Constitution of 1945.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PNC:hr

CAPE GIRARDEAU COURT OF COMMON PLEAS: PROBATE JUDGE OF CAPE GIRARDEAU COUNTY: The judge of the Cape Girardeau Court of Common Pleas is required to account for and deposit the $2\frac{1}{2}\%$ of the state inheritance tax as an accountable fee.

JOHN M. DALTON

February 5, 1953

FILED 92

J. C. JOHNSEN

Mr. Raymond H. Vogel Prosecuting Attorney Cape Girardeau County Cape Girardeau, Missouri

Dear Sir:

Your recent request for an official opinion has been received by this department. You thus state your opinion request:

"I wish an opinion from your office on the following matter.

"Article V, Section 24 of the 1945 Constitution provides as follows:

"No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fees of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

"Section 145.140 Revised Statutes 1949, provides that 25% of the Inheritance Tax shall be paid to the probate judge for fee, which fees shall be deposited by the probate judge as provided by law. Section 481.130 provides that the probate judge shall not receive any compensation for any public service other than his compensation as such judge. Section 483.580 refers to the 25% of the Inheritance Tax in the list of fees and provides

that the fees shall be turned over to the State Director of Revenue or the County Treasurer, as the case may be.

"Section 480.020 provides, among other things, that the Cape Girardeau Court of Common Pleas has concurrent original jurisdiction with the Probate Court of Cape Girardeau County. Section 480.120 provides for the salary of the judge of the Cape Girardeau Court of Common Pleas. Is the judge of the Cape Girardeau Court of Common Pleas required to account for and deposit the 22% of the State Inheritance Tax as an accountable fee?"

We first direct your attention to Section 480.020, RSMo. 1949, which section reads:

"The said court of common pleas shall be held within the city of Cape Girardeau, and shall have power and jurisdiction within the city, township and county of Cape Girardeau, as follows:

- "(1) Concurrent original jurisdiction in all civil actions at law or in equity with the circuit court of said county, and concurrent jurisdiction with the circuit court of said county in the treatment, correction and confinement of delinquent minors;
- "(2) A concurrent superintending control with said circuit court over magistrates in all civil cases in said county of Cape Girardeau, and exclusive jurisdiction in appeals in all cases tried before the recorder or police judge of the city of Cape Girardeau and in all civil cases tried before magistrates within said city and township of Cape Girardeau;
- "(3) Concurrent jurisdiction with said circuit court in appeals in all civil cases tried before magistrates in all townships throughout said county other than said township of Cape Girardeau;

Mr. Raymond H. Vogel

"(4) Concurrent original jurisdiction with the probate court of Cape Girardeau county."

From the above, and from subsequent sections, it would appear that the judge of the Cape Girardeau Court of Common Pleas is a combination circuit and probate judge with all of the powers of each, with certain exceptions in regard to certain appellate cases, and with certain exclusive powers in regard to certain other types of appellate cases.

Paragraph 1 of the above section gives him "concurrent original jurisdiction with the probate court of Cape Girardeau County."

In doing this the statute, we believe, places the judge of the Cape Girardeau Court of Common Pleas, in this particular, upon the same basis as the probate judge of Cape Girardeau County. We believe that in consequence the judge of the Cape Girardeau Court of Common Pleas would be subject to the laws regulating the probate judge of Cape Girardeau County, one of which laws, as you point out, is Section 145.140, RSMo 1949, which section provides that two and one-half per cent of the inheritance tax shall be paid to the probate judge for fee, which fee shall be deposited by the probate judge as provided by law. Section 483.580, RSMo 1949, provides that probate judges shall, at the end of each month, deposit this fee with the Director of Revenue or the county treasurer, depending on the population of the county.

We believe that the restriction thus applied to the probate judge by the above section would be equally applicable to the judge of the Cape Girardeau Court of Common Pleas since this latter judge is given the same powers as the probate judge but no more power, and that since the probate judge is required by Section 145.140, supra, to deposit the two and one-half per cent of the inheritance tax as provided by law that the same requirement would apply to the judge of the Cape Girardeau Court of Common Pleas, and that the latter judge is required to account for the two and one-half per cent as an accountable fee.

As strengthening this conclusion we refer you to Section 483.570, RSMo 1949, which reads:

"The fees of the clerk of the Cape Girardeau court of common pleas, shall be the same as, and shall be governed Mr. Raymond H. Vogel

by the law regulating, the fees of the clerks of the circuit court and probate courts, and magistrates, respectively."

We believe that the same conclusion could be reached by another approach. Section 24 of Article V of the Missouri Constitution, which you quote in part, reads in full as follows:

"All judges shall receive as salary the total amount of their present compensation until otherwise provided by law, but no judge's salary shall be diminished during his term of office. Until the end of their present terms probate judges shall continue to receive compensation and clerk hire as now provided by law. salaries of magistrates shall be fixed by law. No judge or magistrate shall receive any other or additional compensation for any public service, or practice law or do law business, except probate judges during their present terms. Judges may receive reasonable traveling and other expenses allowed by law. The fee of all courts, judges and magistrates shall be paid monthly into the state treasury or to the county paying their salaries."

Since the judge of the Cape Girardeau Court of Common Pleas certainly is a "judge" as that word is used above, and since if he did not account for the two and one-half per cent in question he would be receiving "additional compensation for a public service," for him not to account for the two and one-half per cent would clearly be in violation of Section 24, Article V, supra.

Finally, looking at the whole law on this matter and taking into consideration the undoubted intention of the Legislature, we cannot believe that the Legislature, which placed the judge of the Cape Girardeau Court of Common Pleas on a similar basis as the probate judge of Cape Girardeau County, intended to make an exception in this matter of two and one-half per cent of the inheritance tax. We believe further that if such had been the intention of the Legislature that it would have so indicated, which it did not do.

CONCLUSION

It is the conclusion of this department that the judge of the Cape Girardeau Court of Common Pleas is required to account for and deposit the two and one-half per cent of the state inheritance tax as an accountable fee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General MOTOR VEHICLES: MUNICIPALITIES: POLICE: Section 301.260, RSMo 1949, providing display on side of motor vehicles, name of municipality, county or political subdivision, department thereof, and distinguishing number, does not apply to ambulances, patrol wagons and fire apparatus owned and used by a municipality.



March 6, 1953

Honorable Raymond H. Vogel Prosecuting Attorney Cape Girardeau County Farmers & Merchants Bank Building Cape Girardeau, Missouri

Dear Mr. Vogel:

This is in reply to your recent request for an opinion of this office, which reads as follows:

"I desire your opinion with regard to the matter set out below.

"The Police Department of a third class city operates several four door automobiles as police and patrol vehicles. One of the cars has never been marked with letters on the sides or in any other way designating it as a police patrol car. For the past few weeks the police officers have placed on this unmarked police patrol car state license tags issued by other states such as Ohio, Michigan, etc., and have used such unmarked patrol car with foreign state plates in patroling the city streets. Occasionally, traffic violators have been stopped and summons issued by the officers while patroling the city streets in this unmarked patrol car, but the car is used for the prevention of other violations and crimes and the apprehension and arrest of criminals generally. However, the officers are in uniform and not in plain clothes while using the unmarked patrol car.

"The primary question is whether the above described use and operation of this motor

Honorable Raymond H. Vogel

vehicle, owned by a third class city, is unlawful and in violation of Sections 301.010 to 301.440, R.S.Mo. 1949, or whether it is exempt from the provisions of those sections as is apparently provided for in paragraph 2 of Section 301.260. If exempt, is such exemption from registration and display of number plates contingent on the displaying on the sides of such vehicles the name of the municipality and department thereof and a distinguishing number (as provided in the latter part of paragraph 2 of Section 301.260) or is the exemption absolute and complete without any restrictions as a patrol wagon as provided in the first line of paragraph 2 of Section 301.260.

"The secondary question is whether the police department of a third class city can properly and lawfully use out-of-state license plates as above described, within the city limits, even though such vehicle is not registered in that particular state and the license plate was not issued by that particular state to a third class city for the particular vehicle."

There have been few changes in this law since its initial enactment in Laws of Missouri, 1921, First Extra Session, page 76, Section 10. There is no change in the exemption of motor vehicles used as ambulances, patrol wagons and fire apparatus. That exemption still remains as it was in the former law "from all of the provisions of this article," in Laws of Missouri, 1941, page 446.

Although this above exemption clause appears in RSMo 1949, as "from all of the provisions of Sections 301.010 to 301.440," we do not believe authority to make such a change in the revision is granted by the legislature. We think that the true statute is contained in the laws of 1941, page 446.

Laws of 1941, page 446, Section 8374 in paragraph (b) is in pertinent part as follows:

Motor vehicles used as ambulances, patrol wagons and fire apparatus, owned by any municipality of this state, shall be exempt from all of the provisions of this article while being operated within the limits of such municipality, but the municipality may regulate the speed and use of such motor vehicles owned by them; and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates: Provided, however, that there shall be displayed on each side of such motor vehicle, in letters not less than 3 inches in height with a stroke of not less than 3/8 of an inch wide, the name of such municipality, county or political subdivision, the department thereof, and a distinguishing number. Provided, further, than /that/ when any motor vehicle is owned and operated exclusively by any school district and is used solely for transportation of school children, the commissioner shall assign to each of such motor vehicles two plates bearing the words 'School Bus, State of Missouri, Car No. (with the number inserted thereon), which plates shall be displayed on such motor vehicles when they are being used on the highways. No officer, or employee of the municipality, county or subdivision, or any other person shall operate such a motor vehicle unless the same is marked as herein provided, and no officer, employee or other person shall use such a motor vehicle for other than official purposes."

It will be noted that ambulances, patrol wagons and fire apparatus are exempted from "all of the provisions of this article," while being operated within the limits of the municipality, and there is the same provision that the municipality

may regulate the speed and use of such motor vehicles owned by them. It will then be noticed that there is a semicolon after the word "them" and the statute reads: "and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates:"

After the clause containing the above thought, it is provided, however, that the name that is to be placed on each side of such motor vehicle be the name of such municipality, county or political subdivision. The grammar used appears to refer to "other vehicles" and not to ambulances, patrol wagons and fire apparatus.

In regard to the use of a semicolon after a clause and its evident meaning, the United States Circuit Court of Appeals, 9th Circuit, in McLeon v. Nagle, 48 F. 2d 189, at 1.c. 191, said:

"Again, Ward's 'Sentence and Theme' (Scott, Foresman & Co., 1923), at page 331, says the semicolon 'shows that two sentences, each of which should stand alone, have been combined into one sentence'; and continues; 'A semicolon is used to show that what follows is grammatically independent, though closely related in thought.' (Italics our own.)

"From the point of view of strict grammatical construction, therefore, it is evident that, since the semicolon has been used to set off the various subdivisions of the section, the initial phrase, 'within five years after entry,' cannot be presumed to carry over into the subsequent clauses that are separated from the initial clause by a semicolon. The initial phrase, within five years after entry, is set off by a comma, a weaker punctuation mark than the semicolon. The function of that comma is to set off the phrase from the rest of the clause in which it appears, and not from the rest of the entire section. The semicolon effectually

isolates the opening clause and its dependent phrase from the other and subsequent clauses. These clauses have only one grammatical construction in common; they are joint subjects of the common predicate with which the entire section is brought to a close."

The court in State ex rel. vs. St. Louis, 174 Mo. 125, l.c. 145, in regard to grammatical construction of a statute, stated as follows:

"* * * * * * The particular intent expressed in a proviso or exception will control the general intent of the enactment. The proviso should be confined to what immediately precedes, unless a contrary intent clearly appears; and should be construed with the section with which it is connected. This rule is not, however, absolute, and if the context requires, the proviso may be construed as a limitation extending over more than what immediately precedes, or may amount to an independent enactment.' The cases cited in support or illustration of the text, are too numerous to be reviewed or analyzed here."

In accordance with the above it is indicated that the intention of the legislature still is of great effect in the construction of statutes even despite indications which are given by legislative punctuation and phrasing. Except for the condition that the municipality regulate the speed and use of ambulances, patrol wagons and fire apparatus, there is no other reason that appears, in this section, why these above three should be segregated from all other motor vehicles owned by municipalities, counties and political subdivisions of the state when one paragraph would have applied to them all. They are, however, segregated distinctly and apart from "all other" motor vehicles owned by municipalities, counties and other political subdivisions, and given a distinctive exemption. It appears that they are not to be taken in the same category as vehicles owned by municipalities, counties and other political subdivisions of the state. It is concluded that the regulations of the entire article do not apply to ambulances, patrol wagons and fire apparatus, with the exception of that part of this section which directs that the provisions do not apply, and permits the municipality to regulate their speed and use.

The question then that arises is, is an unmarked passenger motor vehicle a "patrol wagon" when used by police to patrol the streets. A relevant case to this matter is found in Edberg v. Johnson, 184 N.W. Rep. 12, 149 Minn. 395, 1.c. N.W. 13:

"Taking into consideration the objects sought to be attained by the statute, the general use of motorcycles in patrolling streets and highways when the statute was enacted, as well as at the present time, and the evident purpose of the Legislature to except from the operation of the statute vehicles employed as instrumentalities of municipal fire and police departments, we hold that motorcycles so employed come within the exceptions made by the statute."

Since we are of the opinion that that part of Chapter 301, RSMo 1949, requiring the licensing of motor vehicles, does not apply to a municipality, the answer to your second question, in part, is that the Motor Vehicle Registration Law is inapplicable, including Section 301.320, RSMo 1949, and it is not unlawful within the municipality for the Police Department to use out-of-state license plates.

CONCLUSION

It is, therefore, the opinion of this department that motor vehicles used as ambulances, patrol wagons and fire apparatus, owned by any municipality of this state, are not required to be marked with letters giving the name of the municipality, department and distinguishing number, and it is further the opinion of this department that the police department of a municipality of this state does not violate the law by the use of out-of-state license plates within the city limits of such municipality.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. James W. Faris.

Yours very truly,

JOHN M. DALTON Attorney General DESTRUCTION OF DOCUMENTS:

Can official records, documents, etc. of the State Treasurer, Commissioner of Finance and the Division of Insurance be destroyed after the sine die adjournment of the General Assembly where the statute authorizing the destruction provides for destruction "during each biennial session of the General Assembly."

JOHN M. DALTON



June 26, 1953

XXXXXXXX

J. C. Johnsen

Honorable Lester A. Vonderschmidt Speaker, House of Representatives Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of June 11, 1953, requesting an opinion of this office concerning the destruction of documents, which request is as follows:

"The House of Representatives adopted House Resolution No. 71 which provided for destruction of old records of the State Treasurer and the Senate adopted Senate Resolution No. 85 which was similar. The House members were appointed pursuant to the House Resolution and the Senate members were appointed pursuant to the Senate resolution. Your attention is called to Section 30.340 which provides that 'during each biennial session of the General Assembly ' the records may be destroyed.

"Senate Bill No. 369 of the 67th General Assembly repeals and re-enacts Section 361.120 and provides that 'during each biennial session of the General Assembly . . . ' the records may be destroyed. This bill does not carry an emergency clause but I believe it has been signed by the Governor, but it will not take effect until ninety days after May 31, 1953.

"Senate Bill No. 350 of the 67th General Assembly relates to the destruction of records of the Division of Insurance and it carries an emergency clause. It also provides that 'During each biennial session . . . ' the records may be destroyed.

"None of these committees have acted, and I am informed that it is urgent some of the records be destroyed because of the need for storage space. In view of the wording of the statute 'during each biennial session of the General Assembly . . . would it be possible for the committees to act now that the General Assembly is in adjournment?

"Mr. Joseph A. Bauer, Secretary of the Senate, suggests that the words 'biennial session' might mean the entire two year period rather than the period ending May 31, 1953. We would like to have your opinion as to whether under the statute the records may now be destroyed."

Section 30.340, RSMo. 1949, provides for the destruction of certain records, etc., in the office of the State Treasurer. This statute reads:

"During each biennial session of the general assembly, the state treasurer may, in the presence of a joint committee of the house of representatives and senate, destroy, by burning or by any other method satisfactory to said joint committee, such records, financial statements and such public documents which may be on file in the office of the state treasurer or his predecessor as custodian of such records and documents for a period of five years or longer and which are determined to be obsolete or of no further public use or value except such records and documents as may at the time be the subject of litigation or dispute. Said joint committee shall consist of four members of the house of representatives, to be appointed by the speaker of the house of representatives, and two members of the senate, to be appointed by the president pro tem of the senate."

Senate Bill #369 repealed and reenacted Section 361.120 RSMo. 1949, pertaining to the office of the Commissioner of Finance. This Bill was finally passed and approved by the Governor June 8, 1953. The Bill does not contain an emergency clause.

Senate Bill #350 repealed and reenacted Section 374.070, RSMo. 1949, pertaining to the office of Superintendent of Insurance. This Bill was passed May 3, 1953, and approved by the Governor June 5, 1953. This Bill contains an emergency clause.

Each of the above two new enactments contains provisions for the destruction of official papers, documents and records which are in all pertinent details the same as the provisions of Section 30.340, RSMo. 1949, as quoted above. The question with which we are concerned is specifically, can the official documents, records, etc., of the various offices be destroyed pursuant to the provisions of the above statutes after the adjournment sine die of the General Assembly, and it seems that the answer to this question primarily depends upon the meaning of the phrase found in each of the said statutes "during each biennial session of the General Assembly." The important word in this phrase is the word "session" and it becomes necessary to determine what period of time is indicated by the use of said word in these statutes. No case or other authority concerning the meaning of the word "session" has been found from the State of Missouri.

A definition of the word "session" is found in 57 C.J. 286, Session, Section 4, wherein the word session in the sense of time is defined as follows:

"In a more extended sense, a term of a court, or of a legislative body; the entire period intervening between the convening of a tribunal or assembly and its final adjournment; the period, space, term, or time during which a court, council, legislature, or the like meets daily, or regularly, for business; or transacts business regularly, without breaking up; the space of time between the first meeting and the prorogation or final adjournment, of each particular sitting or term; the time during which any body of persons or tribunal is organized, competent for transaction of its business."

and see the cases cited in the footnotes to the above text.

In the case of John B. Farwell Co. v. Matheis (C.C.D. Minn. 1891) 48 Fed 363, the Court defined the word session as applied to a legislature as follows:

"The prime definition of this word, when applied to a legislative body, is the actual sitting of the members of such body for the transaction of business. It also may be used to denote the term during which the legislature meet daily for business, and also the space of time between the first meeting and the adjournment."

Likewise in the case of U.S. v. Dietrich (C.C.D. Neb. 1904) 126 Fed. 659, the court, in considering the meaning of the word session, as applied to the sitting of a court, gave the following general definition:

"These cases show that the word is sometimes employed to indicate an actual sitting of a court, legislative body, or other assembly not interrupted by adjournment; that at other times it is employed to indicate an actual sitting continued by adjournments in ordinary course of from day to day, or over Sundays and holidays but not interrupted by adjournment to a distant day; and that at still other times it is employed as the equivalent of 'term' - that is, to indicate the entire period intervening between the convening of a tribunal or assembly and its final adjournment."

See also Shaw v. Carter (Okla. Sup. 1931) 297 P. 273, 1.c. 279, where the Supreme Court of Oklahoma defined the term session as applied to the Legislature of the State of Oklahoma as follows:

"The expression 'during the session of the legislature' means an entirety, during all of the time that there is a sitting together of the legislative body for the transaction of business; the time during which the Legislature transacts its business; the space of time between the first meeting and final adjournment, or the period from its assembling to its adjournment."

The Missouri Constitution of 1945 mentions the word session in provisions concerning the General Assembly in Article III, Sections 25, 29 and 39(7). In each of said sections it is clear from the context that the word session is used to designate a period of time during which the Legislature is actually sitting and does not indicate a meaning that would include the full two-year biennial period.

From the above it is concluded that under the statutory provision "during each biennial session of the General Assembly," the official documents, files and records of the above mentioned departments can only be destroyed during the regular biennial

session of the General Assembly, that is, the period between its convening in Jamuary and its adjournment sine die on the last of May and that the above quoted provision of the statute prohibits such destruction after such sine die adjournment.

Further, each of the above mentioned statutes provide that such documents and records, etc., are to be destroyed in the presence of a joint committee of the House of Representatives and Senate. Senate Resolution #85 and House Resolution #71 provide for such joint committee but refer only to the office of State Treasurer and the statute section 30.340 which concerns only the office of State Treasurer and authorizes the joint committee created by such resolutions to function only as to said office.

This office is advised that no joint committee was created by the House and Senate during the past term of the Legislature for the destruction of documents in the office of Superintendent of Insurance or Commissioner of Finance. This is entirely understandable since there was no law authorizing such committees until after the sine die adjournment of the General Assembly.

Even if there were committees as to all three offices in question and as to the committee concerning the office of the State Treasurer no action was taken during the time in which the General Assembly was in actual session and the general rule is that absent specific authority in proper form a committee of the Legislature cannot act after the sine die adjournment of such body. It is generally held that the power of the Legislature ceases upon such sine die adjournment and likewise the power of any committee created by such body. This is especially true when there is no specific authority for the action of the committee after such sine die adjournment and there was no such authority given to the committee concerning the office of the State Treasurer. It further appears that it is generally held that authority to act after sine die adjournment of the Legislature can only be conferred by action of both houses of the Legislature with formality similar to that necessary to enact laws. In the State of Missouri that would be by either a bill or joint resolution approved by the Governor.

Again no authority has been found from the State of Missouri either by statute or case law concerning this problem but the general rule seems to be as set out above.

See 28 A.L.R. 1154, 1156-7, where it is said:

"A legislative committee has no power to act during the recess of the legislature unless it was especially authorized to do so. * * *

"While it cannot be denied that the legislature has the power to authorize a committee of its body to sit during vacation, inasmuch as the existence of all committees, in the absence of legislation, necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or at least a clear and unmistakable implication to that effect from the words used in the act or resolution creating the committee, before it can be a legally created committee, to sit after the adjournment of the legislature. * * * * *"

This general rule is likewise set out in 49 Am. Jur. 258, States, Territories and Dependencies, Section 41, where it is said:

"* * *In the absence of special authority, however, committees appointed by the legislature have no power to sit after adjournment sine die of the legislature, and inasmuch as in the absence of legislation, the existence of all committees necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or at least a clear and unmistakable implication to that effect from the words used in the act creating the committee, before it can be a legally created committee to sit after the adjournment of the legislature. Moreover, authority of a committee to sit during a recess of the legislature must ordinarily be derived from the joint act of both houses, that is, from a regularly passed act of the assembly. A legislative committee authorized to make investigations and hold its sessions after the adjournment of the legislature cannot be created by one body of the legislature by a resolution which is not concurred in by the other. According to most authorities, a mere concurrent or joint resolution of both houses which calls into being a legislative committee or continues the existence of such a committee is not sufficient to give the committee life after the functions of the legislative body as such have ceased with its adjournment, sine die, except in those jurisdictions where joint

resolutions are recognized as equivalent to laws enacted by bills. In the latter case, the resolution creating the committee must contain an explicit provision empowering the committee to sit after adjournment, or the implication to that effect must be clear and unmistakable."

See also the case of Russell v. Cone (Ark. Sup. 1925) 272 S.W. 678, and Petition of Special Committee, etc. (Calif. Sup. 1938) 83 P. 2d. 932, where the Supreme Court of California, giving careful consideration to the powers of the Legislative Committee to act after sine die adjournment of the Legislative body, said:

"The overwhelming weight of authority is to the effect that neither house of a legislature may lawfully appoint a committee by single house resolution with power to sit after adjournment sine die, in fact, every state court that has considered this problem has so held."

It therefore further appears that absent any other consideration the committee created by Senate Resolution 85 and House Resolution 71 would not have authority to act after the sine die adjournment of the General Assembly of the State of Missouri.

CONCLUSION

It is the conclusion of this office from the general rules as set out above that the statutory provisions "during each biennial session of the General Assembly" limits action to the period of time from the convening of the General Assembly in January to its adjournment sine die, and by implication prohibits action during the remainder of the two year biennial period. And further, that the committee created by Senate Resolution 85 and House Resolution 71 concerning the office of the State Treasurer is without power as constituted to function after the sine die adjournment of the General Assembly.

This opinion which I hereby approve was written by my assistant, Mr. Fred L. Howard.

Yours very truly,

JOHN M. DALTON Attorney General

An operation
DRIVE-IN THEATER: a prize to the ter of a motor vehicle which
ATTENDANCE PRIZE: brings the most number of persons to the theater on a specified night contains the elements of prize, consideration and chance, and is therefore a lottery.

XXXXXXXX

John M. Dalton



July 28, 1953

John C. Johnsen

Honorable Raymond H. Vogel Prosecuting Attorney Cape Girardeau County Farmers and Merchants Bank Building Cape Girardeau, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

> "I would like an opinion with regard to the matter set out below.

"A drive-in theater gives an attendance prize to the driver of the motor vehicle which brings in the most persons to the theater. The persons in the vehicle pay admission to the theater and the prize is given sometime during the performance. Does this procedure violate any law?

"I was first approached about the legality of this matter on May 25, 1953. I advised the attorney who requested my opinion that it was not a violation of the lottery and gift enterprise statute. On June 5, 1953, your office directed a letter to the Honorable Robert A. Dempster, Prosecuting Attorney of Scott County, giving the opinion that the described procedure would be a lottery. I, therefore, asked the operator of a drive-in theater to desist from this procedure in view of your opinion and in the interest of uniformity.

"I am unable to agree that the element of chance is present in the described procedure. It appears to me that the prize is an award to the person who brings the most persons to the theater and the award is not based on chance. Therefore, I would like to have a detailed and official opinion from your office with regard to this matter."

The question which we have to determine under the state of facts submitted by you is whether the procedure which you have outlined would be in violation of Section 563.430, RSMo 1949, which section reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In the case of State ex inf. McKittrick, Atty. Gen., v. Glove-Democrat Publishing Co., 110 S. W. (2d) 705, 1. c. 713, the Supreme Court of Missouri stated that:

"The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance."

It is readily apparent that in the procedure which you outline the element of "prize" is present.

Let us now turn our attention to the matter of "consideration". In this regard we direct your attention to the 1938 decision of the Missouri Supreme Court in the case of State v. McEwan, 120 S. W. (2d) 1098, in which the Court stated, at 1. c. 1100:

"* * * Courts have uniformally held that the scheme of 'bank night" is a lottery when the participants therein are limited to those purchasing tickets to the theater. * * *"

At 1. c. 1102, the Court stated:

"In 38 C. J. 292, Sec. 7, it is said:
'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'"

In view of the above, we believe that the element of "consideration" is present in the procedure which you outlined to us.

The final question which we have to determine is whether the procedure which you outline contains the element of "chance" within the meaning of that word as a constituent element in a lottery.

For a thorough discussion of this matter we again direct attention to the Globe-Democrat case, supra. At 1. c. 713, et seq., of that opinion, the court stated:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element -- chance -- was there. In England and Canada where the *pure chance doctrine' prevails a game or

contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C. J. 5; page 291; 17 R.C.L. \$ 10, p. 1223; Waite v. Press Publishing Ass'n., 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill, judgment, or research enter thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

And further, at 717, the Court stated:

"Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards. As was said in Coles v. Odhams Press Ltd., supra, 'The competitor is the person to be considered'. In the instant case the public was informed that any one might win; that no special skill, training, or education was required; and that an opportunity was offered to gain some 'easy money.' It is true reference to the possibility of children's winning was omitted from the later advertising, but aside from that hope was held out to the general That being true, whether chance public. or skill was the determining factor in the contest must depend upon the capacity of the general public -- not experts -to solve the problems presented."

In the instant case a prize is given to the driver of the motor vehicle bring the most persons to the theater on

a specified night. Specifically, the term "motor vehicle" could include anything from a motorcyle, capable of carrying, at the most, two persons in addition to the driver, up to and including a transport truck capable of carrying 50 or 60 people. Thus, we see that the use of the term "motor vehicle" is loose, vague, and indefinite, leaving to chance the particular manner in which a contestant may elect to enter this contest. In view of these facts and of the law stated above, it is the opinion of this department that the element of "chance" is here present, and that in as much as the other two necessary elements of "prize" and "consideration" are also present, the operation which you described is a lottery and is therefore illegal.

CONCLUSION

It is the opinion of this department that an operation whereby a drive-in theater gives a prize to the driver of the motor vehicle which brings the most number of persons to the theater on a specified night contains the elements of prize, consideration, and chance, and is therefore a lottery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh F. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW/mv

RECORDER:

The county is entitled to money collected by the recorder under color of office and authority.



August 4, 1953

Honorable Raymond H. Vogel Prosecuting Attorney of Cape Girardeau County Cape Girardeau, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I desire an opinion of your office with regard to the matters set out below.

"The Recorder of Cape Girardeau County was indicted in several courts for (1) violation of Section 59.200, RSMo, (2) failing to keep a full account of all fees received by him, particularly fees received from the preparation, sale and distribution of periodic lists of chattel mortgages and Deeds of Trusts, and failure to turn over to the county such fees; and (3) receiving fees from abstracters for permitting them to work in the Recorder's office. I believe you have copies of the indictment and you may want to refer to it for greater detail.

"Is the county entitled to be reimbursed by the recorder and his sureties for any monies received by the Recorder in violation of Section 59.200? Is the Recorder entitled to keep fees received from publishing lists of chattel mortages, which lists were not issued in violation of Section 59.200? If he is not entitled to keep such fees, is the county entitled to be reimbursed for any such fees received and not accounted for by the Recorder?

"Is the county entitled to be reimbursed by the Recorder and his sureties for money paid to the Recorder by the abstracters, if such payments were illegal? If so, do the abstracters also have a cause of action against the Recorder for money illegally demanded and received from them? In other words, does Section 59.250 mean that the county is entitled to every kind of payment received by the Recorder, above the stated amount, whether it is a legally-established fee or not?

"If the county has a cause of action with regard to any of the matters stated in the above paragraphs, does the County Court have any discretion in compromising or settling such claims?"

You inquire broadly whether under the provisions of Section 59.250, RSMo 1949, a recorder is required to report all fees received by him to the county court and to pay such amounts as may exceed the sums allowed for compensation and deputy and clerical hire into the county treasury, irrespective of whether such fees are authorized or unauthorized. Related to the principal question is the question as to whether, as between the county and the officer, the county is entitled to fees collected although not under authority of law.

The particular fees about which you inquire are; (1) moneys received from persons for the privilege of examining and making memoranda or records on file in the recorder's office, (2) for the preparation, sale and distribution of chattel mortgage lists, (3) for the preparation, sale and distribution of lists of deeds of trust.

Prior to entering into a discussion of the issue presented, we wish to direct your attention to the case of Yuma County v. Wisener, 46 P. (2d) 115, in order that we may make reference to

it later. Defendant was clerk of Superior Court in Yuma County and among his duties was that of issuing licenses to marry. For this duty said clerk was allowed a fee of \$2.00. When a nonresident of the state appeared before him to apply for a license to marry, he required them to fill out another document which had no sanction in law and was not a prerequisite to the issuance of the statutory marriage license. The defendant led the applicants to believe that the latter document was required and received a fee of \$2.50, making the total fee of \$4.50. Defendant, in rendering his accounts to the county would account only for the \$2.00 required by law for the marriage license and would retain for his own personal use the \$2.50. The County of Yuma brought suit against the clerk to recover the \$2.50 not reported, on the theory that; (a) it was a court "fee" within the meaning of the Constitution and statutes and that all fees collected by a public officer must be paid to the county; and (b) that the money so collected, even though it was not strictly "fee" within the purview of the Constitution and statutes, was nevertheless obtained by defendant under color of office as a "fee" and that he was therefore estopped from denying that it was such. In disposing of these opinions, the court in its opinion stated:

> "So far as the first contention of plaintiff is concerned, we think it cannot be sustained. There is no authority whatever to be found in our law authorizing or permitting the clerk of the superior court to collect from applicants for a marriage license the \$2.50 which it is alleged defendant did collect from many nonresidents of Arizona, under the circumstances above set forth. Such being the case, the county cannot recover the money on the theory that it is a legal fee which defendant has collected by authority of law, and which he has not accounted for.

"But when it comes to the second contention the situation is very different. Color of office is defined as follows: '. . . Acts done virtue officii are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done colore officii are where they are of such a nature that his office gives him no authority to do them . . . State v. Fowler, 88 Md. 601, 42 A. 201, 203, 42 L.R.A. 849, 71 Am. St. Rep. 452.

"There can be no question that if defendant by word or deed caused applicants for a marriage license to believe that in order to obtain such license the law required that the \$2.50 in question be collected by him as clerk of the court, that he was securing such money under color of office, as the words are generally understood, and it is the usual rule that where a public officer obtains money under color of office, which he had no legal right to collect, that he is not permitted in a suit to recover such sums, either from himself or his bondsmen, to contend that the state has no right to recover the money from him because it had not authorized him to collect it from the citizens whom he had deceived in regard to the law. City of Phillipsburg v. Degenhart et al., 30 Mont. 299, 76 P. 694; State v. Porter, 69 Neb. 203, 95 N.W. 769, 771: Kern County v. Fay et al., 131 Cal. 547, 63 P. 857; People v. Hamilton, 103 Cal. 488, 37 P. 627; People v. Van Ness et al. 79 Cal. 84, 21 P. 554, 12 Am. St. Rep. 134."

Section 59.250, RSMo 1949, provides as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of four thousand dollars except those set out in section 59.490, for each year of his official term, after paying out of such fees and

emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

We have no hesitancy in stating that it is our opinion that this section only requires the recorder to account to the county court those fees which the office is by law authorized to collect. There exists no authority under our laws for the recorder in his official capacity to make the charges to which you refer and which are noted supra. You will likewise note that that is the holding in the Yuma County case.

As to whether or not the county may successfully maintain an action against the recorder to recover moneys received from persons for the privilege of examining and making memoranda of records on file, presents somewhat of a different question not connected with the duties of the recorder to account for such charges. The instruments on file in the recorder's office are public records and in the absence of a statute authorizing the official occupying the office to charge fees for the view of records, persons are entitled to inspect and make copies thereof without the payment of a fee. 76 C.J.S., Records, page 146. The recorder is under a duty (negative in character), not to interfere with this right of public inspection, subject only to the exception of the power to make reasonable rules and regulations governing the time and manner of inspection. As to the exceptions, see Upton v. Catlin, 17 Colo. 546. For the added work or inconvenience that may be incident to this inspection, the law allows no added fee or compensation. It is our opinion that charges which the recorder in the instant case made for the right to inspect the records was made under color of office and authority and he could be estopped to deny that such are legal or authorized fees. Certainly, in a suit brought by the county, the defendant should not be permitted to successfully offer a defense which would entitle him to profit for his unlawful acts.

We turn next to the charges made by the recorder for the preparation, sale and distribution of chattel mortgage lists and lists of deeds of trust. The recorder is under no duty to prepare, sell and distribute said lists. No statutory fees or charges are allowed for the work involved. Such is totally disconnected from any of the duties of the office. In fact, the recorder is specifically prohibited from making for profit or hire abstracts of instruments of records in his office, affecting title to lands, subject to a penalty for a misdemeanor. See Section 59.200, RSMo 1949. As has already been pointed out, the county is not entitled to be reimbursed for such moneys on the theory that these were fees which the recorder is required to account under Section 59.250, RSMo 1949, nor do we see how

it can be logically contended that such moneys were collected under color of office so as to permit recovery by the county as was allowed in the Yuma County case.

You have inquired whether the abstracters who have paid fees to examine records on file have a cause of action against the recorder for money illegally demanded and received from them; however, since such question does not appear to involve the county or the official duties of the office of the prosecuting attorney, we must therefore decline to answer same. Section 27.040, RSMo 1949.

You next inquire whether the county court has any discretion in compromising or settling any claims that the county may have against the recorder as above discussed. The rule in regard to the authority of the county court to compromise claims owing to the county is stated in 20 C.J.S., Counties, Section 233, page 1114, as follows:

"* * *Also compromises and settlements of claims owing to the county,
or litigation based on such claims,
are generally upheld by the courts
in the absence of a showing of fraud
or collusion, * * * and provided the
jurisdiction is not one in which the
compromise of the indebtedness of an
individual or corporation to a county
is prohibited by constitution or by
statute."

It is our opinion that the county court may, in their discretion, compromise claims against the recorder for moneys to which the county is entitled, subject only to the limitation that such compromise shall not be without consideration. (Section 39, Article III, Par. (5), Constitution of Missouri 1945).

CONCLUSION

Therefore it is the opinion of this office that a recorder in counties of the third class wherein there shall be a separate circuit clerk and recorder, is not required to account to the county "fees" which the office is not authorized to collect; however, we are of the opinion that the county in a proper proceeding may recover from the recorder moneys which was collected

Honorable Raymond H. Vogel

by said officer under color of office and authority, although not legally authorized.

We are further of the opinion that the county court may, in their discretion, compromise claims for moneys received under color of office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General OFFICERS: DEPUTY CIRCUIT CLERK: THIRD CLASS COUNTIES; MAY BE NOTARY PUBLIC:



Office of deputy circuit clerk, third class county and notary public compatible. One person can hold both offices and perform the duties of each. Deputy circuit clerk of third class county commissioned notary public can perform duties of latter office at any location in his own county he might choose, and is entitled to charge, collect and retain as his own, every fee prescribed by statute for notarial service rendered.

August 17, 1953

Honorable Raymond H. Vogel Prosecuting Attorney of Cape Girardeau County Cape Girardeau, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which request reads as follows:

"I would like to have the opinion of your office with regard to the matter set out below.

"May a Deputy Circuit Clerk in a third class county be commissioned a Notary Public? If so, may the Deputy Circuit Clerk perform the duties of a Notary Public in the office of the Circuit Clerk and receive and retain the prescribed fees for such Notary Public work?

"Your early opinion of this matter will be sincerely appreciated."

The general rule prevailing in most jurisdictions with reference to the nature of the office of a clerk of a court of record and the duties of same is set forth in Section 1, Clerks of Courts, page 1211, C. J. S., and reads as follows:

"A clerk of court is an officer of a court of justice who has charge of the clerical part of its business, who keeps its records and seal, issues process, enters judgments and orders, gives certified copies from the records and the like. While the clerk of a court belongs to the judicial as distinguished from the executive or legislative branch of government, his office is essentially a ministerial one, and is in no way necessary to the existence of a court.

Section 483.010, RSMo 1949, provides the qualifications of clerks of all courts of record and reads as follows:

"No person shall be appointed or elected clerk of any court unless he be a citizen of the United States, above the age of twenty-one years, and shall have resided within the state one whole year, and within the county for which he is elected three months before the election; and every clerk shall, after his election, reside in the county for which he is clerk."

The election, commission and term of office of circuit clerks is provided by Section 483.015, RSMo 1949, and reads as follows:

"At the general election in the year 1882, and every four years thereafter, except as herein provided, the clerks of all courts of record, except the clerks of the supreme court, the courts of appeals, the probate courts, the magistrate courts, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor, and shall enter upon the discharge of their duties on the first Monday in January next ensuing their election, and shall hold their offices for the term of four years, and until their successor shall be duly elected and qualified, unless sooner removed from office."

Raymond H. Vogel

Section 483.080, RSMo 1949, contains the general provisions for the appointment of deputy clerks of courts of record and reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

The official records of the Secretary of State's office show that the County of Cape Girardeau is a county of the third class and that the offices of circuit clerk and recorder of deeds are separate. Therefore, the provisions of Section 483.345, RSMo 1949, relating to the appointment of deputies and assistants to the circuit clerk are applicable to the county. Deputies to the circuit clerk of your county would perform such duties as would be assigned to them by the clerk, and as such deputies they should not perform any of the official duties of the recorder of deeds of such county. Section 483.345, RSMo 1949, reads as follows:

"Every circuit clerk in counties of the third class shall be entitled to such number of deputies and assistants to be appointed by such official, with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of the duties of his office. The judge of the circuit court, in his order permitting the circuit clerk to appoint deputies or assistants, shall fix the compensation of such deputies and assistants which order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered on record, and a certified copy thereof shall be filed in the office of the county clerk. The circuit clerk may, at any time, discharge any deputy or assistant, and may regulate the time of his or her employment and

the circuit court may at any time modify or rescind its order permitting an appointment to be made."

When one is appointed deputy circuit clerk of a third class county in accordance with the provisions of Section 483.080, supra, and other applicable statutes, the deputy would have the power in the name of the principal to perform the duties of said principal as a public officer. For reasons given above and also for other reasons to be given hereafter, it is believed that when the deputy acts in the place of the principal he would also be a public officer.

The general rule regarding the status of deputies as public officers has been stated in Section 38, pages 16 and 17 of Mechem on Public Officers. Said section reads as follows:

"Whether deputies appointed by public officers are to be regarded as public officers themselves, depends upon the circumstances and method of their appointment. Where such appointment is provided for by law, and a fortiori and where it is required by law, which fixes the powers and duties of such deputies, and where such deputies are required to take the oath of office and to give bond for the performance of their duties, the deputies are usually regarded as public officers. Thus deputy postmasters appointed and qualified according to law, are public officers. So a deputy marshal is an officer of the United States, and deputy sheriffs are recognized by the statutes of most States as independent public officers.

"But where the deputy is appointed merely at the will and pleasure of his principal to serve some purpose of the latter, he is not a public officer but a mere servant or agent. So a special deputy employed only in a particular case is not a public officer."

Under Section 483.080, supra, deputies of all clerks of courts of record are required to be at least seventeen years of age, must take the same oath of office and possess all the other qualifications of the clerk. In the name of their principals they are authorized to perform any or all of the duties of their principals for whose actions the clerk is liable upon his official

bond.

The appointment of a deputy circuit clerk is regulated by Section 483.345, supra, and such appointment is required to be approved by the circuit judge. While the order appointing the deputy fixes his term and the amount of compensation, such deputy may be discharged at any time by the clerk, yet, since the statutes provide for the appointment, how the compensation is fixed and the method of discharge, and also in view of the provisions of Section 483.080 and other sections noted above, it appears that in the enactment of said statutes, it was the legislative intent that deputy circuit clerks are to be regarded as public officers as much so as clerks, and that such deputies were never intended to occupy the status of servants of their principals, otherwise deputies would not have been granted the power to perform the duties of public officials.

This brings us to that point in our discussion of the subject matter of the opinion request when it is necessary to consider the legal status of a notary public, and that is, whether a notary is, or is not a public officer.

In the case of Ghast v. St. Louis Transit Company, 115 Mo. App. 403, the court quoted the definition of notary public given in Black's Law Dictionary. At l. c. 408, the court said:

"* * *'a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents in order to give them credit and authenticity in foreign jurisdictions.'"

Again the following definition of a notary public is given in Section 1, page 609, Volume 66, C.J.S., and reads as follows:

"A notary or notary public is a public officer whose function it is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions, to take acknow-ledgments of deeds and other conveyances, and certify them, and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, and noting of foreign drafts, and marine protests in cases of loss or damage."

From these definitions it is readily seen that a notary public is a public officer and since it is our belief that a deputy circuit clerk is also a public officer, we must give further consideration and discussion to that part of the inquiry calling for a determination as to whether a deputy circuit clerk of a third class county may be commissioned a notary public. The answer to this inquiry depends upon the answer to the question as to whether these two public offices could, or could not be held by the same person, and whether the duties of either would so conflict with the other as to render the two incompatible and prohibit one person from holding both at the same time.

From the foregoing, it may be said that the various statutes require certain duties to be performed by the circuit clerk, and while these statutes are numerous, we find it unnecessary to quote all of them so that an outline of the duties of that office might be given. But we do wish to call attention to the nature of the general duties of the circuit clerk, even though we may repeat something stated above. The circuit clerk is an officer of the court and the clerk has charge of all the clerical duties of the circuit court, such as keeping court records and the seal. As a part of his official duties he is required to file petitions in civil cases, indictments or informations in criminal cases, and various legal documents which the statutes require to be filed by him. The clerk is also required to issue civil and criminal process, enter judgments, orders or other proceedings of record, and, when so required he must furnish certified copies of court orders in his office. He is also charged with the duty of collecting and accounting for every fee which the statute require of him, and for any failure so to do he and the sureties on his official bond may be liable. Although the clerk is legally authorized to administer oaths and take acknowledgments of instruments in writing, such duties are merely incidental to his most important or primary duties of being a clerical assistant to the circuit court.

It is true that a notary public may legally perform some of the duties which the circuit clerk or his deputy may be called upon to perform, for example, administering oaths or taking acknowledgments to certain written instruments, but from the definitions previously given of a notary public, it is obvious that the duties of the two offices of circuit clerk and notary public are basically different and that possibly the greatest difference between them is that the notary has nothing to do with keeping the circuit court records, whereas, the keeping of such records is the principle duty of the circuit clerk. In this case we wish to point out that a deputy circuit clerk who was also a notary public when acting for his principal acts only as a deputy circuit clerk and cannot perform any of the duties of that office in the capacity of notary public. A notary might legally perform some duties required of the deputy circuit clerk or vice versa, as when the deputy circuit

clerk administers oaths or takes acknowledgments of written instruments, but when the deputy circuit clerk as such, performs the duties ordinarily performed by a notary, he must charge, collect and account for, and turn over every fee prescribed by statute for such services to the county treasurer.

When the office of deputy clerk and notary public are held by the same person at the same time, the functions of each office are to be exercised independently of the other and such person must be careful to keep his notarial duties from interfering in any manner with his duties as deputy circuit clerk, for the duties of the latter office must be given first consideration in every instance.

Therefore, it is our thought that a deputy circuit clerk of a third class county, if possessing the necessary qualifications of a notary public provided by Section 486.010, RSMo 1949, may be commissioned as a notary public since there is no incompatibility between the offices of deputy circuit clerk and notary public.

It is our further thought that a deputy circuit clerk, when commissioned as a notary public for Cape Girardeau County, Missouri, may perform the duties of notary public at the office of the circuit clerk of that county the same as at any other location in that or any adjoining county and may receive and retain the fees prescribed by statute for notary public work, and is not required under any statute to turn over such fees to the treasurer of Cape Girardeau County.

CONCLUSION

It is therefore the opinion of this department that the offices of deputy circuit clerk of a third class county and notary public are compatible and that one person would be permitted to hold both offices and to perform the duties of each. A deputy circuit clerk of a third class county commissioned as notary public could perform the duties of the latter office at any location he might choose within the county for which he was commissioned and would be entitled to charge, collect and retain as his own, every fee prescribed by statute for notarial services rendered.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General TAXATION:
PERSONAL PROPERTY:
MOTOR VEHICLES:
UNITED STATES:
COLLECTOR:

1) Non-resident military personnel exempted from payment of personal property tax. 2) Non-resident civilian employees living within or without boundaries of Fort Leonard Wood reservation owe personal prop-

erty tax. 3) Resident military personnel owe personal property tax in county of residence. 4) Collector should certify no taxes due from non-resident military personnel.

January 8, 1953

FILED 93

Honorable Wayne W. Waldo Prosecuting Attorney Pulaski County Waynesville, Missouri

Dear Mr. Waldo:

This is in reply to your request for an opinion which is as follows:

"The opinion of the Attorney General is respectfully requested on the following situation:

"House Bill number 211, which became effective April 22, 1952 provides that a receipt for personal taxes must be presented at the time of purchase of Missouri automobile licenses. Soldiers living within the area of Fort Leonard Wood often do not have this tax receipt. Although Fort Leonard Wood is in Pulaski County, the assessor has not been able to enter the reservation to assess a tax.

"Is it proper for the collector of Pulaski County to give non-residents living in the Fort Leonard Wood area a certificate that no tax is due.

"If a soldier is stationed at Fort Leonard Wood who is a resident of some other county of Missouri, does he pay the personal tax in Pulaski County or in the other county in Missouri which he claims as his place of residence.

"Is it lawful for the collector of Pulaski County to receive a tax from soldiers living within the Fort Leonard Wood area who voluntarily come to his office and pay a personal tax in order to get automobile licenses. If this is correct, by whom is the tax assessed, when is it assessed, and how much should be assessed.

"Is the county assessor for Pulaski County authorized to enter the reservation of Fort Leonard Wood to assess personal taxes on persons living within the reservation area.

"Are Military personal who are attached to Fort Leonard Wood, who reside within Pulaski County but who do not reside within the reservation boundary, liable for the assessment and payment of personal taxes.

"It is felt that this is an important question because it will reoccur each year and the other counties contiguous or close to Fort Leonard Wood will also be affected by this situation. It is felt that the opinion of the Attorney General will completely clarify the situation."

In view of the fact that there are several questions presented by your request, we will attempt to answer them in what we deem to be the most logical order.

First, we consider the question of whether or not there is liability for personal property tax of non-resident military personnel living both within the area of Fort Leonard Wood and also military personnel who are attached to the command at Fort Leonard Wood and who do not reside within the reservation boundary, but in Pulaski County.

In answer to this question, we call attention to the opinion of this department (Brown-1949) which concludes that under Section 17 of the Soldiers' & Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C.A., Appendix, Section 574, a person stationed in Missouri on military duty is not subject to personal property tax, unless he has actually established a residence in this State and does not maintain a permanent residence or domicile elsewhere.

Section 17, noted above, provides as follows:

"(1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district: vided, That nothing contained in this section shall prevent taxation by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia in respect of personal property used in or arising from a trade or business, if it otherwise This section shall be efhas jurisdiction. fective as of September 8, 1939, except that it shall not require the crediting or refunding of any tax paid prior to October 6, 1942.

[&]quot;(2) When used in this section, (a) the term 'personal property' shall include tangible and

intangible property (including motor vehicles), and (b) the term 'taxation' shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State, Territory, possession, or District of Columbia of which the person is a resident or in which he is domiciled has been paid. Oct. 17, 1940, c. 888, § 514, as added Oct. 6, 1942, c. 581, § 17, 56 Stat. 777, and amended July 3, 1944, c. 397, § 1, 58 Stat. 722."

Thus, it becomes clear that non-resident military personnel stationed within the boundary of Fort Leonard Wood are fully protected by the Soldiers' & Sailors' Civil Relief Act of 1940 from taxation of personal property. The same Act also operates to protect non-resident military personnel attached to the command at Fort Leonard Wood and residing outside the boundaries of the reservation unless they have actually established a residence in Missouri, in which event they would be considered Missouri residents and would be liable for the payment of personal property taxes in Missouri.

In answer to your question as to whether or not military personnel stationed at Fort Leonard Wood who are residents of some other county in Missouri, you are directed to Section 137.090, RSMo 1949, which is as follows:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

With regard to the question as to whether or not the Collector of Pulaski County may receive a tax from non-resident military personnel who are exempted from the payment of personal property taxes, but who, nevertheless, voluntarily offer to pay a personal tax in order to get an automobile license, we must, of necessity, refer to our answer on the basic question of the applicability of House Bill No. 211, passed by the 66th General Assembly, which will appear later in this opinion. It will appear that voluntary payments are unnecessary in order to obtain an automobile license.

Moreover, it should be noted that it is the duty of the Collector to collect taxes which are due and owing and it is not his duty to collect taxes which are not owed to the State. The Collector, under Section 52.020, RSMo 1949, is required to give bond that he shall faithfully perform the duties of the office of collector according to law. It would appear from some of the early Missouri cases (State v. Shacklett, et al., 37 Mo. 280; Glasgow v. Rowse, 43 Mo. 479), that there is a possibility of personal liability on the part of a collector who knowingly collects taxes which are not due and owing.

Non-resident civilian employees who reside in Pulaski County outside the boundary of the reservation are subject to the personal property tax. Section 137.075, RSMo 1949, provides as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Section 137.100, RSMo 1949, provides for certain exemptions from taxation, but nowhere is there an exemption from taxation of the personal property of non-residents.

In the early case of City of St. Louis v. Wiggins Ferry Company, 40 Mo. 587, the Supreme Court of Missouri made it clear that the personal property of non-residents was taxable in the same manner as the personal property of residents. In its opinion, the Court stated as follows:

"The personal property of a non-resident actually situated in another State is not to be assessed and taxed against him in this State, but the property of either a resident or a non-resident is taxable here, if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or his agents. (Citing cases.)" (Emphasis ours.)

We now proceed to the question as to whether or not civilian employees at Fort Leonard Wood who live in the housing area within the boundary of the reservation are subject to the personal property tax.

Unless the jurisdiction of the United States over the reservation area of Fort Leonard Wood is exclusive, the personal property

of the civilian employees residing thereon is subject to taxation in the same manner as the personal property of Missouri residents and non-residents residing outside the military area. It is plain that the civilian employees are not protected by the provisions of the Soldiers' & Sailors' Civil Relief Act, supra.

Section 8, Clause 17, Article 1 of the Constitution of the United States provides that Congress shall have power: "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * * and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dockYards, and other needful Buildings;."

There have been several enactments of the Missouri State Legislature ceding exclusive jurisdiction over land acquired by the Federal Government. These may be found in Laws of Missouri, 1943, page 627, and Laws of Missouri, 1947, Volume I, page 366, and the present Sections, 12.030 and 12.040, RSMo 1949. It should be noted that in all these Acts the State of Missouri has reserved to itself the right of taxation to the same extent and in the same manner as if cession has not been made. The Supreme Court of the United States has ruled upon this question several times and has considered the various aspects of the laws in relation to cession of jurisdiction over land by the States to the United States with certain reservations in the States. These cases are: Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 29 L. Ed. 264, 269, 5 Sup. Ct. Rep. 995; James v. Dravo Contracting Co., 302 U.S. 147, 82 L. Ed. 155, 58 Sup. Ct. 208, 114 A.L.R. 318 and Collins, et al. v. Yosemite Park & Curry Co., 304 U.S. 518, 82 L. Ed. 1502.

At the time of the acquisition of Fort Leonard Wood, there was no statute in effect ceding jurisdiction over lands acquired by the United States for the purposes as set forth in Section 8, Clause 17, Article 1 of the Constitution of the United States, supra. Section 12691, R. S. Mo. 1939, provided for the cession of jurisdiction over land acquired for certain other purposes. Thereafter, the 62nd General Assembly sought to clarify the jurisdiction between the State and Federal governments over certain properties which had been acquired for military purposes. Laws of Missouri, 1943, page 627, provided as follows:

"1. The consent of the State of Missouri is hereby given, in accordance with the seven-

teenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this State which has been acquired, prior to the effective date of this Act, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes.

- Exclusive jurisdiction in and over any land so acquired, prior to the effective date of this Act, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this cession had not been made; and further saving and reserving to the State of Missouri the right to serve thereon any civil or criminal process issued under the authority of the State, in any action on account of rights acquired, obligations incurred, or crimes committed in said State, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired.
- "3. Whereas, there now exist within the boundaries of this State large areas of land occupied for military purposes, among which are those occupied by Lake City Ordnance Plant, Weldon Spring Ordnance Works, St. Louis Ordnance Plant, St. Louis Powder Farm, St. Louis Medical Depot, Fort Leonard Wood, Camp Crowder, Missouri Ordnance Works, Vichy Airport, and Kansas City Quartermaster Depot, and there exists in the said areas uncertainty as to complete jurisdiction, which is resulting in duplication and misunderstandings between the State and Federal law enforcements agencies, and an emergency exists within the meaning of Article IV of the Constitution of

this State, this act shall be in force from and after its passage and approval by the Governor." (Emphasis ours.)

You will note that there was a reservation of the power of taxation in the State of Missouri. The effect of such a reservation upon Section 8, Clause 17, Article 1 of the Constitution of the United States was considered by the United States Supreme Court in the case of James v. Dravo Contracting Co., 302 U.S. 147, 82 L. Ed. 155, 58 Sup. Ct. 208, 114 A.L.R. 318. In that case the State of West Virginia sought to impose a tax upon a contractor doing work for the Federal government in the State of West Virginia. The State had given its consent to the acquisition of the land with a general reservation. The Supreme Court held that since Clause 17 contained no express stipulation that the consent of the State must be without reservation, there was an implied authority in the State to qualify cessions of jurisdiction when purchases have been made without consent or property had been acquired by condemnation.

Since it was within the power of the State of Missouri to reserve specifically the power of taxation, and since it is clear that it did qualify its cession, therefore, we must conclude that civilian employees residing within the boundaries of the Fort Leonard Wood reservation are liable for the payment of personal property taxes.

In view of the above, we think that the duties of the Collector under House Bill No. 211, passed by the 66th General Assembly, become clear. That Bill is as follows:

"AN ACT To provide that no state motor vehicle registration license shall be issued unless proof is given that state and county tangible personal property taxes if due have been paid, with an effective date.

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. No state registration license to operate any motor vehicle in this state shall be issued unless the application for license is accompanied by a tax receipt or a statement certified by the county or township collector of the county or township in which the applicants property was assessed showing that

the state and county tangible personal property taxes for the preceding year have been paid by the applicant or that no such taxes were due.

"Section 2. Every county and township collector shall give each person a tax receipt or a certified statement of tangible personal property taxes paid. Where no such taxes are due each such collector shall, upon request, certify such fact and transmit such statement to the person making the request. The director of revenue shall make necessary rules and regulations for the enforcement of this act, and shall design all necessary forms.

"Section 3. This act shall become effective January 1, 1952."

In the case of non-resident military personnel residing either upon the reservation of Fort Leonard Wood or in the confines of Pulaski County, the Collector should, upon request, certify that no taxes are due from such personnel.

Civilian employees who were residing either upon the reservation or in Pulaski County on the first day of January became liable for the payment of personal property taxes in the same manner as other residents of Pulaski County. In this connection, however, we feel that we should call your attention to an opinion of this office (Dale-1952) which holds that: where a person owns personal property on January 1, 1951, which is not assessed and carried on the tax books delivered to the Collector such person is entitled, under the provisions of House Bill No. 211, 66th General Assembly, upon request, to a certified statement from the Collector that no taxes are due, since the liability for such taxes is based upon a valid assessment.

You ask further whether or not the County Assessor of Pulaski County is authorized to enter the reservation of Fort Leonard Wood to assess personal taxes on persons living within the reservation area.

We are unable to find any authority for such entry in the Federal statutes, and, therefore, must look to the good faith of the United States Government in permitting the State of Missouri to exercise its rights under the statutes ceding exclusive jurisdiction to the Federal government over the area.

In the Collins case, supra, the Supreme Court stated at L. Ed. 1.c. 1510:

" * * * As the National Government may, 'by virtue of its sovereignty' acquire lands within the borders of states by eminent domain and without their consent, the respective sovereignties should be in a position to adjust their jurisdictions. is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States. The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e.g., right to tax, by the Act of April 15, 1919. * * * ." (Emphasis ours.)

Therefore, we assume that the United States Government will permit the State of Missouri to exercise the jurisdiction which it has reserved to itself, that is, the right to tax personal property of the civilian employees living upon the reservation.

CONCLUSION

Therefore, it is the opinion of this department that:

- Non-resident military personnel, whether living within the boundary of the Fort Leonard Wood military reservation or without such boundary, are not liable for a personal property tax in the State of Missouri;
- Resident military personnel should pay the personal property tax in the county of residence;
- 3) It is not the duty of the Collector to accept voluntary payments of a personal property tax from non-resident military personnel;
- 4) Non-resident civilian employees living within the boundary of the Fort Leonard Wood military reservation are subject to the payment of personal property taxes;
- 5) Non-resident civilian employees living without the boundary of the Fort Leonard Wood military reservation are subject to

the payment of personal property taxes in the same manner as other residents of Pulaski County;

6) The Collector should certify that there is no personal property tax due from non-resident military personnel in accordance with the provisions of House Bill No. 211.

Respectfully submitted,

JOHN R. BATY Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General TRAFFIC REGULATIONS:

PENALTIES:

Penalties are provided in Section 304.570, RSMo 1949, for violations of the terms of Section 304.250 of Chapter 304, RSMo 1949.



March 5, 1953

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Superintendent Waggoner:

This will be the opinion requested by letter by former Superintendent of the Missouri State High-way Patrol, Honorable David E. Harrison for the construction by this office of the terms of Section 304.250 of the general provisions relating to traffic regulations contained in Chapter 304, RSMo 1949, to determine if said chapter prescribes a penalty for the violation of the provisions of said section. The letter states:

"Recently one of our officers arrested an operator of a tractor and charged him with violating section 304.250, Revised Statutes Missouri 1949, which pertains to the use of metal tired vehicles on the highways. This case was dismissed by the magistrate as he maintained that there was no penalty for this, except that in sub-section 3 the statutes provide that the person shall be liable for the amount of damage caused to the highway, etc.

"We would like to inquire if there is a provision for a penalty in addition to the liability mentioned in sub-section 3. Of course, if the penalty does not apply to this section, in the future we will be unable to make an arrest but merely supply the name of the violator to the proper authorities. We ask that you give us an opinion on this question at your earliest convenience."

Said Section 304.250 reads as follows:

- "1. No metal tired vehicle shall be operated over any of the improved highways of this state, except over highways constructed of gravel or clay bound gravel, if such vehicle has on the periphery of any of the road wheels any lug, flange, cleat, ridge, bolt or any projection of metal or wood which projects radially beyond the thread or traffic surface of the tire, unless the highway is protected by putting down solid planks or other suitable material, or by attachments to the wheels so as to prevent such vehicles from damaging the highway, except that this prohibition shall not apply to tractors or traction engines equipped with what is known as caterpillar treads, when such caterpiller does not contain any projection of any kind likely to injure the surface of the road. Tractors, traction engines and similar vehicles may be operated which have upon their road wheels 'V' shaped. diagonal or other cleats arranged in such manner as to be continuously in contact with the road surface if the gross weight on the wheels per inch of width of such cleats or road surface, when measured in the direction of the axle of the vehicle, does not exceed eight hundred pounds.
- "2. No tractor, tractor engine, or other metal tired vehicle weighing more than four tons, including the weight of the vehicle and its load, shall drive onto, upon or over the edge of any improved highway without protecting such edge by putting down solid planks or other suitable material to prevent such vehicle from breaking off the edges of the pavement.
- "3. Any person violating this section, whether operating under a permit or not, or who shall willfully or negligently damage a highway, shall be liable for the amount of such damage caused to any highway, bridge, culvert or sewer, and any vehicle causing such damage shall be subject

to a lien for the full amount of such damage, which lien shall not be superior to any duly recorded or filed chattel mortgage or other lien previously attached to such vehicle; the amount of such damage may be recovered in any action in any court of competent jurisdiction, in the name of the state, by the municipality, county or other civil subdivision or interested party."

The letter requesting the opinion states that recently there was an arrest by the Highway Patrol of an operator of a tractor charged with violating said section, and that the case was dismissed by the Magistrate in whose Court the case was pending on the ground that there is no penalty prescribed in the statutes for the violation of the terms of said section. The particular inquiry is, whether there is a penalty provided in the statutes, in addition to the civil liability prescribed in subsection 3 of said Section 304.250 for the violation of said section, which would authorize the arrest and prosecution, and punishment, as for a criminal offense, of any person violating the terms of said Section 304.250.

Section 304.570, RSMo 1949, prescribing a penalty for the violation of any of the provisions of said Chapter 304, reads as follows:

"Any person who violates any of the provisions of this chapter for which no specific punishment is provided, upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than five hundred dollars or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

Said Section 304.570 was in the Revised Statutes of Missouri, 1939, Section 8404. The St. Louis Court of Appeals in the case of State vs. Ball, 171 S.W. (2d) 787, construed the terms of said Section 8404, to determine if the penalties prescribed in said Section 8404 applied to violations of the terms of said Section 8401, although none of the separate paragraphs dealing with various offenses set forth in said Section 8401 provided for a penalty. The Court of Appeals held that the penalties prescribed in said Section 8404, R.S. Mo. 1939, did apply to any violation

of any of the provisions of said Section 8401. In the Court's decision, 1.c. 791, the Court in its discussion of the statute, said:

"An examination of Section 8401 shows that there are twelve separate paragraphs dealing with various offenses which are set forth therein. However, none of said paragraphs provides for a penalty. Penalties for many specific offenses are provided for in Section 8404, supra, as we have shown above. The last mentioned section contains nine separate paragraphs providing penalties for various offenses, some of which are by imprisonment in the penitentiary, while others provide for imprisonment in the county jail or by fine, or by both such fine and imprisonment. Some paragraphs in Section 8404 provide for penalties other than fine or imprisonment, such as revocation of certificate of registration of automobiles.

"The penalty assessed in the case at bar comes within subdivision (d) of Section 8404, supra, the applicable part of which provides: 'Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine * * *.' (Emphasis ours.)"

The information in the case of State vs. Ball, supra, charged that the defendant had operated a motor vehicle on the highways of this State in a careless, reckless and imprudent manner. In holding that the information charged an offense against the defendant for violation of the provisions of Section 8401, R.S. Mo. 1939, and that the penalties prescribed in said Section 8404 applied thereto, the Court, 1.c. 792, further said:

"The general rule as to statutory construction has been stated as follows: 'The intent is the vital part, the essence of the law, and the primary rule

of construction is to ascertain and give effect to that intent. * * * Intent is the spirit which gives life to a legis-lative enactment. In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature. Sutherland on Statutory Construction, 2d Ed., Vol. 2 8 363.

"Having in mind the above rules of construction, we find ourselves unable to agree with the contention of defendant that the information fails to charge any offense under the statutes of the state because, as he argues, the Legislature intended the sections involved herein to be merely rules to apply only to cases involving negligence. Neither do we agree with defendant's view that Section 8404(d) under 'Penalties' was intended to apply only to acts and conduct designated in Section 8401, supra, as 'Miscellaneous Offenses.'"

The Court referred to Article I of the 1939 Revision as including the statutes construed, while here said Section 304.570 refers to Chapter 304 in prescribing the punishment for violation of the terms of said Section 304.250, a part of said Chapter 304. Holding that it was the clear intention of the Legislature to provide specifically in Section 8404, R.S. Mo. 1939, (now said Section 304.570, supra), for punishment of offenses prescribed and for other offenses throughout said Article I and to make such other offenses penal, 1.c. 793, in concluding its opinion upholding the conviction of the defendant, the Court further said:

"We cite the Wahlers case as illustrative of the clear legislative purpose to provide specifically in Section 8404 for punishments for certain offenses and, also, in another part of the same section, to provide generally for punishment for other offenses scattered throughout Article I, thus showing the intention to make such other offenses penal.

"It is clear that the Legislature intended by Section 8404(d), supra, to provide punishment for violation of the rules which would otherwise have no penalty attached. The punishment provided extends from a fine of \$5 up to and including a fine of \$500 plus imprisonment in the county jail for two years, thus giving to the triers of the facts the widest latitude in 'making the punishment fit the crime,' and showing that the law makers recognized that some offenses punishable under said section might be of a minor character while others might be much more serious."

We believe the decision by the St. Louis Court of Appeals in the Ball case, supra, is definite and conclusive as the law of Missouri on this question and guides this office here in holding that the penalty prescribed in said Section 304.570 does cover violations of the provisions contained in Section 304.250, and that any person violating such terms of said section is liable to arrest, prosecution, and punishment therefor, as well as being civilly liable in damages as is set forth in said section.

CONCLUSION.

It is, therefore, the opinion of this office that penalties are provided in Section 304.570, RSMo 1949, for violations of the provisions of Section 304.250 of Chapter 304, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

JUVENILE COURTS: CHILDREN: TRAFFIC VIOLATIONS:



When children sixteen years of age are charged with traffic ordinance violations in local police courts of cities, towns, and villages of St. Louis County, said police courts lack the power to hear and determine said cases, but must certify them to the juvenile court of said county for disposition.

March 5, 1953

Honorable Stanley Wallach Prosecuting Attorney of St. Louis County Clayton, Missouri

Dear Sir:

This is to acknowledge receipt of your request for a legal opinion of this department, which request reads as follows:

"We have had inquiries from various incorporated cities, towns and villages of this County, asking if their respective local police court can adjudicate charges against juveniles, age 16, for violations of their traffic ordinances, or shall same be certified to the St. Louis County Juvenile Court for disposition."

From the opinion request it appears that the inquiry concerns one subject, namely, the court having jurisdiction of the persons and offenses mentioned. That is, whether the various local police courts of the cities, towns, and villages of St. Louis County, in which courts, children under sixteen years of age are charged with violations of traffic ordinances of said cities, towns, and villages or whether such cases must be transferred to the juvenile court of said county for disposition.

It appears that St. Louis County is a county belonging to class one, consequently, the provisions of Sections 211.010 to 211.300, RSMo 1949, relating to delinquent children, and juvenile courts are applicable to St. Louis County.

Paragraph 1, Section 211.010, states that the provisions of Section 211.010 shall apply to all children under seventeen years of age, and reads as follows:

"l. Sections 211.010 to 211.300 shall apply to children under the age of seventeen years not now or hereafter inmates of any state institution or any institution incorporated under the laws of the state for the care and correction of delinquent children: provided, that when jurisdiction has been acquired under the provisions hereof over the person of a child, such jurisdiction shall continue, for the purpose of sections 211.010 to 211.300, until the child shall have attained its majority; but nothing in sections 211,010 to 211.300 shall prevent the juvenile court from inflicting a punishment which shall extend beyond the age of majority in cases where the delinquent shall be convicted of a crime, the punishment of which under the statutes of this state, when committed by persons over the age of eighteen years, is death or imprisonment in the penitentiary for a term of not less than ten years."

Paragraph 3, defines the term "delinquent children" and reads as follows:

"3. The word 'delinquent child' shall include any child under the age of seventeen years who violates any law of this state, or any city or village ordinance, * * *."

(Underscoring ours.)

Under the provisions of Section 211.020, the juvenile courts in class one and two counties, and the City of St. Louis shall have original jurisdiction of all juvenile cases coming within the terms of Sections 211.010 to 211.300, supra. Section 211.020, reads as follows:

"The circuit courts in counties of the first and second classes shall have original jurisdiction of all cases coming within the terms of sections 211.010 to 211.300. The city of St. Louis shall be considered a county of the first class. A courtroom, to be designated the juvenile courtroom, shall be provided or assigned by the circuit court for the hearing of such cases; and the proceedings of the court shall be entered in books to be kept for that purpose and known as the juvenile records, and the court may for convenience be called the juvenile court. The clerk of the circuit court shall act as the clerk of

the juvenile court. The practice and procedure prescribed by law for the conduct of criminal cases shall govern in all proceedings under sections 211.010 to 211.300 in which the child stands charged with the violation of the criminal statutes of the state, and in such proceedings the child, his parent, or any person standing in Loco parentis to him may on his behalf demand a trial by jury. In all other cases the trial shall be before the court without a jury, and the practice and procedure customary in proceedings in equity shall govern except where otherwise provided herein."

From the provisions of above quoted section it is apparent that all proceedings brought to determine whether a child under seventeen years is a neglected or a delinquent child, within the meaning of Section 211.010, supra, are required to originate in the circuit courts of first and second class counties, and the City of St. Louis. The divisions of said courts to which such matters have been committed, by said statute, have for convenience, been referred to as juvenile courts.

An examination of the various statutes relating to neglected and delinquent children discloses that the juvenile court of said counties not only have original jurisdiction in those matters referred to in the preceding paragraph, but that the court has jurisdiction of all cases when a child under seventeen is arrested for, or is charged with certain offenses, which might constitute acts of delinquency. Section 211.060, RSMo 1949, covers matters of this kind and reads as follows:

"When in any such county a child under the age of seventeen years is arrested with or without warrant, such child shall, instead of being taken for trial before a magistrate, or police magistrate, or judge of any court now or hereafter having jurisdiction of the offense charged, be taken directly before such juvenile court; or if the child shall have been taken before a magistrate or a police magistrate or judge of such other court, it shall be the duty of said magistrate or police magistrate or judge to transfer the case to such juvenile court, and of the officer having the child in charge to take such child before said court, and the said court shall proceed to hear the case in accordance with the law for the trials of such offenses."

(Underscoring ours.)

Said section provides for different situations to which said section is applicable, and which are:

- 1. When the child is arrested with or without a warrant.
- 2. When he is arrested and is taken before one of the courts mentioned, and having jurisdiction of the offense, or when the child is charged with an offense in one of the courts mentioned.

In the first instance, the arresting officer or person having custody of the child at the time of the arrest, shall take him before the juvenile court, and not before the court having jurisdiction of the offense.

In the second instance the court before whom the child is taken, or the court in which a charge against said child is pending shall transfer the case to the juvenile court for disposition. It is our thought that the section is applicable in every instance when a child under seventeen is arrested, or is charged in any of the courts referred to for an offense which is criminal or non-criminal in nature.

When it is remembered that the primary purpose for which the delinquent children statutes were enacted was to provide a remedy and a method of procedure by which such children can be given protection, discipline, and training necessary to enable them to become good citizens, rather than to prosecute and punish them for offenses committed against the laws, it is apparent that in the enactment of said statutes, it was obviously the intention of the legislature that when any arrest is made, or charges, (whether civil or criminal) have been filed in the courts mentioned, against a child under seventeen, it is the duty of the person having custody of said child to take him before the juvenile court, and it is the duty of the court where the charge is pending to transfer the case to the juvenile court of the proper county or city for disposition. Such is our construction of Section 211.060 and 211.080, supra.

Therefore, in view of the foregoing, it is our further thought that the local police courts of the cities, towns and villages of St. Louis County, Missouri, in which children sixteen years of age are charged with traffic ordinance violations lack the power to hear and determine said cases, and must transfer all of them to the juvenile court of said county for disposition.

CONCLUSION

It is therefore, the opinion of this department that the local police courts of the cities, towns, and villages of St. Louis County in which children sixteen lears of age are charged with violations

Honorable Stanley Wallach

of traffic ordinances of said municipalities, lack the power to hear and determine said cases, but must certify them to the juvenile court of said county for disposition.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General PENSIONS:

COUNCILMEN:

There is no incompatibility in a retired pensioned policeman of the City of Maplewood serving as city councilman of the City of Maplewood so long as such retired pensioned policeman, in his capacity as councilman, can take no action with regard to the amount of pension that a retired policeman of Maplewood should receive.

JOHN M. DALTON

FILED 93

March 12, 1953

J. C. JOHNSEN

Honorable Stanley Wallach Prosecuting Attorney St. Louis County Clayton, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"We would deeply appreciate it if you would let us have the opinion of your office on the following questions:

"1. Can a retired police officer of a third class city who is receiving a pension during his retirement, at the same time hold office as a councilman or alderman of said city and draw a salary for that service?

"2. Can such retired police officer waive his pension during the time he serves as alderman or councilman and then resume his pension when his service on the council has ended."

The problem which you present is, so far as we are able to determine, unique. The nearest analogy to it seems to be that of "incompatible offices," which, we believe, furnishes some guidance in this matter. By "incompatible offices" is meant the holding, by the same person, of two or more offices the duties of which are conflicting. This matter is clearly stated in the case of State v. Bus, 135 Mo. 325. At l.c. 338 of its opinion, the court stated:

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law. ""

From the above it would appear that incompatibility consists of conflict in function, and that one person may hold two or more offices if the proper discharge of the duties of each may be performed by the same individual.

However, the fact situation which you present is not one

Hon. Stanley Wallach

in which the same person holds, or seeks to hold, two or more offices, but is one in which a person who receives a pension from a city as a retired police officer seeks to know whether he may properly serve as councilman of his city.

We believe that the only question in this regard is whether there would be any conflict in interest in such a situation. We further believe that such conflict could only arise if such person, in his capacity as councilman, would be in a position to exert influence in having his pension raised. If he could we believe that such incompatibility would exist; but that if he could not that such incompatibility would not exist.

In this regard we note the opinion forwarded by you to us, of Charles E. Altenbernd, city attorney of Maplewood, which is the city in question.

That opinion states that Ordinance No. 3039, which is the ordinance which provides for and fixes the amount of the retired policeman's pension, was passed under the provisions of Section 7075, RSMo 1939, which is now Section 78.200, RSMo 1949. Ordinance No. 3039 was, the opinion informed us, submitted to the city council by petition, signed by electors of the city equal in number to twenty-five per cent of the votes cast for all candidates for mayor at the last preceding general election, and contained a request that said ordinance be submitted to a vote of the people if not passed by the city council. This ordinance was not passed by the city council, but was submitted to a vote of the people, and was adopted at an election held November 2, 1948, becoming effective thirty days thereafter.

The opinion then calls attention to the provisions of Section 7075 (now Section 78.200) which provides that:

"If a majority of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people."

In the 1939 Revised Statutes of Missouri the above portion of the quoted statute was contained in Section 7075 (now Section

Hon. Stanley Wallach

78.200). In the 1949 Revised Statutes of Missouri the above is found in Section 78.210.

The Altenbernd opinion concludes:

"It is, therefore, my conclusion that since the proposed ordinance was adopted by a vote of the people, a councilman of the City of Maplewood would have no opportunity to vote upon the question of whether or not pensions of retired police officers could be lowered or raised since the ordinance could only be amended by a vote of the people and the pensions provided for could only be determined by a vote of the people."

From the above it would seem to be clear that the retired pensioned policeman would not, as councilman, be in a position, in his capacity as councilman, to have any influence in raising his pension, and that therefore no conflict or incompatibility would be present.

CONCLUSION

It is the opinion of this department that there is no incompatibility in a retired pensioned policeman of the City of Maplewood serving as city councilman of the City of Maplewood so long as such retired pensioned policeman, in his capacity as councilman, can take no action in regard to the amount of pension that a retired policeman of the City of Maplewood should receive.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Respectfully submitted,

JOHN M. DALTON Attorney General

HPW:lrt

CRIMINAL JURISDICTION OF:

FERT MEONARD WOOD:

The land area embraced by Fort Leonard Wood, including that portion of such area which is occupied by Highway No. 17, is under the exclusive jurisdiction of the United States so far as criminal jurisdiction is concerned.

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JOHN M. DALTON



March 16, 1953

J. C. JOHNSEN ZXZXZXZXZ

Honorable Wayne W. Waldo Prosecuting Attorney Pulaski County Waynesville, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

"The opinion of the attorney general is respectfully requested on the following situation.

"The Military Reservation of Fort Leonard Wood is situated in Pulaski County. Missouri State Highway No. 17 goes from one side of the reservation to the other and over property within the boundaries of the Military Reservation. The officials at Fort Leonard Wood contend that they have no jurisdiction to try civilians for an offense committed on Missouri State Highway No. 17 within the reservation boundaries. It is my contention that civilian authorities of Pulaski County have no jurisdiction to try a civilian for such an offense. This situation also applies to the remainder of the area covered by Fort Leonard Wood as well as that portion used by Missouri Highway No. 17.

"The opinion of the attorney general is respectfully requested concerning the jurisdiction and venue of Pulaski

County in dealing with criminal offenses committed on the reservation of Fort Leonard Wood, Missouri, and criminal offenses committed on Missouri Highway No. 17 within the boundaries of Fort Leonard Wood."

We here note that the land acquired by the United States Government for the site of Fort Leonard Wood was, as the name indicates, acquired for a "fort."

We would here direct attention to Section 12.030, RSMo 1949, which section reads:

"The consent of the state of Missouri is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, of any land in this state which has been acquired, prior to the effective date of sections 12.030 and 12.040, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes."

And, to Section 12.040, RSMo 1949, which reads:

"Exclusive jurisdiction in and over any land so acquired, prior to the effective date of sections 12.030 and 12.040, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the state of Missouri the right of taxation to the same extent and in the same manner as if this cassion had not been made; and further saving and reserving to the state of Missouri the right to serve thereon any civil or criminal process issued under the authority of the state, in any action on account of rights acquired, obligations incurred, or crimes committed in said state, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

Both of the above sections were enacted in 1947, and are found as enacted in Laws of Missouri, 1947, Vol. I, p. 366, paragraphs 1 and 2, respectively, the effective date of these sections being July 1, 1947.

The land which comprises the Fort Leonard Wood area was acquired by purchase and/or condemnation prior to July 1, 1947. It will be noted that Sections 12.030 and 12.040, supra, apply to any lands acquired by the United States by purchase, condemnation, or otherwise, prior to the effective dates of Sections 12.030 and 12.040, supra, as sites for various governmental purposes including forts. Therefore, Sections 12.030 and 12.040, supra, constitute acts of consent by the State of Missouri to the acquisition by the United States of the land embraced in the Fort Leonard Wood area. These sections granted "exclusive jurisdiction" to the United States except for some purposes, i.e., taxation and the service of civil and criminal process, none of which is here in issue, the issue here being whether the State of Missouri has jurisdiction of crimes committed on the Fort Leonard Wood area. Since "exclusive jurisdiction" certainly includes jurisdiction of crimes, then it would follow that the State of Missouri does not have jurisdiction of crimes committed on the Fort Leonard Wood area, but that such jurisdiction is vested exclusively in the United States.

Your letter poses the additional problem of criminal jurisdiction over that portion of what you designate as Missouri State Highway No. 17, which passes across the Fort Leonard Wood area from one side to the other.

We would here point out that the 13.003 miles of highway, being that portion of Highway No. 17 which passes across the Fort Leonard Wood area, is no longer, officially, known as Missouri State Highway No. 17. We would further point out that prior to the acquisition by the United States of the Fort Leonard Wood area, Missouri State Highway No. 17 occupied substantially the same land area and location which it now occupies, and that on January 11, 1941, in the District Court of the

Hon. Wayne W. Waldo

United States for the Southern Division of the Western District of Missouri, a condemnation suit was filed, the style of which was: United States of America, plaintiff, vs. 1.114.54 acres of land, more or less, situated in Pulaski and Texas Counties, Missouri.

The sixteenth count of the above petition reads:

"Rights of the State of Missouri in and to a strip of land occupied by Missouri State Highway No. 17."

On the same day, January 11, 1941, a judgment and declaration for the aforesaid count sixteen was entered in the United States District Court for the Southern Division of the Western District of Missouri, at which date and time the United States acquired right and title to the 13.003 miles of Highway No. 17 discussed above. For this reason this aforesaid area acquired by the United States is in the same legal position as the remainder of the Fort Leonard Wood area. Since we have held that the State of Missouri does not have criminal jurisdiction over that portion of the Fort Leonard Wood area not occupied by Highway No. 17, it follows that it does not have criminal jurisdiction over that portion of the area occupied by Highway No. 17, but that criminal jurisdiction over the entire area is exclusively vested in the United States.

It will be noted that Section 12.040, supra, states that "the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired." It is a matter of common knowledge that the Fort Leonard Wood area, since its acquisition by the United States, has been continuously used for the purpose for which it was acquired.

CONCLUSION

It is the opinion of this department that the land area embraced by Fort Leonard Wood, including that portion of such area which is occupied by Highway No. 17, is under the exclusive jurisdiction of the United States so far as criminal jurisdiction is concerned.

'The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Hugh P. Williamson.

Respectfully submitted,

JOHN M. DALTON Attorney General HIGHWAY PATROL:

Information complied under subsection (4), Section 43.120, RSMo 1949, available to peace officers only.

April 8, 1953

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri 65101



Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"Recently questions have arisen as to whom information may be furnished regarding an individual's criminal record and other types of information contained in our files.

"It is requested we be furnished an official opinion on the following questions:

- "1. When an attorney representing his client in a civil case requests the Highway Patrol furnish any criminal record on witnesses in that civil case, should the attorney be denied this information?
- "2. Is the Highway Patrol required to furnish information complied from its various sources, to attorneys who may be seeking information to be used in connection with representing clients in various other capacities? In this connection we had in mind reports and records complied as results of investigations conducted by members of this department."

It is important at the outset to determine what records are required to be maintained by the Missouri State

Highway Patrol with respect to the matters mentioned in your letter of inquiry.

Subsection (4) of Section 43.120, RSMo 1949, reads as follows:

"The superintendent shall collect, compile and keep available for the use of peace officers of the state such information as is deemed necessary for the detection of crime and identification of criminals."

(Emphasis ours.)

While it is true that under many circumstances public records are available to inspection by persons having an interest therein, yet it is further true that the supreme legislative body of a state may surround public records with restrictions relating to the persons or classes of persons to whom inspection of such records may be made available.

We direct your attention to the following which appears in 53 C.J., page 625:

"A state has the power to grant by statute the right of inspection of public records to all persons, regardless of interest, or as to particular records, or to any person it may see proper for the purpose of transcribing particular records for such purposes as it may deem the public interest requires; and the legislature may surround the privilege of inspection with such restrictions and limitations as it deems necessary and proper, where they apply to all persons and all are equally bound thereby. * * *"

Even where a general statute authorizes the inspection of public records, yet such a statute is inapplicable to records whose availability to inspection has been limited by the act requiring such records to be kept. Your attention is further directed to the following quotation from 53 C.J., pages 626, 627:

"* * * A statute providing for inspection of public records by all persons is intended to include only those records intended for the use of the public and not those intended only for the use of particular public officers. * * * On the other hand records that have been held not subject to inspection are: * * * police records * * *."

(Emphasis ours.)

Examining subsection (4) of Section 43.120, RSMo 1949, quoted supra, in the light of these general rules, and giving due regard to the obvious purpose for the establishment of such records which has been expressed in the statute, that is to say, that such records are for the use of peace officers, it seems quite apparent that it was not the intention of the General Assembly that the public in general have access thereto.

We are further persuaded to this opinion by reason of the fact that such records peculiarly relate to the duties of peace officers, and the information contained therein is germane to the discharge of the duties of such officials.

What we have said heretofore relates primarily to the first question which you have proposed.

With respect to the second question, you have advised us that you receive many requests for copies of accident reports, particularly those involving injuries to persons or property. These reports, as we understand it, are prepared by members of the State Highway Patrol who are called to the scene of collisions or wrecks involving motor vehicles.

We have carefully examined the provisions of Chapter 43, RSMo 1949, relating to the State Highway Patrol, and we do not find that such reports are required to be made under any statute. On the contrary, they are but matters which relate to the internal organization and functioning of the department. It is true that in some instances the factual matters contained therein may be useful to law enforcement officials, yet they are not within the scope of subsection (4) of Section 43.110, RSMo 1949, as relating to the "detection of crime and identification of criminals." For that reason we do not believe that they attain the status of "public records" to which the public generally may have access.

CONCLUSION

In the premises, we are of the opinion:

- (1) That the records complied and maintained under the provisions of subsection (4) of Section 43.120, RSMo 1949, are not available to the public generally, and that their inspection is limited to the class of officials designated in the statutes as "peace officers;" and,
- (2) That other records maintained by the State Highway Patrol merely for the convenience of the department and relating to the internal organization and functioning of that department, based upon field reports made by members of the patrol as a result of their observations, and statments taken at the scene of wrecks or collisions involving motor vehicles, are not "public records" and that no duty is imposed upon the State Highway Patrol to supply copies thereof to interested persons.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General DEFINITIONS:

MOTOR VEHICLE REGIS-TRATION: "Seating capacity" as used in Section 301.060, V.A.M.S., 1952, means number of persons who may be actually seated in a commercial vehicle, and does not limit number of passengers who may be carried.



April 9, 1953

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Colonel Waggoner:

In your letter of March 31, 1953, you requested an official opinion of this office on the following question:

> "In connection with the enforcement of the provisions of Section 301.060 of the Motor Vehicle Laws, as listed in the supplement covering those laws passed in 1951, there is a question as to the interpretation which should be placed on paragraphs four, five and six.

"A member of this organization recently arrested a driver of a bus who had paid a fee of \$290 on the vehicle which had a seating capacity of twenty-nine passengers. This is the proper fee for this number of passengers as set out in paragraph four of Section 301.060. At the time the driver was arrested, he had twenty-nine passengers seated and nine additional passengers standing in the aisle. The patrolman who made the arrest has charged the operator with exceeding the authority for which he is licensed.

"In placing an interpretation upon the wording of this paragraph, the question arises as to whether a bus licensed on the basis of a certain seating capacity may haul an unlimited number of additional passengers who are required to stand. In ruling on this question your attention is directed to rule number thirty

of the present regulations of the Missouri Bus and Truck Department. This rule does not forbid passengers from standing in the aisles and only requires that standees remain back of a certain area in order that they not interfere with the driver."

The portion of Section 301.060, V.A.M.S. 1952, about which you inquire, is quoted:

"The annual registration fee shall be as follows:

"4. For passenger-carrying commercial motor vehicles (not including passenger carrying local commercial motor vehicles, school buses or local transit buses) having a seating capacity of:

10	passer	ngers	or	less			,			\$100.00
11	to 18	passe	inge	ers						180.00
19	to 25	passe	nge	ers						250.00
26	to 29	passe	nge	ers						290.00
30		passe						•		330.00
34	to 37						•			370.00
38	to 41	passe	-		•	•			•	410.00
42	to 45	passe	nge	ers						450.00

"5. For passenger-carrying local commercial, motor vehicles having a seating capacity of:

10	passe	ngers	or	less							\$ 50.00
11	to 18	passe	ange	rs							90.00
	to 25										125.00
26	to 29										145.00
30											165.00
	to 37					•					185.00
38		passe			•	•	•			•	205.00
42	to 45	passe	enge	rs	•			•	•	•	225.00

"6. For local transit buses having a seating capacity of:

40	passeng to 45 p	ers	or	less				. 1	25.00
41	to 45 p	asse	nge	rs		•			35.00
Ove	r 45 pa	ssen	ger	S					50.00

In construing a statute and determining the meaning of words and phrases used therein, we are aided by Section 1.090, RSMo 1949, which states as follows:

"1.090. Words and phrases, how construed.--Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

Since "seating capacity" does not have "a peculiar and appropriate meaning in law" we must determine what the plain and ordinary meaning is.

Webster's New International Dictionary, Second Edition, Unabridged, defines "seating" as follows:

"adj. That seats or provides seats; as seating arrangements or accommodation."

The same authority gives this definition of "capacity":

"b. Extent of room or space; content; specif., cubic content; * * *."

These definitions plainly indicate that "seating capacity" means the number of persons who can be seated in a vehicle rather than the number who can be loaded into the vehicle. In the case of Reynolds vs. General Electric Co., 141 Fed. 551, 554, "seating capacity" is defined as follows:

"The seating capacity of a hall is its size, its ability to permit people to be seated within it."

In further considering the intention of the Legislature, it must be considered that having determined commercial passenger carrying motor vehicles should be charged

a registration fee according to their size, the Legislature was in need of a criterion or standard by which they could place different sized vehicles into different categories. If "seating capacity" is construed to mean the number of persons who can be seated in a commercial motor vehicle, the category into which it falls can be readily determined by casual inspection. If, on the other hand, "seating capacity" is construed to mean "carrying capacity", it would be most difficult to determine how many persons any particular commercial motor vehicle might carry; the determination of which would involve considerable mathemetical calculation. In view of this, it does not seem likely that the Legislature intended to strain the construction of "seating capacity" to mean the number of persons who can be loaded into a commercial motor vehicle.

The registration fee for the vehicle, in question, based upon its size as measured by the yardstick of "seating capacity", had been paid. The statute regulating the registration does not attempt to regulate the number of passengers who may actually be carried on board. Further, there appears no other statute which does limit the number of persons who may be carried on such vehicle.

CONCLUSION.

It is, therefore, the opinion of this office that "seating capacity" as used in Section 301.060, subsections 4, 5 and 6, V.A.M.S., 1952, means the number of passengers who may be seated within the commercial motor vehicles mentioned, and is for the purpose of determining registration fee of such vehicles; it does not limit the number of persons who may actually be carried on such vehicles.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:irk

DOMICILE:

RESIDENCE:

Evidence that a person maintains a home and family in this MOTOR VEHICLES:) state to which he returns on weekends, although he renus) a room in a foreign state, carrys a notarized statement) that he is a resident of such foreign state and registers) his truck in the foreign state, constitutes substantial evidence from which the trier of fact could find that such) person was a resident of the State of Missouri; and that) the operation of his truck on the highways of this state) without having registered the same with the Director of Revenue as provided in Section 301.020 would be a violation) of Section 301.020.

May 21, 1953

Colonel Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Colonel Waggoner:

We render herewith our opinion on your request of April 17, 1953, which request reads as follows:

> "Because of an increase in the truck registration fees in this State we have found that some residents are moving to other states, particularly Alabama, and renting a room and paying the license in that State. trucker frequently carries with him a notarized paper stating that he is a resident of Alabama, etc. people maintain a home and family in the State of Missouri and usually return on week ends, and it is our opinion that they are not legal residents of a foreign State.

"We request your opinion as to what would constitute residence in the State of Missouri for the purpose of determining registration of such commercial vehicles, and whether or not these persons would be in violation if they operated these vehicles on the highways of the State of Missouri."

The questions involved are: (1) whether nonresident owners of trucks operated within Missouri are required to register them in Missouri, assuming the owner otherwise falls within the terms of Section 301.270, RSMo 1949, with regard to registration in state of residence, reciprocity and display of tags; and (2) whether a person situated as

Colonel Hugh H. Waggoner

described in your request is a nonresident of Missouri for the purposes of this act.

In the course of the opinion reference will be made to Sections 1.020, 301.020 and 301.270, RSMo 1949, the pertinent parts of which read as follows:

Section 1.020, RSMo 1949:

"(9) 'Place of residence' means the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge;"

Section 301.020, RSMo 1949:

"Registration of motor vehicles.--Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, except as herein otherwise expressly provided, shall file, by mail or otherwise, in the office of the director of revenue, an application for registration on a blank to be furnished by the director of revenue for that purpose, * * *"

Section 301.270, RSMo 1949:

"Registration of nonresidents -- reciprocity. -- A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a

nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The first question must be answered in the negative, nonresidents, assuming the other conditions of Section 301.270 are met, being specifically excepted from the operation of the act by the terms of Section 301.270.

As to the second question, "residence" is a question of fact to be determined by the trier of fact and not a question of law. It is dependent upon all the facts and circumstances in evidence and not upon any particular fact. In Re Ozias Estate, (No. App.), 29 S.W. (2d) 240, at 243. Many facts and circumstances other than those set out in your request might enter into determination of the question of residence -- but nothing else appearing, we believe that the facts and circumstances set out in your letter would constitute substantial evidence of residence in the State of Missouri from which the trier of fact could well find that the person so situated was a resident of this state, and hence, would not be relieved of the duty of registration in this state under Section 301.270, quoted above.

The concept of residence has been before the courts of Missouri in innumerable cases. We here set out excerpts from a few of those cases, which we believe to be pertinent to the problems presented in your request.

In Greene v. Beckwith, 38 Mo. 238, 1.c. 239, the court said:

" * * * A man's residence, like his domicil, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on--Chaine v. Wilson, 1 Bosw. (N. Y.) 673. * * *" In Re Ozias Estate, (Mo. App.), 29 S.W. (2d) 240, 1.c. 243, the court said:

"* * * Residence and domicile are used interchangeably, and, in so far as they apply to the situation here presented are synonymous.

"'Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning."

"Bouv. Law Dict., Vol. 1, page 915.

In Chariton County v. Moberly, 59 Mo. 238, 1.c. 242, the court said:

"* * If a married man has two places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen. (Sto. Con. Laws. § § 47, 6 and 8.)"

Proof of the maintenance of a home and family in Missouri to which the person returns on weekends is very persuasive that he is a resident of Missouri under the above-quoted Section 1.020 and the foregoing cases, and would constitute evidence from which the trier of fact could well find he was a resident of Missouri. The self-serving notarized statement is of little or no probative weight on the question of residence. The renting of a room in the foreign state, assuming he returns to it on occasion, and the registration of his truck in the foreign state, is evidence of domicile or residence in such other state but probably not of such weight as the evidence to the contrary.

CONCLUSION

It is the opinion of this office that evidence that a person maintains a home and family in this state to which he returns on weekends, although he rents a room in a foreign state, carries a notarized statement that he is a resident of such foreign state, and registers his truck in the foreign state, constitutes substantial evidence from which the trier of fact could find that such person was a resident of the State of Missouri; and that the operation of his truck on the highways of this state without having registered the same with the Director of Revenue, as provided in Section 301.020, would be a violation of Section 301.020.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

WDK/fh

JOHN M. DALTON Attorney General MOTOR VEHICLES: BRAKES; SUFFICIENCY REQUIRED:



Intention of legislature in enactment of Par. 3, Section 304.560, RSMo 1949, is that all motor vehicles except motorcycles be provided at all times with two sets of brakes kept in good working order. When either set is operated independently of the other, must be sufficient to enable driver of moving vehicle to stop same within reasonable distance. Moving vehicle with two sets of brakes that cannot be stopped within reasonable distance when hand or emergency brake is operated, then driver violates said statute.

June 13, 1953

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads in part as follows:

"Paragraph 3 of Section 304.560, R.S. Mo. 1949, reads as follows: 'All motor vehicles, except motorcycles, shall be provided at all times with two sets of adequate brakes, kept in good working order, and motorcycles shall be provided with one set of adequate brakes kept in good working order.'

"It has been our interpretation that this section required all motor vehicles except motorcycles, to have foot brakes and an emergency or hand brake capable of stopping the vehicle.

"It has recently come to our attention that certain motor vehicles do not have emergency or hand brakes capable of stopping the moving vehicle, but which are capable of holding the vehicle while it is parked.

"Your opinion is respectfully requested on the following questions:

"1. Is the driver of a vehicle which does not have, in addition to the foot brake, an emergency or hand brake capable of stopping the vehicle in violation of section 304.560?"

Paragraph 3 of Section 304.560, RSMo 1949, referred to in the inquiry reads as follows:

"(3) Brakes: All motor vehicles, except motorcycles shall be provided at all times with two sets of adequate brakes, kept in good working order, and motorcycles shall be provided with one set of adequate brakes kept in good working order."

From the facts upon which the inquiry is based, it appears that motor vehicles are being operated within this state although having two sets of brakes required by above quoted section, the emergency or hand brake are incapable of stopping said vehicle when they are moving, but capable of holding them when they are parked.

As to whether or not the driver of a motor vehicle will be guilty of violating the provisions of Paragraph 3 of Section 304.560, supra, when driving a motor vehicle under the circumstances referred to in the preceding paragraph, thereby subjecting him to criminal prosecution, and the punishment provided by Section 304.570, RSMo 1949, will depend upon the construction given to Section 304.560, supra.

In attempting to arrive at the proper construction of said section, as in every other instance, the primary rule of statutory construction must be borne in mind. That rule was given in the case of Artophone v. Coale, 133 S. W. (2d) 343, in which the Supreme Court of Missouri said at 1. c. 347:

"* * *'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," as properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S.W. 2d 920, 925 (7-10)."

In so far as our discussion is concerned above inquiry resolves itself into these questions:

- (1) In the enactment of Section 304.560, supra, did the legislature intend that all motor vehicles, except motorcycles, operated upon the highways of this state should at all times be equipped with two sets of adequate brakes, kept in good working order, and that either set when used independently of the other, should be capable of stopping the vehicle?
- (2) In the enactment of said section, was it the intention of the lawmakers that all motor vehicles, while required to be equipped at all times with two sets of adequate brakes kept in good working order, only the foot brakes are required to be capable of stopping the vehicle when in motion, and that the hand or emergency brakes are not required to be capable of stopping the vehicle, but to hold or keep the vehicle still when it is not moving or when it is parked?
- (3) What are the meanings of the terms "adequate brakes" "Kept in good working order" as used in said section?

Unfortunately, Section 304.560, supra, nor any of the terms used therein have ever been construed by the appellate courts of this state, therefore, in attempting to construe said section and particularly the terms "adequate brakes" and "kept in good working order," we find it helpful to refer to the decisions of the higher courts of other states which have construed the terms as used in the statutes of other states which are similar to the above quoted section of the Missouri statutes.

In this connection we first call attention to the case of Turrell v. State, 51 N. E. 359, in which the defendant had been convicted of the criminal offense of reckless homicide by means of a motor vehicle. In construing the terms "good working order" and "adequate brakes" as used in a statute of the State of Indiana, the Supreme Court of that state said at 1. c. 361:

"The affidavit alleges that the brakes of appellant's car 'were not maintained in good working order and were inadequate to control the motion of and to stop and hold the movement of said automobile.'
This language was doubtless obtained from Secs. 47-2228, Burns' 1940 Replacement, Secs. 11189-157, Baldwin's Supp. 1939, prescribing a general standard of brake capacity for motor vehicles 'when operated upon a highway.' 'Good working order' and 'adequate' are relative terms. A brake adequate to 'stop and hold' on a level road

might be inadequate on a 15 percent grade. Pleasure car brakes would be inadequate for heavy trucks. The brakes of a Model T Ford in 'good working order' would not adequately stop and hold a Cadillac. The statute must be construed as requiring that brakes shall be in good working order and adequate for the particular type of vehicle in ordinary reasonable use on the highway. This is common sense. * * *"

Again in the case of People v. Circado, 250 N.Y.S. 477, the defendant was convicted of violating a statute which required all motor vehicles driven upon the state highways to be provided with adequate brakes in good working order and sufficient to control the vehicle at all times it was being used.

It was contended that since defendant's vehicle was equipped with an adequate foot brake, defendant was not guilty of violating the statute, and that under the provisions of said statute the emergency brake was intended to be used only for holding the vehicle when parked. In passing upon these contentions of the defendant the court at 1. c. 479 said:

"The contention that as defendant's car was equipped with an adequate foot brake, he did not violate the statute because his emergency brake was not in good condition, is untenable. The statute reads: 'Brakes' plural, not 'brake' singular. If it were the intention of the Legislature to use the word 'brake' singular, it could very easily have been said that every motor vehicle operated or driven upon the public highways of the state shall be provided with an adequate foot brake (or an adequate emergency brake) in good working order and sufficient to control such vehicle at all times while in use. This the Legislature did not do, and in my opinion the statute means just what it says, that the brakes of the motor vehicle must be adequate, which means that both the foot brake and the emergency brake must be in good working order and sufficient to control the car at all times when in use.

"As to counsel for defendant's second contention, subdivisions 3 and 4 of section 87 of the Vehicle and Traffic Law have no application to the present case, but are provisions of law for the protection of the public where a car is parked and left unattended in the street to prevent same from rolling.

"The word 'emergency' is defined in the Standard Dictionary as follows: 'A sudden or unexpected occurrence or condition calling for immediate action.' The emergency brake (as the name implies) is for the purpose of bringing the car to a stop in a sudden or unexpected occurrence or condition, to be used in addition to the foot brake and also in case the foot brake should be out of order or unable to bring the car to a stop.

"The emergency brake in defendant's car when applied by defendant, while his car was being operated at a speed of twenty miles per hour, stopped the car in a distance of 87 feet. The officer testified that had the emergency brake been adequate, it would have stopped the car within 37 feet. This shows conclusively that the emergency brake is not for parking purposes only, but as above noted to be applied in an emergency to bring the car to a stop."

It appears that the words used in Paragraph 3, Section 304.560; supra, were intended to be given their plain and ordinary meaning, since there is no indication that some other or different meaning was intended.

Applying the reasoning given in the New York case to the facts before us, and in construing above quoted statute, it appears that each of the two sets of brakes with which all motor vehicles except motorcycles, must be provided at all times shall be kept in the same condition, that is, "adequate" and "in good working order." Had it been the intention of the lawmakers that only one set of brakes, for example, the foot brakes were to be kept in such condition and capable of stopping the vehicle within a

reasonable distance, and that the hand or emergency brake was to be used exclusively for the purpose of holding the vehicle after it had been stopped, then they would have specifically provided such in this or some other section of the statute. Since they have not seen fit to do so, we are not at liberty to supply missing statutory provisions or to construe it in a manner which appears to be contrary to the intention of said lawmakers.

While the statute does not provide that brakes shall be sufficiently maintained that when applied, they shall stop the vehicle at the will of the driver, yet, the plural of the word "brake" has been used, and it appears that all brakes were intended to be kept in the same condition and intended to be used for the same purpose. It is believed that the purpose for which such brakes were intended, when applied by the driver, that vehicle operated by him will be retarded, or the vehicle will come to a complete stop within a reasonable distance, and that the application of either set of brakes will assist the driver in having the proper control of his vehicle at all times.

When the brakes are applied for the purpose of stopping the vehicle within a reasonable distance, the inquiry might arise as to what is meant by "reasonable distance." No statutory construction of this term has been given and we make no attempt to give any definition or to lay down any rule applicable to every situation which might arise when the meaning or use of the term might become material.

The fact that no definition or general rule has been established for determining what should be a reasonable distance for stopping a moving motor vehicle in every instance does not indicate that the term "reasonable distance" is vague and meaningless, but that it may be explained or interpreted by use of ordinary words or terms which adequately convey the meaning intended. Such was held to be the rule in the case of Sproles v. Binford, 52 S. Ct., 581, in which the court at 1. c. 587 said:

"Appellants urge that this provision, by reason of the use of the terms 'nearest practicable common carrier receiving or loading point' and 'shortest practicable route to destination,' and 'common carrier receiving or loading point equipped to transport such load,' is so uncertain that it affords no standard of conduct that it is possible to know. We cannot agree

with this view. The 'common carrier receiving or loading points.' and the unloading points, described seem quite clearly to be points at which common carriers customarily receive shipments, of the sort that may be involved, for transportation, or points at which common carriers customarily unload such shipments. 'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * *The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it."

It is believed that under such circumstances that no definition or general rule can be given, but that the facts of each particular case must be considered in determining whether or not the moving vehicle had been stopped within a reasonable distance.

It is common knowledge that the foot brake is ordinarily used for the purpose of lessening the speed of a moving vehicle or to bring it to a stop, and that the hand or emergency brake is ordinarily used for the purpose of holding it after it has been stopped. The emergency brake is not often used for the purpose of stopping the vehicle, however, as was pointed out in the opinion of People v. Circado, supra, the purpose of the emergency brake is to bring the car to a stop in a sudden or unexpected occurrence or condition, to be used in addition to the foot brake and also when the foot brake is out of order or unable to bring the car to a stop.

In view of the foregoing, we construe Paragraph 3, Section 304.560, supra, in accordance with what is believed to be the intention of the legislature, that all motor vehicles, except motorcycles, must be provided with two sets of adequate brakes, kept in good working order and that when either set is operated independently of the other such brakes must be sufficient to

retard and lessen the speed of the vehicle, or to bring it to a complete stop within a reasonable distance at the will of the driver.

Therefore, in answer to the inquiry of the opinion request, it is our thought that the driver of the motor vehicle, which vehicle does not have, in addition to the foot brakes, an emergency or hand brake capable of stopping the vehicle within a reasonable distance, violates the provisions of Section 304.560, Paragraph 3.

CONCLUSION

It is therefore the opinion of this department that in the enactment of Paragraph 3, Section 304.560, RSMo 1949, it was the intention of the legislature that all motor vehicles, except motorcycles, shall at all times be provided with two sets of adequate brakes kept in good working order and that either set of which, when operated independently of the other shall be sufficient to enable the driver of a moving motor vehicle to stop said vehicle within a reasonable distance.

It is further the opinion of this department that when a moving motor vehicle, although provided with two sets of brakes required by above cited statute, cannot be stopped within a reasonable distance after the driver has operated only the hand or emergency brake, then said driver will have violated the provisions of said statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PNC:hr

MOTOR VEHICLES: Reciprocity with States of Arkansas,

RECIPROCITY: I

Illinois and Kansas.

June 23, 1953

FILED 93

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"By virtue of authority granted by Section 301.270, the State of Missouri has entered into reciprocal agreements with a number of states in regard to the use of licenses on motor vehicles.

"One paragraph taken from the agreement with the State of Arkansas, which is similar to the agreement with many other states, reads as follows:

"Any bus, truck or combination of truck and trailer or semi-trailer operated interstate for compensation and properly authorized, licensed and registered to be so operated in either the State of Arkansas or Missouri as the state of owner's residence, shall be permitted to come into or through the other state provided a permit is obtained from the duly authorized authority or authorities of said other state, and which permit if granted, shall be issued without any charge or application fee, provided however, that whenever an owner or operator shall maintain a vehicle at any terminal upon an interstate route, which vehicle for other legal purposes might ordinarily be regarded as engaged in "interstate commerce" by reason of

which is engaged in such operations, but which is engaged in such operations exclusively within the state of nondomicile, such vehicle shall not be exempt under this agreement, but shall be registered in and subject to taxation by the state of non-domicile.

"In enforcing the provisions of our license regulations, members of this department have recently arrested the drivers of several trucks operating under lease to the Southwest Freight Lines with offices in Kansas City and St. Louis. These trucks were picking up steel in St. Louis, Missouri, and delivering it to Kansas City. The shipment had originated in Pittsburgh, Pennsylvania, and came to St. Louis by barge. The drivers, who were arrested, have been charged with using improper license for the reason that they were bearing licenses from either Illinois, Arkansas or Kansas.

"The opinion of your department is requested in regard to whether such vehicles making an intra state haul in Missouri, regardless of whether the shipment is moving intra or inter state, would be required to bear Missouri license especially when the operator is domiciled in this State."

The agreement referred to in your letter of inquiry has been executed by the Public Service Commission of the State of Missouri, under the powers granted to that body, under the provisions of Section 386.220, RSMo 1949. This section reads as follows:

"386.220. The commission is hereby authorized and empowered to engage in any conferences with officials of any and all other states and the District of Columbia for the purpose of promoting, entering into, and establishing fair and equitable reciprocal contracts or agreements that in the judgment of the

commission would be proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof to the end that any motor carrier of passengers or property who or which is a nonresident of the state of Missouri and operates motor vehicles into, out of, or through this state as a for hire motor carrier and who has complied with the laws of the state of his or its residence and paid all fees required by the state of his or its residence shall not be required to pay fees prescribed in section 390.110, RSMo 1949; * * "

(Emphasis ours.)

You will note the reference to Section 390.110, RSMo 1949, embodied in the statute. Reference to the latter section discloses that its provisions are applicable only to fees required to be paid in addition to the regular registration license fees imposed on all motor vehicles in Missouri.

We quote from Section 390.110, RSMo 1949, in part:

"390.110. In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, * * "

(Emphasis ours.)

Section 301.270, RSMo 1949, referred to in your letter of inquiry relates to reciprocity between the State of Missouri and other states with respect to regular license fees required to be paid upon all motor vehicles in Missouri. It reads as follows:

"301.270. A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

We do not find that any official of the State of Missouri has been empowered to negotiate any agreement or agreements under the provisions of this statute; on the contrary, the right of reciprocity with respect to the regular license fees imposed on motor vehicles must be determined by reference to the statutory laws of the foreign state under consideration.

From the foregoing, we are of the opinion that the "agreement" set out in your letter of inquiry is of no force or effect in determining the reciprocal rights existing between residents of Missouri and residents of various foreign states with respect to licenses. To determine whether or not rights exist with respect to residents of the states mentioned in your letter of inquiry, namely, Arkansas, Illinois and Kansas, and operating under the conditions outlined therein, so as to relieve such residents of such foreign states from the necessity of complying with the general laws of Missouri relating to the registration and payment of license fees to the State of Missouri, we must look to the statutes of such foreign states.

We first consider the statutory enactments of the State of Arkansas. The references to section numbers are to the Arkansas Statutes, 1947, Official Edition.

Section 75-238 grants reciprocity to nonresidents of the State of Arkansas under five enumerated circumstances. It is noted that none of the enumerated types of operation includes intrastate "for hire" hauling of the nature outlined in your letter of inquiry. Section 75-239 limits the operation of Section 75-238 to foreign states granting similar reciprocity to residents of the State of Arkansas. In this respect, Missouri would qualify by reason of Section 301.270, RSMo 1949, quoted supra.

Sections 75-250 to 75-252, inclusive, provide for the establishment of a commission to enter into reciprocal agreements with similarly authorized bodies of foreign states. These sections include Section 75-251, which we quote in full:

75.251. The Commission is hereby authorized to negotiate and consummate reciprocal agreements with the duly authorized officials or representatives of any state or the several states of the United States, whereby residents of such other state or states who operate motor vehicles that are properly registered and licensed in their respective state or states may have such privileges and be exempt from such licenses and fees in the operation of their motor vehicles in Arkansas. as residents of this State are granted by such other states in the operation of motor vehicles that are duly registered and licensed under the laws of Arkansas. Provided, however, that nothing in this act (Secs. 75-250--75-252) shall be construed as relieving any motor vehicle owner or operator from complying with all laws, rules and regulations pertaining to safety of operation of motor vehicles and the preservation of the highways of this state."

This latter statute has not been the subject of judicial construction by the appellate courts of the State of Arkansas. Consequently, we are unable to determine whether under its provisions the commission created by other portions of the same act is authorized to extend full reciprocity by the State of Arkansas beyond the enumerated types of operations included in Section 75-238. Also, as mentioned previously, no statute of the State of Missouri authorizes any official of this state to enter into such reciprocity agreements with respect to motor vehicle license fees. However, if, in fact, the State of Arkansas

does recognize an agreement executed pursuant to Section 75-251, as granting full reciprocity as to all types of operation by nonresidents within that state, then the State of Missouri would be obligated to extend such full reciprocity to residents of the State & Arkansas. As mentioned, we are unable to definitely answer this portion of your inquiry.

We have further examined the statutory enactments of the State of Illinois. References hereafter to section numbers relate to the Illinois Revised Statutes, 1951.

Chapter 95½, Section 22, authorizes agreements for reciprocity with foreign states. However, this grant of reciprocity is limited by the following provision appearing therein:

" * * * Foreign corporations, partnerships and individuals owning, maintaining
or operating places of business in this
State and using motor vehicles or motor
bicycles in connection with such places
of business, shall comply with the provisions of Sections 8, 9, 10, 14, 17
and 27 of this Act insofar as the motor
vehicles and motor bicycles used in
connection with such places of business
are concerned."

(Emphasis ours.)

Section 9, mentioned in the quoted portion of the statute, imposes license fees upon trucks operated in "for hire" hauling intrastate within the State of Illinois.

You have not advised us in your letter of inquiry as to whether a "place of business" is owned, maintained or operated in Missouri. If such, in fact, is done, then under the provisions of the Illinois statute quoted supra, a Missouri resident under similar circumstances would be required to register motor vehicles used in connection with such place of business in Illinois, and conversely residents of Illinois would thereupon be required to register motor vehicles so used by them in Missouri with this state.

We have further examined the statutory enactments of the State of Kansas. Section number references herein relate to the General Statutes of Kansas, 1949. Section 8-138 authorizes reciprocity with respect to license fees with other states. However, it too contains a limitation upon such full reciprocity, in subsection (b) thereof, which we quote:

"a nonresident owner of a foreign vehicle, including any foreign corporation, operated within this state for the transportation of persons or property for compensation between points within the state, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state."

CONCLUSION

In the premises, we are of the opinion that a resident of the State of Arkansas is not required to register and pay the motor vehicle license tax imposed under the laws of the State of Missouri upon vehicles used in the manner described in your letter of inquiry, provided that in the administration of the motor vehicle registration and licensing laws of the State of Arkansas, residents of the State of Missouri are accorded the same privilege.

We are further of the opinion that residents of the State of Illinois are exempt from registration of motor vehicles used as described in your letter of inquiry, unless such residents of Illinois own, maintain or operate a place of business within the State of Missouri and use such motor vehicles in connection therewith.

We are further of the opinion that residents of the State of Kansas are required to comply with the registration and licensing provisions of the laws of the State of Missouri relating to motor vehicles, for the reason that such state does not accord residents of the State of Missouri exemption from the registration and licensing laws of that state with respect to motor vehicles operated in such state by residents of the State of Missouri, in carrying on operations of the type described in your letter of inquiry.

The foregoing opinion, which I hereby approve, was

prepared by my assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General RECIPROCITY: MISSOURI: KANSAS: As regards the registration of motor vehicles transporting passengers or property for hire, reciprocity does not exist between the state of Missouri and the state of Kansas.

June 23, 1953



Colonel Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion. You thus state your request:

"We request your opinion on whether or not reciprocity on commercial motor vehicle license should be granted to the residents of the State of Kansas as is presently done. Commercial operators, both private and for hire are required to register and pay a ton mile tax when operating on the highways of the State of Kansas. Of course, Missouri does not have such a tax and commercial motor vehicle operators from the State of Kansas, when properly licensed in that State are permitted to operate through Missouri without payment of any license fee other than the Public Service Commission sticker on for hire operation.

"Attached are several forms which a Missouri trucker must fill out for operation through the State of Kansas. We realize there is a great deal of difficulty on the part of motor carriers in complying with all State regulations, and of course, we have no desire to create any additional State barrier, however, we feel that Missouri truckers operating in the State of Kansas are discriminated against and would like to know whether or not Kansas truckers are entitled to reciprocity on State motor vehicle license when Missouri truckers are required to pay a fee for operation in the State of Kansas."

Colonel Hugh H. Waggoner

The Missouri law setting forth the terms and conditions upon which reciprocity with other states will be recognized, is found in Section 301.270, RSMo 1949, which reads:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The substance of the above section is that a motor vehicle duly registered in the state where it is owned may operate in this state without registering or paying any fee to this state, provided that a motor vehicle owned in this state and registered in this state may operate in such other state upon the same terms, to wit, without registering or paying any fee. It seems clear to us that this section means that in order for reciprocity to exist, the other state must not do either of these two things, require the Missouri motor vehicle to register in such state, and/or pay any fee in such state, or sum of money for any purpose for the privilege of operating in such state. This we infer from that part of the above section which, referring to motor vehicles from another state, reads:

"* * * without registering such vehicle or paying any fee to this state * * * only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The matter which we now have to determine is whether the state of Kansas makes any registration or fee requirement of Missouri owned and registered motor vehicles that Missouri does not make of Kansas owned and registered motor vehicles operating in Missouri. That Kansas does do this is clearly shown by the following:

"INSTRUCTIONS FOR PREPARING APPLICATION FOR A PRIVATE CARRIER PERMIT IN THE STATE OF KANSAS

"All enclosed forms must be filed in duplicate except the form marked 'Designation of Agent for Service of Process.'

"FILING FEE: The filing fee for a private carrier application is \$10.

"ADVANCE MILEAGE TAX DEPOSIT: The advance mileage tax deposit required for each piece of equipment registered is \$20 for each unit having a rated capacity of three tons or less and \$6 for each additional ton. The deposit on vehicles placed in service after July 1 of any year will be graduated by periods of the year as follows: July 1 to September 30 -- \$20 with \$6 for each additional ton; October 1 to December 31 -- \$15 with \$4.50 for each additional ton; January 1 to June 30 -- \$10 with \$3 for each additional ton.

"FINANCIAL STATEMENT: Financial statements must be furnished. In preparing this statement, an accurate showing must be made of your assets and liabilities. Partnerships must furnish individual financial statements for each of the partners as well as a combined financial statement.

"PARTNERSHIP AGREEMENT - ARTICLES OF INCOR-PORATION: When the applicant is a partnership, a copy of the partnership agreement must accompany the application. If there is no written agreement, a statement of partnership should be filed naming the partners and showing the interest of each partner. The agreement or statement must be signed by all partners. When the applicant is a corporation, a certified copy of the Articles of Incorporation must be attached to the application.

Colonel Hugh H. Waggoner

"SCALE TICKETS: Scale tickets showing the actual empty weight of each piece of equipment to be operated must accompany the application.

"DESIGNATION OF AGENT FOR SERVICE OF PROCESS:
If you reside outside the State of Kansas,
you must designate an agent for service of
process in this state. If you have no one in
the State of Kansas who can act as process
agent for you, you may consent that service
of process be made upon the Secretary of State of the
State of Kansas, or his successor, by so
indicating on the designation of agent form.

"INSURANCE: The instructions for filing proper insurance are attached hereto.

"If the application is complete and properly executed and notarized, we can give the matter prompt handling.

"STATE CORPORATION COMMISSION

"s/ Ray R. McKinley

"Ray R. McKinley, Chief Clerk "Motor Carrier Division"

The above is based upon Sections 66-1,120 General Statutes of Kansas Annotated 1949, et seq. Section 66-1,120 reads as follows:

"In addition to the regular license fees or taxes imposed upon 'public motor carriers of property or of passengers,' contract motor carriers of property or of passengers,' and 'private motor carriers of property,' there shall be assessed against and collected from every such carrier a tax of five-tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (a) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added

the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (b) 200 percent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000."

From the language of the above statute, it appears that the gross ton mileage tax is in part at least a use tax. It is so treated in the case of Continental Baking Company v. Woodring, Governor of Kansas, 55 Federal (2d) 347. At l.c. 351, the court stated:

"First looking at the statute as a whole:
It is immediately observed that it draws
no distinction between residents and nonresidents. Next, it discloses a general
intent to levy a reasonable tax for the
use of its highways by those who habitually
use the highways for business purposes.

* * *"

This also appears to be in part the nature of the Missouri motor vehicle registration law. In the case of State ex rel. McClung v. Becker, 288 Mo. 607, at l.c. 614, the court stated:

"The advent of motor vehicles made necessary the continued expenditure of large sums of money in the construction and maintenance of better roads and bridges, including the cost for the protection and identification of such vehicles, for police protection and for control and direction of the heavy and dangerous traffic which came with that class of high-powered vehicles. It is, therefore, not only a police regulation, but a revenue measure as well. (Berry, Automobiles, sec. 110, p. 119.)

"Its purpose is manifestly the production of revenue to be used for the purpose specifically set forth. If the law raised sufficient to pay only the expense of administering it, it would not be a tax at all. It would be in the nature

of a license. Being a tax laid on the privilege for a specific purpose to be used for the maintenance and repair of the thing concerning which the privilege is granted. it is a valid tax unless unreasonable. The use of the entire proceeds in aid of the specific privilege enjoyed by those who pay the tax is an essential feature in determining its reasonableness. . . The authorities agree that a statute is general and uniform if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness, or because in practice it may result in some inequality. (Saviers v. Smith, 128 N.E. (Ohio) 269, 1.c. 272, citing many cases.)

"The charging of an annual sum for the use of its highways by automobiles, instead of a mileage fee, is clearly a matter within the discretion of the State. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows. * * * * * * * *

Section 66-1,120, supra, refers to the mileage charge as a "tax", whereas the Missouri registration law and reciprocity law refer to the cost of registering a motor vehicle as a "fee", but whether it be called a "fee", a "tax", or simply a "charge", the fact remains that a Missouri owned and registered motor vehicle operating in the state of Kansas is subjected to a monetary payment to which a motor vehicle owned and registered in the state of Kansas is not subjected to when operating in Missouri. This, we believe, to be contrary to the intent and the letter of the Missouri reciprocity statute (Section 301.270, supra), and we believe, therefore, that as regards registration of motor vehicles transporting passengers or property for hire, reciprocity does not exist between the state of Missouri and the state of Kansas.

We do not believe that the fact that the gross ton mileage tax set out in Section 66-1,120, supra, is applicable to residents of Kansas as well as to nonresidents has any

bearing upon the matter. The Missouri reciprocity statute (Section 301.270, supra) states that a motor vehicle duly registered in another state may operate in this state "with-out registering such vehicle or paying any fee to this state" if a Missouri registered motor vehicle may operate in such other state upon the same terms, which would be without registering or paying any fee. Clearly the gross ton mileage tax of Kansas is such a "fee" or charge as would come under the compass of the Missouri reciprocity statute.

CONCLUSION.

It is the opinion of this department that as regards the registration of motor vehicles transporting passengers or property for hire, reciprocity does not exist between the state of Missouri and the state of Kansas.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON Attorney General

HPW:mm:sw

HIGHWAYS: NUISANCE:



A motor vehicle may be parked or abandoned on the MOTOR VEHICLES: public roads and highways in such a manner as to constitute a public nuisance; each situation must be appraised to determine whether there is a public nuisance. Motor vehicles which are public nuisances may be summarily removed by Highway authorities. Such Highway authorities cannot incur liability on the part of the owner for the cost of towing such vehicle to a garage and storing it.

July 6, 1953

Honorable Hugh H. Waggoner Supe rintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Colonel Waggoner:

In your letter of April 28, 1953, you requested an official opinion of this Department as follows:

> "The members of this department often find wrecked vehicles or illegally parked vehicles on the right of way of highways throughout the State. Your opinion is respectfully requested as to the authority of the members of the Patrol to have such vehicles towed in to a garage for safe keeping under each of the following conditions:

- "1. If a vehicle has been involved in an accident, or has become disabled and is on the traveled portion of the roadway and the owner or driver is physically unable to make arrangements for its removal or refuses or neglects to make such arrangements.
- "2. If a vehicle has been involved in an accident or has become disabled and is not on the traveled portion of the highway and the owner or driver is physically unable to make arrangements for its removal or refuses or neglects to make such arrangements.
- **"**3• If a vehicle is parked unattended upon a highway or shoulder adjacent thereto without exhibiting lights as required in section 304.450.

"If. under any of the conditions stated above. a vehicle is ordered towed in by a member of

this department, who is responsible for the payment of tow-in and storage charges."

An examination of the statutory laws of Missouri discloses no summary provision for removing such motor vehicles from the highways.

Any authority to remove such vehicles must be based upon the premise that such vehicles are nuisances.

The right of the public to the use of highways is discussed in Cohen vs. Mayor, Etc. of New York, 21 N.E. 700, 1.c. 701:

"* * * The primary use of a highway is for the purpose of permitting the passing and repassing of the public; and it is entitled to the unobstructed and uninterrupted use of the entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and receive and take away property for or in the interest of the owners of the adjoining premises, which it is not now necessary to more specifically enumerate. * * * * * * * * * * It is no answer to the charge of nuisance that, even with the obstruction in the highway, there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. If it be permanently or even habitually in the highway, it is a nuisance. The highway may be a convenient place for the owner of carriages to keep them in. but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable-yard; * * *."

What constitutes a nuisance is defined in 66 C.J.S., page 727:

"Although the term 'nuisance' has been regarded as incapable of precise definition so as to fit all cases, it has

also been held to be a term with a well defined legal meaning, and in legal phraseology applies to that class of wrongs which arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing material annoyance, inconvenience, discomfort, or hurt."

Nuisances are usually classified either as public or private. A public nuisance is one which interferes with the rights enjoyed by the public, and which damages all persons who come within the sphere of the operation of the nuisance, or which injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public. A private nuisance is one that affects a single individual or a determinative number of persons in the enjoyment of a private right. A motor vehicle so placed on the highway as to endanger the persons traveling thereon, and cause them inconvenience, would be a public nuisance.

Nuisances may be further classified as "per se" or "per accidens". A nuisance per se is an act or thing which is at all times and under all circumstances a nuisance. A nuisance per accidens may be an act or thing which may be under some circumstances a legitimate and desirable act or thing, but which under other circumstances may become, in fact, a nuisance. Obviously, a motor vehicle is not a nuisance per se, but may become a nuisance per accidens.

That a motor vehicle may become a public nuisance by reason of its presence on the highway, is indicated by this excerpt from Carson vs. Baldwin, 144 S.W. (2d) 134, 1.c. 135:

"The common law condemns as a public nuisance any unauthorized or unreasonable obstruction of a highway which necessarily impedes or incommodes its use by the travelling public. * * *."

25 Am. Jur., page 565, also states that an obstruction of a highway may constitute a public nuisance:

"The public is rightfully entitled to the use of a highway free of all unauthorized or unlawful obstructions or impediments which tend to delay or obstruct traffic, and free of all nuisances which tend to annoy or endanger the safety of travelers. It has long been recognized that any object, condition, or occurrence, whether within or outside the way, which materially and unlawfully interferes with the free and safe enjoyment of the public easement constitutes a public nuisance.

That an appropriate officer may remove an obstruction from the highway is made clear by 66 C.J.S., page 854:

"* * * The right of summary abatement of nuisances, without judicial process or proceeding, was an established principle of the common law, * * *."

Having determined that an automobile left on the highway may constitute a public nuisance, and having determined that public nuisances may be summarily abated, it is necessary to examine each of the instances you cite to determine whether they constitute a public nuisance. The first instance you mention is when a disabled vehicle is on the traveled portion of the roadway. That such vehicle on the traveled portion of the roadway would be a great danger to the public traveling thereon is clear. Thus, such vehicle may be removed from the traveled portion of a road.

Your second instance involves a disabled vehicle not on the traveled portion of the highway. To determine whether a vehicle parked on the shoulder is a public nuisance, the prevailing circumstances must be considered. Among the items of importance to the determination is the width of the traveled portion of the road, the width of the shoulder and the distance the vehicle is from the traveled portion. The amount and type of traffic on the highway where the vehicle is parked, the speed of such traffic and the distance from which an oncoming traveler may see such vehicle, must all be balanced together to see whether the vehicle does, in fact, create a public danger or material inconvenience. It also is proper to consider the length of time which the vehicle is left on the shoulder. A vehicle which may cause a small amount of danger or annoyance to the public might, in the aggregate, over a period of time be so great as to constitute a public nuisance, and thus be summarily abated.

The third instance about which you inquire is whether an unlighted vehicle parked unattended may be removed. Section 304.450, RSMo 1949, requires that parked vehicles be lighted, as follows:

"304.450. Parked vehicles--how lighted-exception. -- Whenever a vehicle is parked or stopped upon a highway or shoulder adjacent thereto, whether attended or unattended during the times when lighted lamps are required, such vehicle shall be equipped with one or more lamps which shall exhibit a white light on the traffic side visible from a distance of five hundred feet to the front of such vehicle and a red light visible from a distance of five hundred feet to the rear; provided, that local authorities in cities, towns and villages may provide by ordinance that no lights need be displayed upon any such vehicle when stopped or parked in accordance with local parking regulations upon a highway where there is sufficient light to reveal any person or object within a distance of five hundred feet upon such highway. Any lighted head lamps upon a parked vehicle shall be depressed or dimmed."

Although the above section makes it a misdemeanor to park unlighted cars in the manner prohibited, that alone does not give the Highway authorities the right or power to remove them from the highway unless such vehicles become a public nuisance as discussed above.

Even though the common law may authorize the removal of obstructions on the highway, there is no indication where such obstructions are to be placed. The only places that such obstructions may safely be left would be either on public property, on the property of the owner of the obstruction, or on the property of a stranger who consents thereto. If there be a place on the highway where such obstruction may be placed where it would not be a nuisance, it should be placed there. There is no authority empowering a highway officer to cause the offending vehicle to be towed to a garage. In the absence of such authority a public official cannot obligate any person

Honorable Hugh H. Waggoner:

for the towing and storage charge which that individual did not himself authorize. Such charges must be recovered from the person who entered into the contract for towing and storage.

In recapitulation, we find that a motor vehicle parked or abandoned on the traveled portion of a roadway is a public nuisance which may be summarily abated; and a parked or abandoned vehicle on the shoulder of a highway may also be a public nuisance if it endangers or annoys or inconveniences the traveling public. Such vehicles as are public nuisances may be removed from the point where they do constitute a nuisance, to a place where they are not. Thus, as a practical matter in order to remove an automobile, the highway authorities should move it only so far as is necessary for the public safety and convenience.

CONCLUSION

It is, therefore, the opinion of this office that a motor vehicle may be parked or abandoned on the public roads and highways in such a manner as to constitute a public nuisance, and that each situation must be appraised to determine whether there is a public nuisance. Those motor vehicles which are public nuisances may be summarily removed by Highway authorities. Such Highway authorities cannot incur liability on the part of the owner for the cost of towing such vehicle to a garage and storing it.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMCG:irk

CRIMINAL SEXUAL PSYCHOPATHS: Costs of proceedings alleging criminal sexual psychopathy to be paid according to rules found in Secs. 458.080 and 458.090, RSMo

September 15, 1953

Honorable Stanley Wallach Prosecuting Attorney St. Louis County Clayton, Missouri

Dear Mr. Wallach:

The following opinion is rendered in reply to your request reading as follows:

> "Please advise your opinion with respect to the following.

"We some time ago had occasion to use the recent enacted 'Sex Psychopathic Act' in sending a subject to Fulton, as was the Courts order.

"The question involved pertains to payment of the fees of the physicians whom the Court appointed and made examinations of the defendant and filed with the Court their respective reports and also testified at the formal hearing before the Court. These physicians (2) presented their bills and same were filed with the cause and taxed as costs.

"However, the State Auditor refuses, or I should say declines to pay the same on the theory that 'final disposition' of the case has not been effected.

"True it is the statutes on this subject are rather broad as to the ultimate disposition of the defendant; and perhaps, consists of a continuation of the original charge. However, this may go on indefinitely, but needless to say the local physicians duties are completed and they should be paid.

"Should we have occasion to have another such case we are going to have difficulty in securing physicians to make these examinations without compensation, at least when payment can not be assured.

"Would like to hear from you on this subject, advising the State Auditor likewise."

Missouri's present law relating to criminal sexual psychopaths is found at Sections 202.700 to 202.770, RSMo 1949. The nature of the proceeding to declare a person a criminal sexual psychopath is described in the following language from State ex rel. Sweezer v. Green, 232 S.W. (2d) 897, 360 Mo. 1249, 1.c. 1253:

"Is the inquiry and proceeding provided by the Act civil or criminal in character? As to that we can reach but one conclusion. Ordinarily a criminal proceeding is some step taken before a court against some person or persons charged with a violation of the criminal law. The purpose of a criminal proceeding is to punish. But this Act is but a civil inquiry to determine a status.

* * * In character the Act is not unlike statutes which provide for a civil inquiry into the sanity of a person. * * * Proceedings under the Act have none of the elements of a criminal proceeding. It is our conclusion that the Act is not criminal in character."

Section 202.770, RSMo 1949, provides:

"All laws now in force relating to the admission of insane persons to state hospitals, shall apply to criminal sexual psychopaths."

Missouri's general statutes relating to insanity inquiries and subsequent admission of insane persons to state hospitals is found at Chapter 458, RSMo 1949. The subject of costs in such proceedings is treated in Sections 458.080 and 458.090, RSMo 1949, which provide as follows:

"458.080. Costs paid by county, when. -- When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county.

"458.090. Costs paid by person causing inquiry, when.--If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the costs shall be paid by the county."

CONCLUSION

It is the opinion of this office that reasonable compensation to be allowed examining physicians appointed under Section 202.720, RSMo 1949, to make an examination of an alleged criminal sexual psychopath, are to be taxed as costs in the proceeding and are to be paid according to the rules found in Sections 458.080 and 458.090, RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON Attorney General

JLO'M: lw

MCTOR VEHICLES: LICENSE FEE OF LOCAL COMMERCIAL VEHICLES AND COMMERCIAL VEHICLES:

A truck line is transporting freight long distances over state highways by tractor-trailers, and all tractors are licensed as local commercial vehicles. None of tractors driven more than 25 miles from each municipality specified in local licenses, but trailers pulled greater distances. This is done by disconnecting each trailer from its

tractor and connecting it to another tractor at end of each 25 miles of route, and is repeated indefinitely until trailer reaches destination. Operation is violation of terms of each local commercial license and subsections 3 and 7, Section 301.060, pages 699, 700, Laws of 1951.



September 24, 1953

Honorable Hugh H. Waggoner Superintendent Missouri State Highway Patrol Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion of this department which reads as follows:

"A truck line operating tractortrailer units hauling freight a distance greater than twenty-five miles has registered its tractors in this State as local commercial motor vehicles. The tractors are so located along the route traveled by this company that no tractor operates in excess of the limits. imposed by law on a local commercial vehicle. This, of course, is done by unhooking the trailer at predetermined points and pulling it by a tractor registered for operation in that particular local area.

"We would like to inquire if such operation is legal or if the tractors would be required to have beyond local license, inasmuch as the shipment travels a distance greater than that permitted by the operation of a local commercial vehicle."

Subsection 1, Section 301.010, page 696, Laws of Missouri 1951, defines the term "commercial motor vehicle" and reads as follows:

"(1) 'Commercial motor vehicle,' a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers; * * *."

Subsection 9 of said section defines local commercial motor vehicle and reads as follows:

"(9) 'Local commercial motor vehicle,' a commercial motor vehicle whose operations are confined solely to a municipality and that area extending not more than twenty-five miles therefrom; or a commercial motor vehicle whose property carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle, to or from a farm owned by such person or under his control by virtue of a landlord and tenant lease; provided that any such property transported to any such farm is for use in the operation of such farm; * * *."

Subsection 25 defines the term tractor and reads as follows:

"'Tractor,' any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently; * * *."

Subsection 26 gives the definition of the word trailer and reads as follows:

"'Trailer,' any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle; * * *."

Honorable Hugh H. Waggoner

Subsection 7, Section 301.060, page 700 Laws of 1951, provides how the annual license fee for tractors, trailers and semi-trailers shall be paid and reads as follows:

"7. For each trailer or semitrailer there shall be paid an annual fee of seven dollars, and in addition thereto such permit fees authorized by law against trailers used in combination with tractors operated under the supervision of the Public Service Commission. The fees for tractors used in any combination with trailers or semitrailers or both trailers and semitrailers (other than on passenger carrying trailers or semitrailers) shall be computed on the total gross weight of the vehicles in the combination with load."

This section provides that the fees for tractors used in any combination with trailers, semitrailers or both, (other than passenger carrying trailers and semitrailers) shall be computed upon the total gross weight of the vehicle in combination with the load. From the definitions given above of tractors and trailers it is evident that tractors could not carry a load except when pulling a trailer or semitrailer, and the requirement that the vehicle can be licensed only in combination with such trailer or semitrailer, or both, is logical.

For the reasons given hereafter, it is believed that a tractor licensed as a local commercial vehicle could not be disconnected from its trailer or other equipment making up the combination for license purposes, and used with parts of another vehicle for transporting property beyond the mileage limitations of the local license.

by this statement we do not mean that a local commercial vehicle can be used to transport property locally only when every part of the combination is used at the same time. For example, it is believed that a tractor can be disconnected from its trailer, connected, and used with another trailer, when the latter trailer was a part of a different tractor-trailer combination for which a local commercial vehicle license had been issued, provided, that the same type of licenses had been issued to the same owner of both combinations, and such licenses applied to the same municipality. From the provisions of the above statutes, particularly Subsection 9, Section 301.010, and Subsection 7, Section 301.060, it appears that tractors licensed as commercial

vehicles, are licensed for the purpose of pulling trailer and semitrailer loads of freight, the points of origin and destination of which are greater distances apart than the twenty-five mile limitation of the local license. It appears that by their actions both the shipper and transporter of freight of this kind deem it as what might be termed through or long distance freight as distinguished from local freight, which latter type of freight the operator of a local commercial vehicle is authorized to transport.

Tractors pulling, trailers, semitrailers, or both, containing freight shipped long distances, are licensed on the basis of the gross weight of the tractor, trailer, semitrailer or both, whatever the vehicle combination might be, in addition to the load. By a comparison of Subsections 2 and 3, Section 301.060, it will be seen that the license fee of the commercial vehicle is greater than the fee for the local commercial vehicle of the same gross weight. In the instant case a truck line operating tractor-trailer units moving freight greater distances than twenty-five miles has registered its tractors in Missouri as local commercial vehicles. Tractors located along the regularly travelled route of the truck line are used to pull trailers not farther than twenty-five miles each and the moving of such trailers is accomplished by disconnecting the tractors from their trailers and then connecting each tractor to a different trailer, no tractor pulling any one trailer beyond the distance of twenty-five miles from the municipality from which its local license was granted.

It might be contended that the truck line did not violate any statute or the terms of its local license since none of its tractors pulled any trailer beyond the mileage limits of the municipality specified in each such license; however, when the facts involved are more closely examined it will be seen that such contention is without any merit whatsoever.

While the tractors were not driven greater distance than authorized by their licenses, yet, the trailers which were parts of the tractors (for license purposes) are being used to transport freight greater distances, than those for which authority had been granted under the licenses. Said trailers could only be used to transport freight locally and the operation of said truck line constituted violations of the terms of said licenses, as well as the provisions of Subsection 2 and 7 of Section 301.060, supra.

CONCLUSION

Therefore, it is the opinion of this department that a truck line which is engaged in the long distance transportation of freight

over the highways of this state, has all of its tractors licensed as local commercial vehicles and is authorized to transport freight for distances of not more than twenty-five miles from the municipality specified in said license. None of the tractors are driven beyond the mileage limitations of said license, and each trailer forming a part of every tractor, trailer combination, for license purposes, is pulled a greater distance than the limits provided in said local license. That this is accomplished by disconnecting each trailer from its tractor and connecting it with another tractor at the termination of each twenty-five miles travelled by each tractor, and which procedure is repeated indefinitely until every trailer has reached its destination. Such operations of said truck line are illegal and are violations of the terms of every local commercial license issued to it as well as the provisions of Subsections 3 and 7, Section 301.060, pages 699 and 700, Laws of Missouri, 1951.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General

PNC:hr

CONSTABLES: COUNTIES UNDER SPECIAL CHARTER: County council of St. Louis County has no authority to enact proposed ordinance (Bill No. 31-1953) relating to special deputy constables.



October 30, 1953

Honorable Stanley Wallach Prosecuting Attorney St. Louis County Clayton, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting official opinion of this office and reading as follows:

"We enclose herewith a proposed ordinance up for passage before the St. Louis County Council, which as noted, pertains to appointment of "Special Constables".

"St. Louis County, a county of the First Class, operates under the Charter form of government as adopted by the people by popular vote.

"Section 63.010 RSMo 1949 and following sections in that chapter govern 'Constables' in counties of this classification. Section 63.085 specifically provides for 'deputy Constables' and the number which each Constable may appoint, duties, salaries, qualifications, etc.

"Nowhere in the Chapter referred to is any provision whereby any 'Special Constables' may be appointed.

"It is our opinion such an Ordinance incorporating provisions for appointment of "Special Constables' as in the proposed enclosed bill, is void.

"Will you therefore render us your opinion on this subject, and oblige."

Section 18(e) Art. VI of the Constitution of Mssouri provides as follows:

"Laws affecting Charter Counties - Limitations.
Laws shall be enacted providing for free and open
elections in such counties, and laws may be enacted providing the number and salaries of the judi-

of the same of

cial officers therein as provided by this Constitution and by law, but no law shall provide for any other office or employee of the county or fix the salary of any of its officers or employees."

St. Louis county adopted a charter for its own government at a special election March 28, 1950, under the authorization of Sec-18(a), Art. VI, Constitution of Missouri.

Since deputy constables are not "judicial officers" from the clear, unequivocal provisions of section 18(e), Art.VI of the Constitution of Missouri, it is apparent that the provisions of Section 63.085, Vernon's Ann. St., Sec. 63.080A Senate Bill 104, 66th General Assembly, Laws of Missouri 1951, p. 375, as well as the other provisions of Chap. 63 RSMo 1949 purporting to provide for constables and deputies, and the pay therefor, in first class counties operating under a charter form of government, are unconstitutional and of no effect.

Sections 3, 4 and 9 of the proposed ordinance provide as follows:

"Section 3. Special Deputy Constables may be appointed hereunder at the initiative of the Constables, for the purpose of performing special police work in handling traffic at school and other pe destrian crossings and other times and places, upon the call of the Constable, and when in the performance of such duties shall have all of the power and authority of Deputy Constables.

"Section 4. Special Deputy Constables may be appointed subject to all the provisions of this ordinance upon the joint application of the person desiring such employment and his employer or sponsor. In such case the Special Deputy Constable shall have the same rights, powers and duties as Deputy Constables upon the premises of the employer or sponsor and elsewhere in the County to the extent necessary to protect the property and assets of the employer or sponsor and to protect the lives and safety of the persons lawfully upon, entering or leaving the premises of the employer or sponsor.

"Section 9. Special Deputy Constables shall receive no compensation from the County, but those
appointed pursuant to Section 4 of this Ordinance
may be compensated by their employer or sponsor for
services in and about the premises of the employer
or sponsor, and those appointed pursuant to Section
3 of this ordinance may accept compensation as watchman or guards, from those employing them with the

written approval of the Constable, to be filed with the County Clerk, setting forth the nature and other particulars of the employment and the amount or rate of compensation to be paid."

We fail to find any provision in the charter of St. Louis County authorizing the enactment of such an ordinance. We are, therefore, of the opinion that the county council does not have power to enact such an ordinance. Since we have arrived at this conclusion, we deem it unnecessary to discuss the question of whether or not other constitutional provisions might prohibit the enactment of such an ordinance by the St. Louis County Council.

CONCLUSION

It is the opinion of this department that the county council of St. Louis does not have power to enact an ordinance relating to the appointment of special deputy constables titled "Bill No. 31-1953".

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. C. B. Burns, Jr.

Very truly yours,

CCB/1d

JOHN M. DALTON Attorney General

INTOXICATING LIQUOR: NON-INTOXICATING BEER:

intoxicating liquor on the premise, except on Sunday and between certain hours, may open on Sunday for the purpose of selling food and supplying entertainment, so long as it does not permit the consumption of intoxicating liquor. Also, that said premise may be kept open on Sunday even though 3.2 or non-intoxicating beer is permitted to be consumed on the premise on that day.

A premise licensed to sell food, supply en-

tertainment, and permit the consumption of

FILED 93

December 10, 1953

Honorable Wayne W. Waldo Prosecuting Attorney Pulaski County, Richland, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"The opinion of the Attorney General is respectfully requested on the following question:

"A person has obtained a license for certain premises in Pulaski County, Missouri under Sec. 311.480 M.R.S., 1949, for the consumption of liquor on the premises. There are other premises adjacent thereto for which a license has been obtained to sell 3.2 or non-intoxicating beer. Can the premises licensed under Section 311.480, M.R.S. 1949 for the consumption of liquor on the premises be kept open on Sunday, even though no intoxicating liquor is allowed to be consumed on the premises? Can said premises be kept open if 3.2 or non-intoxicating beer is allowed to be consumed on the premises?

"Thank you very much for your consideration in this matter."

Section 311.480 RSMo 1949, reads as follows:

"1. It shall be unlawful for any person operating any premises where food, beverages or entertainment are sold or provided for compensation, who does not possess a license for the sale of intoxicating liquor, to permit the drinking or consumption of intexicating liquor in, on or about said premises between ten P.M. and six A.M. the following day, without having a license as in this section provided.

- "2. Application for such license shall be made to the supervisor of liquor control on forms to be prescribed by him, describing the premises to be licensed and giving all other reasonable information required by the form. The license shall be issued upon the payment of the fee required herein. A license shall be required for each separate premises and shall expire on the thirtieth day of June next succeeding the date of such license. The license fee shall be sixty dollars per year and the applicant shall pay five dollars for each month or part thereof remaining from the date of the license to the next succeeding first of July. Application for renewals of licenses shall be filed on or before the first of May of each year.
- "3. The drinking or consumption of intoxicating liquor shall not be permitted in, upon or about the licensed premises by any person under twenty-one years of age, or by any other person between the hours of 1:30 A.M. and 6:00 A.M. on any week day, and between the hours of twelve o'clock midnight Saturday and twelve o'clock midnight Sunday, or on the day of any general, special, or primary election in this state, or upon any county, township, city, town, or municipal election day during the hours the polls are legally open. Licenses issued hereunder shall be conditioned upon the observance of the provisions of this section and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the The provision of this section regulating the drinking or consumption of intoxicating liquor between certain hours and on election day and Sunday shall apply also to premises licensed under this chapter to sell intoxicating liquor by the drink. In any incorporated city having a population of more than twenty thousand inhabitants, the board of aldermen, city council, or other proper authorities of incorporated cities may, in addition to the license fee herein required, require a license not exceeding three hundred dollars per annum, payable to said incorporated cities, and provide for the collection thereof; make and enforce ordinances regulating the hours of consumption of intoxicating liquors on premises licensed hereunder, not inconsistent with the other provisions of this law, and provide penalties for the violation thereof. No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen

of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village.

- "4. Before any application for the license provided for in this section shall be approved, the supervisor of liquor control shall require of the applicant a bond to be given to the state in the sum of one thousand dollars, with sufficient surety, such bond to be approved by the supervisor of liquor control, conditioned that the applicant shall at all times observe the provisions of this chapter and the regulations promulgated thereunder governing the conduct of premises licensed for the sale of intoxicating liquor by the drink and the regulations promulgated by him construing and enforcing the provisions of this section.
- "5. Any premises operated in violation of the provisions of this section, or where intoxicating liquor
 is consumed in violation of this section, is hereby
 declared to be a public and common nuisance and it
 shall be the duty of the supervisor of liquor control and of the prosecuting or circuit attorney of
 the city of St. Louis, and the prosecuting attorney
 of the county in which the premises are located to
 enjoin such nuisance.
- "6. Any person operating any premises, or any employee, agent, representative, partner or associate of such person, who shall knowingly violate any of the provisions of this section, or any of the laws or regulations herein made applicable to the conduct of such premises, shall, upon conviction, be deemed guilty of a misdemeanor.
- "7. The supervisor of liquor control is hereby empowered to promulgate regulations necessary or reasonably designed to enforce or construe the provisions of this section, and is empowered to revoke or suspend any license issued hereunder, as provided in this chapter, for violation of this section or any of the laws or regulations herein made applicable to the conduct of premises licensed hereunder."

The above section relates to places which do not sell intoxicating liquor, but which have a license which permits the consumption of intoxicating liquor on the premises. These places also sell food and provide entertainment. It is clear that the limitations in the statute as to hours and days of consumption on these premises applies only to the consumption of intoxicating liquor at such times, and not to the selling of food and the furnishing of entertainment. In this regard we call attention to the case of Graff v. Priest, 201 S.W.(2d) 945. This case is a construction of Section 311.480, supra, At 1.c. 951, of its opinion, the court states:

"Plaintiff contends that the act does not regulate the drinking or consumption of alcoholic liquor, but regulates the business of providing food, beverages or entertainment. The section plainly does not regulate the business of providing food, etc.; it is only the drinking and consumption of intoxicating liquor that is regu-There is nothing in the act that affects plaintiff's sale of food, soft beverages, and entertainment between the hours mentioned therein except as the prohibition of permitting drinking of intoxicants in plaintiff's cafe might affect the number of customers who might come between the hours mentioned, and plaintiff, in his evidence, in effect, so concedes. In his evidence he said that if the act is enforced the late crowd 'just wouldn't come.' If the effect of enforcement of the act would be such as plaintiff says and would result in pecuniary loss to him that would not make the act unconstitutional. 11 Am. Jur., Constitutional Law, Sec. 268, p. 1012; L'Hote v. New Orleans, 177 U.S. 587, 20 S. Ct. 788, 44 L. Ed. 899; Erie R. Co. v. Williams, 233 U.S. 685, 34 S. Ct. 761, 58 L. Ed. 1155, 51 L.R.A., N.S., 1097. * * *"

Our answer to your first question is, therefore, that a premise licensed under Sec. 311.480, supra, may be open on Sunday, provided the consumption of intoxicating liquor is not permitted on the premises at that time. Honorable Wayne W. Waldo

Your next question is whether these aforesaid premises can be kept open (on Sundays) if 3.2 or non-intoxicating beer is allowed to be consumed on the premises at that time. We are unable to find any law which would prohibit the consumption of non-intoxicating beer on such premises on Sunday. Sec. 311.480, supra, itself is directed only against the consumption of intoxicating liquor on such premises on Sunday and within the prohibitive hours.

CONCLUSION

It is the opinion of this department that the premises licensed to sell food, supply entertainment, and permit the consumption of intoxicating liquor on the premises, except on Sunday and between certain hours, may remain open on Sunday for the purpose of selling food and supplying entertainment, so long as it does not permit the consumption of intoxicating liquor. Also that said premises may be kept open on Sunday even though 3.2 or non-intoxicating beer is permitted to be consumed on the premises on that day.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON Attorney General FIRE DISTRICTS:
RAILROADS:
TAX COMMISSION:

A railroad company is not required in the annual statements required by Section 151.020 to specify the amount of mileage of track within a fire district, and the failure of a railroad company to so specify will not give the Tax Commission power under Section 151.070 to make further assessment, adjustment or

equalization of the railroad property, since nothing has been omitted. The State Tax Commission has no legal right to compel a railroad company under Section 151.080 to report its mileage within a fire district. The State Tax Commission cannot make an arbitrary assessment under Section 151.050 for failure of a railroad company to specify the amount of mileage of track within a fire district. The State Tax Commission does not have the power to apportion railroad company mileage to a fire district under Section 138.380; because apportionment of taxes is made under Section 151.080. It must be done in the manner therein provided.

December 14, 1953

Honorable Stanley Wallach Prosecuting Attorney St. Louis County Clayton, Missouri

Dear Mr. Wallach:

Your office, by letter dated November 10, 1953, requested an official opinion of this department as follows:



- "(1) If a railroad company furnishes its annual statement to the State Tax Commission under provisions of Sec. 151.020 R.S.Mo. 1949, showing the length of road, etc. in the County and in incorporated cities, towns and villages, but does not show its mileage within Fire Protection Districts incorporated pursuant to the provisions of Chapter 321 R.S. Mo. 1949, so that the Commission cannot apportion to the Fire Districts under provisions of Section 151.060, has property been omitted which can be assessed for years prior to 1953 under the provisions of Section 151.070?
- "(2) Has the State Tax Commission a legal right to compel a railroad company to furnish information relating to mileage within a Fire District for the purpose of assessment under Section 151.080?
- "(3) If a railroad company fails or refuses to furnish its mileage in the Fire Districts, can the State Tax Commission make an arbitrary assessment under provisions of Section 151.050?

"(4) Has the State Tax Commission power to apportion railroad company mileage to the fire districts at any time during the year under the provisions of Section 138.380?"

Statutory citations herein are all RSMo 1949, except as otherwise noted.

Section 151.010 makes railroads taxable within this state and provides that the manner of taxation is as follows:

"All railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all real property, tangible personal property, and intangible personal property, owned, hired or leased by any railroad company or corporation in this state, shall be subject to taxation, and taxes levied on real property, and tangible personal property, shall be levied in themanner herein set forth, and the taxes on intangible personal property shall be levied and collected in the manner otherwise provided by law."

Section 151.020 requires railroad companies to make an annual statement to the State Tax Commission as follows:

On or before the first day of May in each and every year, the president or any authorized officer of every railroad company whose road is now or which shall hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state tax commission a statement, duly subscribed and sworn to by said president or other authorized officer, before some officer authorized to administer oaths. setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or sidetracks, with depots, water tanks and turntables, the length of such road, double or sidetracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state;

the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the first day of January in each year, and the actual cash value thereof.

"2. In case the report, from any railroad, required by this section, is not
received by May first of the year in
which it is due the state tax commission
may, at its discretion, increase by four
per cent the total assessed valuation of
the railroad company and certify such
increase to the director of revenue for
collection."

The above section requires the report of certain taxable property such as tracks in "each county, municipal township, incorporated city, town or village". To determine whether a railroad company must specify in its annual report the amount of mileage in each fire district, we must determine whether a fire district is one of the governmental subdivisions mentioned in the quotes above. Obviously, a fire district is not a county, incorporated city, town or village. Therefore, if it comes within the purview of Section 151.020 it must be under "municipal township". The Supreme Court of Missouri in State ex rel. Halferty vs. Kansas City Power and Light Company 346 Mo. 1069, 145 S.W. 2d 116, in construing the meaning of "municipal township" under the provisions of this chapter determine that a water district was not a municipal township, and gave this definition of what a "municipal township" under this chapter, means, l.c. 122:

"* * * But does that mean that it is a municipal township as that term is used in the taxing statutes? A municipal township may be, for some purposes and in a broad sense, a 'municipal corporation' -- (we suggest this thought without deciding the question) -- but, even if so, is a 'municipal corporation' necessarily a 'municipal township?' It is to be borne in mind that taxing statutes are construed strictly in favor of the taxpayer, bearing in mind that they should be applied with due regard to the apparent intention of the Legislature as expressed in the statute, with a view to promoting the apparent object of the legislative enactment. It will be noted that in all of the taxing provisions we have noted the words 'municipal townships' have been

used. Nowhere are the words 'municipal corporations' used. Appellant says 'municipal township! is not defined by our statutes. We think its meaning, as used in the statutes we have quoted, is well understood and is clearly enough indicated as a subdivision of a county. Illustrative, we refer to Chap. 86, R.S. 1929, Mo. St. Ann. Sec. 12251 et seq., p. 8119 et seq., relating to 'Township Organization.' Sec. 12251, the first section of that chapter, provides for the holding of an election in any county for or against township organizations. Subsequent sections provide for the organization, government and powers of the townships if township organization is voted. By Sec. 12259 provision is made for 'the county court of each county' to alter the boundaries of townships and to increase or diminish their number, in the manner there provided. From these and other references in the statutes that might be made we think it too clear to admit of argument that when the Legislature used the term 'municipal townships' in the statutes above referred to it meant subdivisions of a county as that term is generally understood." (Emphasis theirs).

Therefore, since a fire district is not a county, municipal township, incorporated city, town or village, a railroad company need not specify the amount of track in a fire district. Nor is such information required by Section 151.080, infra, page 6. Provision is made for assessment by the Tax Commission of property omitted in prior years by Section 151.070, RSMo 1949.

"The state tax commission shall have the power to assess, adjust and equalize the property herein specified of any railroad company, in whole or in part, for any year or years since January 1, 1935, which has been or which may hereafter be omitted from assessment, adjustment and equalization, and to reassess, adjust and equalize any such railroad property, in whole or in part, as the case may be, for any year or years for which it may have been heretofore or in which it may hereafter be assessed, adjusted and equalized, but which assessment, adjustment and equalization, for any cause has been or which may hereafter be held by the courts to be irregular or void.

The above section provides for the assessment, adjustment and equalization of property which has been omitted from assessment, adjustment, and equalization in prior years. If the railroad company has included the total mileage of their track and other property assessed under Section 151.020, property has not been omitted within the meaning of Section 151.070. Therefore, there can be no assessment for prior years under this section. It must be understood that if mileage has not been specified for a fire district, it nevertheless, would have been included within the mileage within each county. Therefore, there would not be an omission. The answer to your question number one is, no.

There appears no statutory authority requiring the report by railroad companies of the amount of mileage within a fire district, and in the absence of such requirement by statute there is no way by which the State Tax Commission can compel the giving of such information. It must be noted that Section 151.080 does not provide a different method for assessment of property for the purpose of taxation, but merely provides for the apportionment of the aggregate value of property as between the governmental subdivision mentioned in Section 151.080; Cumulative Supplement, 1951:

> "Said commission shall apportion the aggregate value of all property herein specified belonging to or under the control of each railroad company, to each county, municipal township, city or incorporated town, special road districts. library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949, public water supply, fire protection and sewer districts or subdivision, except other school districts, in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town, special road district, library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949. public water supply, fire protection and sewer districts or subdivision, except other school districts, in which such road is located shall bear to the whole length of such road in this state; provided, that in any case where a company whose line or road is liable to taxation shall have been or

may become consolidated into another corporation, entitled by its charter or otherwise to exemption from county or other taxation, that portion of the road which is liable to taxation, as aforesaid, shall be assessed separately, and the value thereof apportioned to the counties, municipal townships, cities or incorporated towns, special road districts, library districts, school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949, public water supply, fire protection and sewer districts or subdivision, except other school district, in which it is located; and the president or any authorized officer of each such railroad company shall in the annual statements rendered to the commission, as provided in section 151.020, include statement of the length of the road within school districts which levy taxes for library purposes pursuant to section 137.030 RSMo 1949 and library districts; provided, further that in no event shall any school district levy school taxes, taxes for the erection of public buildings, or for other purposes except library purposes on the property herein specified, in any manner other than that provided for in section 151.150."

If railroad companies will not voluntarily specify what mileage of track is within a fire district, the State Tax Commission may ascertain such, among other methods, through their agents, appointed by authority of Section 138.290, et seq. Therefore the answer to your question number two is, no.

Section 151.050 gives the State Tax Commission power to ascertain the value of the property of railroad companies in case such railroad companies fail to make the required reports to the State Tax Commission.

"Should any railroad company fail to make and return to the state tax commission and county clerks any of the statements required by the foregoing provisions of this chapter, the said commission shall ascertain the property of such company, from the best information they can obtain, and shall fix the value thereof; and their action on the same shall be filed in the office of the state tax commission as herein required."

Since, however, it has been determined that there is no obligation on the part of railroad companies to specify the amount of mileage of track in a fire district there has been no failure on the part of the railroad company to make the required statements to the State Tax Commission. Therefore, Section 151.050 would not be applicable and there could be no assessment under the provisions of that section. The answer to your question number three is, no.

In answer to your question number four as to whether the State Tax Commission has the power to apportion railroad company mileage to the fire districts at any time during the year under Section 138.380, we point out that that section does not deal with the apportionment of the aggregate value of the railroad company property between the various governmental subdivisions who are entitled to taxation therefrom, but deals merely with the assessment, equalization and adjustment of the property of the railroad company. The section has no connection at all with the apportionment of the mileage to a fire district; such apportionment would be under Section 151.080. Section 138.380 is quoted herewith:

"It shall be the duty of the state tax commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

- "(1) To raise or lower the assessed valuation of any real or tangible personal property, including the power to raise or lower the assessed valuation of the real or tangible personal property of any individual, copartnership, company, association or corporation; provided, that before any such assessment is so raised, notice of the intention of the commission to raise such assessed valuation and of the time and place at which a hearing thereon will be held, shall be given to such individual, copartnership, company, association or corporation as provided in sections 138.460 and 138.470;
- "(2) To require from any officer in this state, on forms prescribed by the commission, such annual or other reports as shall enable said commission to ascertain the assessed and equalized value of all real and tangible property listed for taxation, the amount of taxes assessed, collected and returned, and

such other matter as the commission may require, to the end that it may have complete information concerning the entire subject of revenue and taxation and all matters and things incidental thereto;

- "(3) To cause to be placed upon the assessment rolls at any time during the year omitted property which may be discovered to have, for any reason escaped assessment and taxation, and to correct any errors that may be found on the assessment rolls and to cause the proper entry to be made thereon.
- "(4) To investigate the tax laws of other states and countries, to formulate and submit to the legislature such recommendations as the commission may deem expedient to prevent evasions of the assessment and taxing laws, whether the tax is specific or general, to secure just, equal and uniform taxes, and improve the system of assessment and taxation in this state;
- "(5) To prescribe the form of all blanks and books that are used in the assessment and collection of the general property tax, except as otherwise provided by law."

CONCLUSION

It is therefore, the opinion of this office that a railroad company is not required in the annual statements required by Section 151.020 and Section 151.080 to specify the amount of mileage of track within a fire district, and that the failure of a railroad company to so specify will not give the Tax Commission power under Section 151.070 to make further assessment, adjustment or equalization of the railroad property, since nothing has been omitted. The State Tax Commission has no legal right to compel a railroad company under Section 151.080 to report its mileage within a fire district, but may ascertain such mileage in any legal manner. The State Tax Commission cannot make an arbitrary assessment under Section 151.050 for failure of a railroad company to specify the amount of mileage

of track within a fire district. The State Tax Commission does not have the power to apportion railroad company mileage to a fire district under Section 138.380 because such apportionment is made under Section 151.080. It must be done in the manner therein provided.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

PMcG:vlw

RECIPROCITY:
MISSOURI AND MICHIGAN:

A commercial motor vehicle owned by a resident of Michigan and licensed by the State of Michigan, operating within the State of Missouri, engaged in the transportation of persons or property for compensation for a period exceeding ten (10) days, is subject

to be licensed by the State of Missouri; a resident of the State of Michigan, carrying on a business in the State of Missouri, who owns and operates in such business any commercial motor vehicle subject to registration in the State of Missouri, would, at once, be required to register each such vehicle and pay the same fee therefor as is required with reference to like vehicles owned by a resident of the State of Missouri.

December 18, 1953

Colonel Hugh H. Waggoner, Superintendent, Missouri State Highway Patrol, State Office Building, Jefferson City, Missouri



Dear Colonel Waggoner:

This department recently received from you the following communication:

"Attached is a copy of a report submitted by Sergeant A. G. White of this department, regarding the operation of the Transamerican Freight Lines of Detroit, Michigan. Also attached is a copy of the reciprocal agreement between the States of Missouri and Michigan, which was entered into on February 9, 1944.

"It is respectfully requested that you render an official opinion regarding the operation of the vehicles owned by Transamerican Freight Lines and domiciled in the State of Missouri, as requested in paragraph 6 on Sergeant White's report."

The full Report of Sergeant White, to which you refer, reads as follows:

"1. The TRANSAMERICAN FREIGHT LINES of Detroit, Michigan have a terminal at 2306 North Broadway, St. Louis, Missouri. At this terminal, they keep two tractors known as over-the-road tractors. These tractors are primarily used to pull semitrailers from St. Louis, Missouri to Kansas City, Missouri and return. In addition to the two over-the-road tractors, TRANSAMERICAN has two more tractors that are kept at this same terminal, which are used to move the semi-trailers locally; that is, anywhere within the greater St. Louis area.

- "2. In Kansas City, Missouri, TRANSAMERICAN FREIGHT LINES have a terminal at 2716 Warwick. Here they also have two over-the-road tractors, used exclusively between Kansas City, Missouri and St. Louis; and two tractors for local delivery of the semitrailers. In addition to these eight tractors, TRANSAMERICAN has some smaller units at each terminal for lighter pickup and delivery.
- "3. All four of the over-the-road tractors have Michigan license. The two local tractors, plus the smaller units domiciled in St. Louis, are reported to have Missouri truck license. The two local tractors domiciled in Kansas City are thought to have Michigan license; it is not known which license the smaller units are carrying.
- On the night of October 12, 1953, KENNETH GEORGE MAY, age 42, Route 8, Kansas City, Missouri, was arrested in St. Louis County and charged with operating a motor vehicle on improper license. At the time of arrest, he was operating one of the TRANSAMERICAN overthe-road tractors domiciled in Kansas City, Missouri. He was pulling a trail-mobile semi-trailer owned by East Texas Motor Freight of Dallas, Texas. MAY had picked up this trailer at the St. Louis Terminal and was to deliver it to their terminal in Kansas City, Missouri; from there, another truck line would move the trailer west. MAY stated he has been working for the TRANSAMERICAN FREIGHT LINES for eighteen years and outside of a few rare trips to Detroit, Michigan, all of his driving has been from Kansas City to St. Louis. Missouri, and return.
- "5. It is not known how authentic the information is, but TRANSAMERICAN is reported to have some tractors domiciled in Peoria, Illinois. These tractors are used to pull trailers from Peoria, to St. Louis, Missouri, and return. Illinois officials have now, after a court fight, forced TRANSAMERICAN to license these particular tractors in Illinois.
- "6. It is the reporting officer's belief that the tractors and other units domiciled in Missouri and operated, primarily, intra-state, should have Missouri license. It is true the merchandise transported by these tractors is classed as inter-state shipments, but the movement of the tractors is intra-state only. Paragraph (B) on page One of our reciprocal agreement with the State of Michigan, implys these tractors must have Missouri license if used

exclusively within the State of Missouri. Would an occasional trip, such as one trip a month or even less, exclude the word *exclusively' from the description of their type of operation and exempt them from having to license these vehicles with Missouri license? If we can verify that Illinois made TRANSAMERICAN license their vehicles in Illinois, it may assist in arriving at the correct decision."

Paragraph B of the reciprocity agreement, to which Sergeant White refers, reads as follows:

"Whenever an owner or operator shall maintain a vehicle at any terminal upon an interstate route, which vehicle for other legal purposes might ordinarily be regarded as engaged in 'interstate commerce' by reason of the character of its operations, but which is engaged in such operations exclusively within the state of non-domicile, such vehicle shall not be exempt under this agreement, but shall be registered in, and subject to taxation by the state of non-domicile."

At this point we feel that it would be well to look at the reciprocity agreement between the State of Missouri and the State of Michigan, to which Sergeant White refers, and a portion of which is quoted above, with reference to its validity.

This "agreement", which was entered into on February 9, 1944, to be effective as of January 1, 1944, was negotiated and signed on behalf of the State of Missouri by Albert Miller, Chairman of the Missouri Public Service Commission, and by V. H. Steward, Commissioner of Motor Vehicles.

In regard to this, we will first observe that we are unable to find that any authority whatever is vested by Missouri law in the Commissioner of Motor Vehicles to enter into reciprocity agreements with other states. In the absence of such authorization we must conclude that the Commissioner of Motor Vehicles does not have such authorization and that, therefore, his participation in the Missouri and Michigan agreement is void and of no effect.

The Missouri Public Service Commission is authorized to enter into reciprocity contracts. Section 386.220 RSMo 1949, reads:

"The commission is hereby authorized and empowered to engage in any conferences with officials of any and all other states and the District of Columbia for the purpose of promoting, entering into, and

establishing fair and equitable reciprocal contracts or agreements that in the judgment of the commission would be proper, expedient, fair and equitable and in the interest of the state of Missouri and the citizens thereof to the end that any motor carrier of passengers or property who or which is a nonresident of the state of Missouri and operates motor vehicles into, out of, or through this state as a for hire motor carrier and who has complied with the laws of the state of his or its residence and paid all fees required by the state of his or its residence shall not be required to pay fees prescribed in section 390.110, RSMo 1949; provided, that the provisions of this section shall be operative as to a motor vehicle or motor vehicles owned by a nonresident of this state when operated for hire in Missouri only to the extent that under the laws of the state, country, or other place of residence of such nonresident motor carrier like exemptions are granted to residents of Missouri who may be conducting similar motor carrier operations for hire in the state of such nonresident."

It will be observed from a reading of the above that the authority of the Missouri Public Service Commission to enter into reciprocity contracts relates only to matters involving the Public Service Commission and fees collected by that body. It does not extend to the licensing and registration of motor vehicles, which is the subject of your inquiry and the subject of Paragraph B of the reciprocity agreement quoted above. In brief, we believe that Paragraph B deals with a matter which is beyond the scope of the Missouri Public Service Commission, and that in regard to it the Commission cannot therefore bind the State of Missouri in a reciprocity agreement, and that, therefore Paragraph B cannot be considered in determining whether reciprocity exists between Missouri and Michigan, but that this matter will have to be determined by an examination of the laws of these two states on these points.

The Reciprocity Law of Missouri is found in Section 301.270 RSMo 1949, and reads as follows:

"A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, country or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the

operation of such vehicle within this state without registering such vehicle or paying any fee
to this state, provided that the provisions of
this section shall be operative as to a vehicle
owned by a nonresident of this state only to the
extent that under the laws of the state, country
or other place of residence of such nonresident
owner like exemptions are granted to vehicles
registered under the laws of and owned by residents of this state.

From the above it will be seen that a motor vehicle which is owned by a resident of Michigan, and which has been duly registered for the current year in and by the State of Michigan, may be operated by such owner or operated by his permission in the State of Missouri, without registering said motor vehicle in Missouri, or paying any registration fee in Missouri, only if a like motor vehicle duly registered for the current year in Missouri would have the same privilege in Michigan.

We would now direct your attention to Section 257.243, Public and Local Acts of Michigan, Session of 1949, the reciprocity law of Michigan, which reads:

"257.243. Nonresident owners; exemption, transportation for hire, pleasure, carrying on business. (M.S.A. 9.1943)

"Sec. 243. (a) A non resident owner, except as otherwise provided in this section, owning any foreign vehicle of a type otherwise subject to registration hereunder may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration certificate and registration plate or plates issued for such vehicle in the place of residence of such owner.

"(b) A nonresident owner of a foreign vehicle operated within this state for the transportation of persons or property for compensation or for the transportation of merchandise, for a period exceeding 10 days, shall register such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state.

- "(c) A nonresident owner of a pleasure vehicle otherwise subject to registration under this act shall not operate the same for a period exceeding 90 days without securing registration in this state.
- "(d) Every nonresident, including any foreign corporation carrying on business within this state and owning and operating in such business any vehicle subject to registration as provided in this chapter, shall be required to register each such vehicle and pay the same fee therefor as is required with reference to like vehicles owned by residents of this state."

From the above, we believe that a commercial motor vehicle owned by a resident of Missouri and licensed in Missouri, operating within the State of Michigan, engaged in the transportation of persons or property for compensation for a period exceeding ten (10) days, is subject to be licensed by the State of Michigan. Also, in view of Paragraph (d) of Section 257.243 of the Public and Local Acts of Michigan, supra, that a resident of Missouri carrying on a business in the State of Michigan, who owns and operates in such business any motor vehicle subject to registration in the State of Michigan, would be required, at once, to register each vehicle and pay the same fee therefor as is required with reference to like vehicles owned by residents of the State of Michigan.

CONCLUSION

It is the opinion of this office that a commercial motor vehicle owned by a resident of Michigan and licensed by the State of Michigan, operating within the State of Missouri, engaged in the transportation of persons or property for compensation for a period exceeding ten (10) days, is subject to be licensed by the State of Missouri. It is our further opinion that a resident of the State of Michigan, carrying on a business in the State of Missouri, who owns and operates in such business any commercial motor vehicle subject to registration in the State of Missouri, would at once, be required to register each such vehicle and pay the same fee therefor as is required with reference to like vehicles owned by a resident of the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

COUNTY HEALTH CENTERS:

ELECTION EXPENSES:

The several counties of Missouri are liable for all the expense of holding a general election in this State at which County Health Center Trustees are elected.

April 25, 1953

Honorable Harry C. Watkins Clerk of the County Court Scott County Benton, Missouri

Dear Mr. Watkins:

This will be the opinion you requested from this office whether the Trustees of the County Health Center of Scott County, Missouri, are authorized by law to direct payment out of the Health Center funds of said county of expenses of printing ballots and ballot publication pertaining to the election of Trustees of such County Health Center incurred at the general election in 1952 in said county. Your letter submitting this question to this office for an opinion states:

"After the 1952 General Election bills of expense in connection with the printing of ballots and ballot publication pertaining to the election of health center trustees, as provided in House Bill No. 307, 66th General Assembly, were referred to the board of trustees of the county health center for payment.

"The board of trustees declined to pay such expense bills resulting from the election and later suggested that the Prosecuting Attorney request an official opinion from your office as to whether or not the board had authority to pay these bills. In reply, the Prosecuting Attorney advised the board that the question was so accdemic he did not feel justified in asking for the opinion.

"Since the board of trustees of the county health center still declines to pay such bills, I am directed by the County Court to ask that you consider this letter as a formal request for

Honorable Harry C. Wat kins:

opinion as to whether or not it is permissable for board of trustees of the county health center to authorize payment, from health center funds, of bills of expense covering the printing of the ballots and official publication of such ballot in connection with the election of health center trustees under House Bill No. 307, 66th General Assembly."

Section 205.040, Laws of Missouri, 1951, Page 781, in Subsection 1, provides that candidates for the offices of County Health Center Trustees shall each file with the Clerk of the County Court announcement of candidacy for such office; that if there is not a sufficient number of announcements for Trustees filed, the County Court shall appoint Trustees to fill all vacancies on the Board who shall serve until the next general election; and in Subsection 2 it is provided that the County Court shall prepare a separate ballot for the use of voters for election of Trustees, said section upon such requirements reads, in part, as follows:

"1. Each candidate for the office of health center trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. The announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term.

"2. The county court shall prepare a separate ballot containing the names

Honorable Harry C. Watkins:

of all candidates who have announced for trustee which shall not contain any designation of the political party affiliation of any candidate for trustee. The ballots shall designate the number of trustees to be elected and shall state whether any of the trustees is to be elected for an unexpired term, and shall be in form substantially as follows:"

Subsection 3 of said Section 205.040, Laws of Missouri, 1951, Page 782, respecting the furnishing of ballots and the return of the vote by the election officials of the election of County Health Center Trustees, reads as follows:

"3. Such ballots shall be furnished to the election officials of each precinct in the county and shall be voted by the qualified voters therein in the same manner as other ballots are furnished and voted. The election officials shall make return of the vote for candidates for trustee to the county court in the same manner as required for the return of the vote for candidates for other offices. The candidates receiving the highest number of votes for the offices of trustee to be filled shall be declared elected by the county court which shall issue commissions to the elected trustees."

The terms quoted from Section 205.040, Laws of Missouri, 1951, Page 781, clearly establish that the offices of Trustees of County Health Centers are public offices. We observe from Subsection 1 of said Section 205.040, that each candidate for the office of Health Center Trustee must file with the County Clerk an announcement of his candidacy, in writing, not later than thirty days before the general election. This is the procedure required of all other public officers in every county of this State who become candidates for public office in primary nominating elections. The Legislature had the undoubted right in its purpose and design to remove County

Honorable Harry C. Watkins:

Health Center Trustees and their elections from political affiliations to require the declaration of the candidacy of each Trustee to be filed thirty days before the general election at which such offices would be filled by the voters of the county. This the Legislature did in said Subsection 1 which requires Trustees of the offices of County Health Centers to be filled at the general election.

Subsection 2 of said Section 205.040, provides that the County Court shall prepare the ballot and the form of the ballot to be used at the general election for filling the offices of Trustees of County Health Centers.

Subsection 3 of said Section 205.040, provides that such ballots to be voted by the electors to fill the offices of County Health Center Trustees shall be furnished to the election officials of each precinct in the county and shall be voted by the qualified voters therein in the same manner as other ballots are furnished and voted. This, we believe, undoubtedly means that such ballots are to be furnished and voted under the general election laws of this State. Said Subsection 3 further provides that the election officials shall make return of the vote for candidates for such Trustees to the County Court in the same manner as required for the return of the vote for candidates for other offices. This, too, means that the same methods shall be used by the election officials and such duties in the casting up of the votes for such Trustees shall be performed by the same officers and in the same manner as are votes cast up for other officers. Said Subsection 3 further provides that the candidates receiving the highest number of votes for the offices of Trustees shall be declared elected by the County Court which shall issue commissions to the elected Trustees.

Your letter states that the expense of printing ballots and ballot publication occurred incident to the election of County Health Center Trustees in your county in connection with the general election held in 1952 in said county.

Section 1 of Article VIII of the Constitution of Missouri, 1945, fixes the time of the general election in this State as follows:

"The general election shall be held on the Tuesday next following the first Monday in November of each even year, unless a different day is fixed by law, two-thirds of all members of each house assenting." Honorable Harry C. Watkins:

Subsection 2 of Section 1.020, RSMo 1949, defines "general election" as follows:

"'General election'means the election required to be held on the Tuesday succeeding the first Monday in November, biennially."

There are numerous sections of Chapter 111 of the Revised Statutes of Missouri, 1949, under the title of "Sufferage and Elections", providing that every kind of expense incident to the preparation for and the holding of a general election shall be borne by the respective counties in this State. We are here concerned specifically under your request in determining who shall pay the cost of printing ballots and ballot publication pertaining to the election of County Health Center Trustees. Section 111.400, providing for the printing, distribution and payment therefor of ballots at elections for public officers which, of course, would include the separate ballot for use in voting for County Health Center Trustees, reads as follows:

"All ballots cast in elections for public officers within this state shall be printed and distributed at public expense, as herein provided. The printing of the ballots and of the cards of instruction for the electors in each county, and the delivery of the same to the election officers, as provided in section 111.480, shall be a county charge, except where the officers to be voted for are exclusively city officers. in which case such printing and delivery shall be a city charge, the payment of which shall be provided for in the same manner as the payment of other county or city expenses."

The last above quoted statute of the election laws of this State makesit conclusive that the expense of printing the ballots and holding general elections in the counties in this State must be paid by the county whether the duty performed which incurs such expense is performed by the County Court, or the County Clerk. It is, therefore, plain that the county is liable for the expense incurred in preparing for and in holding a general election at the time

Honorable Harry C. Watkins:

fixed by the Constitution and the statutes cited herein, including the election of Trustees for County Health Centers in any such county, and that, since there is no section within the County Health Center Act, Laws of Missouri, 1951, Pages 779 to 784, inclusive, imposing the duty or obligation upon the County Health Center to pay for any items of such costs, the Trustees of such County Health Centers in the several counties of this State are not liable therefor, and have no authority to pay, or direct the payment, out of the County Health Center Funds the expense of printing the ballots or ballot publication pertaining to the election of County Health Center Trustees in Scott County, Missouri, at the general election in 1952.

As stated hereinabove, there are numerous other sections of Chapter 111, respecting the conduct of general elections, which provide that the various items of expense shall be paid by the respective counties of the State holding such election. Section 111.350, RSMo 1949, provides that judges and clerks of the election and in returning the poll books and ballots to the County Clerk's office shall be paid out of the county treasury.

Section 111.480, RSMo 1949, provides that the County Clerk shall cause the sheriff of the county or his deputy to transfer ballots to the judges of election before the polls are open, such officer to be allowed reasonable compensation therefor, to be provided for by the County Court.

Section 111.490, RSMo 1949, requires the sheriffs of their respective counties to provide ballot boxes at the expense of their counties for general elections. These are some, if not all, of the separate sections of the election laws imposing the cost of holding general elections upon the counties. There is no statute in this State to the contrary.

CONCLUSION

It is, therefore, the opinion of this office, in conformity with the provisions of the County Health Center Act, Laws of Missouri, 1951, Page 779 (H.B. 307--66th General Assembly) and in conformity with the general election laws of this State, set forth in Chapter 111, RSMo 1949, some sections of which and parts of other sections of such chapters have been quoted herein, that the respective counties in this State, where candidates for the offices of Trustees

Honorable Harry C. Watkins:

of the County Health Centers are to be elected, are liable for and are obligated to pay the expense covering the printing of the separate ballots in connection with the election of County Health Center Trustees, and that such County Health Center Trustees have no authority to pay or to order the payment out of the County Health fund of any of the expense incident to such election, including the printing of such ballots or the official publication thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

SHERIFFS: SALARY:

County Court may not pay sheriff money in lieu of living quarters.



June 26, 1953

Honorable Charles A. Weber Prosecuting Attorney of Ste. Genevieve County Ste. Genevieve, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

"I respectfully request an Opinion on the following set of facts:

"Section 57.430 R.S. Mo. 1949 provides 'In addition to the compensation provided in Sections 57.390 and 57.400 the county court may in its discretion furnish living quarters for the sheriff.'

"Since there are no living quarters provided for the sheriff in this county, the county court would like to know whether under this Section if it would be permissible for the court to pay a certain sum each month to the sheriff in lieu of his living quarters."

We note first, Ste. Genevieve County is a county of the fourth class. The compensation of the sheriff of a county of the fourth class is fixed at a specified salary by Section 57.400, RSMo 1949. In addition thereto, Section 57.420, to which you refer provides:

Honorable Charles A. Weber

"In addition to the compensation provided in sections 57.390 and 57.400 county court may, in its discretion, furnish living quarters for the sheriff."

Prior to answering your inquiry, we wish to make reference to certain rules of statutory construction in aid thereof. A statute must be so construed so as to ascertain and give effect to the legislative intent, Wentz v. Price Candy Co., 175 S. W. (2d) 852, and a county court can allow compensation to county officials only where authority so to do is conferred by statute, and then only in the manner provided. The latter rule is stated in the case of Nodaway County v. Kidder, 129 S.W. (2d) 851, l. c. 860, as follows:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *"

Section 57.400, RSMo 1949, specifies the actual cash remuneration of the sheriff of the county of the fourth class. Such, we believe, would preclude any other remuneration in the medium of cash unless directly authorized by statute. Section 57.420 specifies a different type of remuneration, i.e., living quarters. Having specified the mode, it is our opinion that a certain sum could not be paid to the sheriff in lieu of such living quarters.

CONCLUSION

Therefore, it is the opinion of this office that the county court cannot pay to the sheriff a certain sum in lieu of living quarters where no such living quarters are furnished by the county as authorized by Section 57.420, R. S. Mo.1949.

Honorable Charles A. Weber

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General



An individual member of the Industrial WORKMEN'S COMPENSATION: Commission of this State may approve compromise settlements made by parties SETTLEMENTS & HEARINGS: to a claim for compensation. He may not, however, hold a hearing on a claim after an award is made thereon by a Referee and after the claim has reached the full Commission on review, under Section 287.480, RSMo 1949.

March 10, 1953

Honorable Gordon P. Weir Chairman Industrial Commission of Missouri Department of Labor and Industrial Relations Jefferson City, Missouri

Dear Chairman Weir:

This will be the opinion you requested recently by letter for clarification of what your letter states is one point in an opinion issued by this office January 21, 1952, to Honorable Carl J. Henry then the Chairman of the Industrial Commission of Missouri. Your letter requesting an opinion reads as follows:

> "On January 21, 1952 your department wrote an opinion to Mr. Carl J. Henry, Chairman of the Industrial Commission. with reference to the authority of the Industrial Commission of Missouri, or an individual member of the Commission or a referee, to approve settlements at any time, including cases on appeal.

"We would like an official opinion clarifying one point in this opinion and that is, 'after an award has been made by a referee of the Division of Workmen's Compensation and an application for review has been made to the Industrial Commission by either party, what authority does an individual member of the Commission then have to hold a hearing and make a settlement without the knowledge of the full Commission that such hearing is to be held for the purpose of making a settlement !?

"An early reply to this will be greatly appreciated."

We have carefully reviewed the said opinion of January 21, 1952. Your particular question is, what authority does an individual member of the Industrial Commission of this State have to hold "hearings" and make a "settlement" without the knowledge of the full Commission that such "hearing" is to be held for the purpose of making a "settlement". You enclose in quotes your question as stated in your letter which would ordinarily imply that that part of your letter in quotes is a part of the text of said opinion of January 21, 1952. This is not the case, however. Although the subject of the authority of a single member of the Commission to approve a compromise settlement of a claim for compensation at any time and the authority of a single member of the Commission to hold hearings were both discussed, and in the conclusion to said opinion such individual members were held to have such authority in each instance, the opinion did not, as a careful review thereof discloses, cover the question you submit in your letter for another opinion from this office. The said former opinion of this office does hold that, under the decision of the Kansas City Court of Appeals in Morgan vs. Jewel Const. Co., et al., 91 S.W.(2d) 638, and other cases by our Courts of Appeals and Supreme Court cited in said opinion, and under present existing statutes, individual members of the Commission do now have, along with the full Commission and Referees, the concurrent authority to approve compromise settlements of compensation cases and to hold original hearings on claims for compensation.

The two terms "hearing" and "compromise settlement" must not be confused in the enforcement and application of the sections in the Act providing for the carrying out of both such proceedings. Section 287.390, RSMo 1949, authorizes the compromise and settlement of disputes between employers and employees under the Act. That section was Section 3729 in the Revision of 1939, and was Section 3333 in the Revised Statutes of 1929. Section 287.460 is our present section in the Compensation Act providing for original and formal hearings of claims for compensation: That section in the Revision of 1939 was Section 3729, and in the Revision of 1929 was Section 3339.

Our Courts have repeatedly said that there is a clear and necessary fundamental distinction between the two remedies under the Act. One instance, in the case of LaTour vs. Green Foundry Co., et al., 93 S.W. (2d) 297, the

St. Louis Court of Appeals, in speaking of a "rehearing and review", a step taken after an award, as being different from a compromise settlement, l.c. 301, said:

"'Moreover, a rehearing and review as provided by section 3340, ending, diminishing, or increasing compensation previously awarded, can have no application to compromise settlements under section 3333 (Mo. St. Ann. § 3333, p. 8267). * * * Burnham v. Keystone Service Co. (Mo. App.) 77 S.W. (2d) 848, 854.)"

The quote just given was a paragraph quoted from the Burnham case, 77 S.W. (2d) 848, 854. The original Burnham case, 77 S.W. (2d) 848, very clearly discusses the distinction between a hearing and a settlement and we believe a reference to and the quotation of what the Court held will be beneficial here in dispelling any confusion which might exist, with reference to the carrying out of a compromise settlement or the making of an award upon a formal hearing and the necessarily differences in the effect resulting from the carrying out of either of said remedies. The Court on this point, 1.c. 852, 853, said:

"By the final agreement and report of facts and the final report and receipt for compensation, every controverted issue in the cause was eliminated. Every issue was determined and settled by the parties; and there remained no controverted issue in the cause for determination by the commission; and by its purported award of December 28. 1931, it determined none. By its own record, it disclosed that, upon the evidence gathered upon the hearings held by it, it was unable to determine the extent of respondent's permanent partial disability and suspended proceedings upon its part for further hearing therefor, except upon request thereafter by respondent for a resetting of the case upon further evidence to be produced. No such request appears ever

to have been made, and no further hearing appears ever to have been held by the commission. So far as the record discloses, the parties voluntarily, of their own accord, entered into the agreement for settlement, and, for the purposes of complying with the requirements of section 3333, supra, filed it with the commission for its approval, in order to make it legal, binding, and final. The commission was not required or authorized to make any award thereon. All that it was required or authorized to do was to examine the settlement and receipt, and, if found to be in accordance with the rights of the parties under the act, approve them or, if not so found, to reject them. It did approve the agreement for settlement so filed with it by the parties together with the receipt. The purported award by the commission, being unauthorized, was without effect as an award under section 3340, and served no useful purpose. It, at best, was a mere confirmation of the compromise already approved. Brown v. Corn Products Refining Co., supra."

The Appellate Courts of this State have made it clear that an award upon a hearing is not a settlement, neither is a compromise settlement upon agreement between the parties an award. This question was discussed by the Kansas City Court of Appeals in the case of Brown vs. Corn Products Refining Co., et al., 55 S.W. (2d) 706. That Court, pointing out the point of controversy in the case, 1.c. 707, said:

"The chief point of controversy between the parties and the main one for settlement on this appeal is whether, under the facts disclosed by the record, there was a valid compromise and settlement as contemplated by section 3333, R.S. Mo. 1929 (Mo. St. Ann § 3333), or whether the facts are such as to authorize the commission to rehear and review the case and make an additional award as contemplated by section 3340, R.S. Mo. 1929 (Mo. St.Ann. § 3340)."

Again, the Court in stating the distinction between the two proceedings, l.c. 710 further said:

"* * * The so-called award on agreement, made in this case after the compromise was reached, approved, and executed, is not an award after hearing by the commission of contested issues authorized under other sections of the statute. * * *."

The St. Louis Court of Appeals again defining this distinction in the case of Dewey vs. Union Electric Light and Power Co., 83 S.W. (2d) 203, 1.c. 206, said:

"So it is that a voluntary compromise settlement agreement made and executed by the parties under section 3333, and approved by the commission, is not thereafter reviewable on the ground of a change in condition; nor is the commissioner's mere approval of a receipt for compensation voluntarily paid, given upon a mere examination of the receipt by the commission and without a hearing upon the issues, to be regarded as an award within the contemplation of section 3340, so as to be thereafter subject to modification and review by virtue of its provisions. * * *."

We are assuming from the wording of the letter that the word "hearing" is not referred to as a formal hearing, such as is provided for in Section 287.460, RSMo 1949, but is intended to mean, and, as we view all of the language of the request for this opinion, does mean, merely a conference held by an individual member of the Commission with the parties to a claim incident to a compromise settlement. If our understanding of the wording of the request as just stated is correct, we believe, and we here further confirm the said former opinion of this office in that behalf, that an individual member does have the right to approve a settlement between the parties to a claim for compensation under the Act even if the matter is pending upon review before the Industrial Commission, or on appeal to the Circuit Court or to the Appellate Courts of this State. Our former opinion of date January 21, 1952, citing the Tokash case, 139 S.W. (2d) 978, on pages 6 and 7 of said opinion as authority, so holds.

However, if, on the other hand, your request is intended to mean, and does mean to ask what authority, after an award has been made by a Referee of the Division of Workmen's

Compensation and the matter is pending before the Industrial Commission on an application for review, an individual member has to hold a hearing, such as is provided in said Section 287.460, and make an award at such hearing, we think such individual member does not have such authority. He may, however, as said in our former opinion, hold an original hearing and make an award, if the parties to a claim submit their dispute to him. In such case, however, such an award would not be a settlement. It has been held by our Appellate Courts in numerous cases, construing the terms of Section 287.480, RSMo 1949, respecting the powers of the full Commission on review, where the original hearing was not held before the full Commission, that the full Commission may conduct a further hearing, take testimony and change or make a different award. (Pearson vs. Randall, 91 S.W. (2d) 116, 230 Mo. App. 416, and other cases cited, page 337. Annotations V.A.M.S. under Section 287.480). No such power, however, is given to an individual member of the Commission in Section 287.480 or any other section of the Act. So, therefore, it clearly appears from the terms of said Section 287.480 that an individual member of the Commission, either with or without the knowledge of the full Commission could not hold a hearing, review evidence, take testimony or change an award previously made and on appeal for review before the full Industrial Commission. That section plainly gives the full Commission complete jurisdiction to review a case and further conduct a hearing on the facts at issue to the exclusion of an individual member of the Commission. It is the view of this office that an individual member of the Commission would have the authority under the cases cited and quoted in the said former opinion of this office dated January 21, 1952, and referred to in this opinion with other authorities to approve a compromise settlement at any time wheresoever a controversy between an employer and an employee under the Act may be pending. It is the further view of this office that an individual member of the Industrial Commission has no authority to hold a hearing for any purpose when a claim for compensation under the Act is pending before the full Commission on review under Section 287.480 of an award previously made by a Referee in the case.

We trust this additional opinion will be of benefit to the Commission on the questions submitted to this office.

CONCLUSION.

It is, therefore, considering the premises, the opinion of this office that:

- 1) An individual member of the Industrial Commission of this State may approve compromise settlements of claims for compensation under the Act between employers and employees whenever and wherever the parties to such claims have agreed upon a settlement and submit such settlement to such individual member for approval;
- 2) It is the further opinion of this office that after an award has been made by a Referee on a claim for compensation under the Act and the claim is pending before the full Commission by appeal on review, an individual member of the Commission has no authority to hold a hearing such as is provided in Section 287.460 for any purpose.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

GWC:irk

JOHN M. DALTON Attorney General PROBATE COURT:

Duty of county to furnish certain legal publications for the office of probate judge.



March 11, 1953

Honorable E. C. Westhouse Probate Judge and Ex-Officio Magistrate Madison County Fredericktown, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"Could you give me an opinion on whether the complete sets or the part that applies to Probate and Magistrate Courts of Vernon's Annotated Missouri Statutes and Missouri Digest would be classified under other necessaries as per Missouri Statute, 1949, section 481.060? Also, would Limbaugh's Missouri Practice with Forms, which concerns Justice of the Peace (Magistrate) and Probate, be considered as necessaries?

"Concerning the above, what effect if any would the action of the County Court have if they arbitrarily disallowed these items and furniture from the budget without first granting the officer a hearing? Mo. Stat. 1949, Sec. 50.740.

"Any information that you can give me in this regard will be greatly appreciated."

Section 481.060, RSMo 1949, to which you refer provides as follows:

Honorable E. C. Westhouse

"Every probate court shall have a seal of office, of some suitable device, the expense of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessaries, shall be paid by the county."

At the outset we wish to state that the appellate courts of this state, in regard to furnishing offices, janitor service, stationery, postage and equipment for the offices, have adopted a liberal policy. County of Boone v. Todd, 3 Mo. 140; St. Louis County v. Ruland, 5 Mo. 268; Saylor v. Nodaway County, 159 Mo. 520; Ewing v. Vernon County, 216 Mo. 681 and 696; Buchanan County v. Ralls County, 283 Mo. 10.

In the above noted cases the statutes under consideration were not explicit on what should be furnished each county official, yet the courts have adopted a liberal view in the interests of efficiency of the office and its officers in the performance of their duties.

Section 481.060, supra, and particularly in regard to the term "other necessaries" has received construction by the Supreme Court of Missouri on several occasions. In the case of Saylor v. Nodaway County, 159 Mo. 520, the Supreme Court held that a probate judge under this section was entitled to postage stamps used in his office and in the opinion the court said:

"By the same rule of interpretation the judgment of the circuit court herein must be reversed, for in this case it was agreed at the trial, that the stamps, for which the probate judge presented his bill to the county court for allowance, were used in the discharge of the official business of his office and that they were necessarily required in the performance of his official duty. While everything that an official may use to facilitate him in the accomplishment of the work he is directed by law to perform, may not be asked to fall within the meaning of the term 'all other neccessaries, as used in section 1726, supra, certainly everything that he is directed to use, or that must necessarily be used in the performance of a designated act or acts required to be performed by him, should be held to be included within the meaning of that term. unless something previously or subsequently used in the section or act so providing, should clearly indicate a contrary intention."

In the case of Motley v. Pike County, 233 Mo. 42, the court held that a probate judge was entitled to janitor service and an office phone and in its opinion said:

"Nor do we think there was error in the allowance for telephone service. The term 'other necessaries' as used in the statute is sufficiently broad to cover this item. We are not living in the 'dark ages,' but in a day of progressiveness and enlightenment. Modern business is transacted by modern means and methods. In this day of the world the use of the telephone is in many instances as much of a necessity in the transaction of both public and private business as is the postal service. The use of the telephone has passed the period of mere convenience. It has reached the period of necessity. We are of the opinion that the plaintiff with the power to furnish his office with 'other necessaries' had the right to engage telephone service to facilitate the business of his office with the general public. The testimony is that it was necessary, but even without testimony we would have to know what the general public knows with reference to a matter of this kind."

You will note that the court, in the Pike County case, indicated that a telephone might not have been a necessity at one time but that under the modern methods of transacting business it has passed the period of mere convenience. The same reasons, we believe, would apply to the instant case. Legal publications comprise an attorney's "tools of trade." With an ever increasing number of cases reaching the appellate courts involving the construction, interpretation and application of existing statutes and constant new legislation stimulated by a more complex society, it becomes incumbent upon an attorney to rely upon certain legal publications if he is to adequately and efficiently perform the duties enjoined upon him. Such publications, or access thereto, we believe are as necessary to the operation of the office of probate judge as fuel, furniture, janitor service, postage stamps or a telephone. That part of Vernon's Annotated Statutes that applies to the probate and magistrate court and form books, such as the one you have mentioned, would fall within such category.

You next inquire what effect the action of the county court would have if they arbitrarily disallowed these items from the budget without

first granting the officer a hearing. Section 50.740 provides that it is the duty of the county court at its regular February Term to go over the estimates and revise and amend the same in such a way as to promote efficiency and economy in county government. Said section further provides that the court shall give the person preparing supporting data an opportunity to be heard. Assuming that this section makes it mandatory to grant a hearing, we note that probably the county court has already met at its February Term and therefore, this question would be moot.

We believe that if the county court acted arbitrarily, capriciously or otherwise, in abuse of its discretion in disallowing said items, such action could be reviewed by an appeal to the circuit court, such an action is indicated in the case of Bradford v. Phelps County, 210 S.W. (2d) 996, wherein the court, in its opinion said:

"It is seen in the Daues case, supra, the county court's exercise of a discretionary duty delegated by the Legislature could have been examined by the circuit court in an action of an equitable nature when it was alleged the county court had acted arbitrarily, corruptly and fraudulently, and not in the exercise of an honest discretion.

* * * * * * * * * * * * * * * * *

"We have noticed the Legislature has seen fit to delegate to the county court discretionary powers and duties under Section 10917 of the County Budget Law-the county court can be said to be 'the agency most familiar with the fiscal affairs and financial condition of the county' (State ex rel. Dietrich v. Daues, supra; State ex rel. Dwyer v. Nolte, supra), as well as the agency most likely to soundly budget estimated receipts and expenditures to the end of efficiency and economy in county government. It seems the county court's exercise of its discretion in the performance of its statutory and discretionary duty should not be interfered with, vacated or set aside, except in a case where it is clear the county court in acting abused or arbitrarily exercised its discretion (or, if such were the charge, acted fraudulently or corruptly)."

CONCLUSION

Therefore, it is the opinion of this office that certain legal publications or access thereto, are "necessaries" for the proper and efficient operation of the office of probate judge.

We are further of the opinion that if the county court acting within its discretion, arbitrarily, capriciously or fraudulently disallows such items, such action may be reviewed in an appeal to the circuit court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General

DDG:hr

UNEMPLOYMENT SECURITY:

Gordon P. Weir, Director of the Division of Employment Security of Missouri is the person who has authority to requisition funds from the Unemployment Trust Fund.



April 8, 1953

Honorable Gordon P. Weir Director Division of Employment Security Department of Labor and Industrial Relations Jefferson City, Missouri

Dear Mr. Weir:

This is the opinion, in compliance with your request of recent date for an official opinion of this office, respecting your authority as Director of the Division of Employment Security of the Department of Labor and Industrial Relations of this State, to make requisitions under the statutes of this State from the Unemployment Trust Fund. Your letter in that behalf reads as follows:

"According to the requirements of the Director of Employment Security, De-partment of Labor, and the Fiscal Service of the Treasury Department, a certification by the Attorney General with respect to my appointment as Director of the Division of Employment Security of the Department of Labor and Industrial Relations is required in accordance with the following:

"Treasury Department Requirements for Withdrawals From the Unemployment Trust Fund. In order that State agency requisitions for moneys from the unemployment trust fund may be honored by the Treasury Department, whenever the status of the person or persons previously certified has changed, the Treasury Department requires that the following must be submitted directly to it:

" A. An original, signed opinion or certification by the attorney general of the State, or a certified copy thereof, that the individual over whose signature the requisitions are made has duly constituted authority under the State law and under resolution of the State agency, if required by law or regulation to make such requisitions. If such qualified individual delegates his authority to requisition funds from the unemployment trust fund, the opinion shall contain reference to the authority for such delegation of power."

Section 288.210, Laws of Missouri, 1951, page 599, (Section 288.290,4) provides as follows:

"Moneys shall be requisitioned from the Missouri account in the federal unemployment trust fund solely for the payment of benefits or for refunds of contributions in accordance with regulations prescribed by the director. The director shall from time to time requisition from the federal unemployment trust fund such amounts, not exceeding the amounts standing to the Missouri account therein, as he deems necessary for the payment of benefits and refunds for a reasonable future period. Upon its receipt the treasurer shall deposit such money in the benefit account and shall issue his warrants for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of moneys belonging to this

state in their custody. All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the counter-signature of the director. Any balance of moneys requisitioned from the federal unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the director, shall be redeposited with the secretary of the treasury of the United States of America, to the credit of the Missouri account in the federal unemployment trust fund as provided in subsection 3 of this section."

Under the provisions of such subsection 4, the Director of the Division has authority to make requisitions for moneys from the Unemployment Trust Fund.

Section 288.190, Laws of Missouri, 1951, page 595, (Section 288.220, Cumulative Supplement, 1951, Missouri Revised Statutes) reads, in part, as follows:

"The division of employment security of the department of labor and industrial relations shall be under the control, management and supervision of a director who shall be appointed by the governor, by and with the advice and consent of the senate. Such director shall be a citizen and qualified voter of this state, and he shall serve at the pleasure of the governor. * * *."

Section 28.060, RSMo 1949, respecting the duties of the Secretary of State of Missouri to record commissions of public officials, reads as follows:

"He shall keep in his office an abstract of all commissions issued and appointments made by the governor, and shall register therein the substance of each commission, specifying the name of the person appointed, the office conferred, the district or county for which the appointment is made, and the term of office; and when any office shall become vacant he shall enter, in a space to be left for that purpose a memorandum of such vacancy and the occasion thereof, with a reference to any evidence deposited in his office."

The State Senate of the State of Missouri received on March 25, 1953, a statement, in writing, from Phil M. Donnelly, Governor of the State of Missouri, while the State Senate of Missouri was in session in the 67th General Assembly of the State of Missouri, informing the Senate that he had appointed Gordon P. Weir of Greenfield, Missouri, Director of the Division of Employment Security of the Department of Labor and Industrial Relations of Missouri for a term ending at the pleasure of the Governor of Missouri, and requesting the confirmation of such appointment by the State Senate of the State of Missouri; that said appointment of the said Gordon P. Weir was by the State Senate of the State of Missouri in session on March 31, 1953, approved and confirmed, and the Governor was by the State Senate of the State of Missouri so notified thereof, in writing.

That thereafter, to-wit, on the first day of April, 1953, in conformity to such confirmation by the State Senate of Missouri of said appointment of the said Gordon P. Weir to such office, Phil M. Donnelly, Governor of the State of Missouri, on April 1, 1953, appointed and commissioned the said Gordon P. Weir of Greenfield, Missouri, as Director of the Division of Employment Security of the Department of Labor and Industrial Relations of Missouri for a term ending at the pleasure of the Governor; that book 4 at page 126 of the official records of the Secretary of the State of Missouri discloses that said commission and appointment of the said Gordon P. Weir is officially registered in the office of the Secretary of State of Missouri.

CONCLUSION

It is, therefore, the opinion of this office that Mr. Gordon P. Weir, Director of the Division of Employment

Security of the Department of Labor and Industrial Relations of Missouri is the person who has duly constituted authority under the Laws of Missouri to make requisitions for moneys from the Unemployment Trust Fund.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

CRIMINAL PROCEDURE: TRIAL MAGISTRATE TO AFFORD CONSULTATION TIME TO DEFENDANT, WHEN:

When defendant is arraigned on misdemeanor charge, in magistrate court magistrate must, before accepting plea afford defendant sufficient time and opportunity to consult attorney and a friend. If necessary, he must continue case until defendant is accorded such rights. Prosecuting attorney who instituted misdemeanor case before magistrate, not required by guilty plea made and sentence entered to \$5.00 statutory apprint to



to be present when guilty plea made and sentence entered but he is entitled to \$5.00 statutory conviction fee whether present or absent.

May 19, 1953

Honorable E. C. Westhouse Probate Judge and Ex-officio Magistrate Madison County Fredericktown, Missouri

Dear Sir:

This is to acknowledge receipt of your recent request for a legal opinion, which reads as follows:

"What in your opinion does Ex parte Stone, 255 S.W. 2d 155 hold and how can it be reconciled with the following RSMo 1949 Statutes: Sections 543.080 and 543.180?

"Does the case hold that the defendant, and then only after his arraignment, must be 'afforded time and opportunity to consult with an attorney and a friend' before his plea of guilty can be accepted? If the case does so hold, would it also apply no matter whether a warrant had been issued or whether a summons had been given by a State Trooper to appear and answer a misdemeanor charge to be filed in Magistrate Court?

"Can this case and the statutes quoted above be reconciled by saying that the Court upon its own motion (RSMo 1949, Sec. 543.120) must grant a continuance

in all cases after arraignment and before any plea of guilty can be accepted? Meaning of course that this Statute, RSMo 1949, Section 558.380, is good ground for a continuance.

"I have another question on a different point. Is it necessary that the Prosecuting Attorney be present in Magistrate Court when the defendant is arraigned and pleads guilty to a misdemeanor charge? If not, should the \$5.00 Prosecuting Attorney fee be taxed as costs against the defendant, no matter if the Prosecuting Attorney is or is not present?

"I would appreciate your opinion on both these questions."

In regard to the first inquiry, and in answer to the first part of same, it is our thought that the very recent case of Ex Parte Stone, 255 S. W. (2d) 155, in effect holds that the right of counsel is guaranteed to one accused of crime before he is compelled to plead to a criminal charge, by Supreme Court Rules 21.14 and 29.05, and Sections 544.170 and 558.830, RSMo 1949. That in every criminal case pending before a magistrate, it is the duty of the court to afford the defendant such time or opportunity to consult an attorney and a friend as may be necessary, before a plea of guilty is accepted, and that it should appear of record that such time and opportunity has been afforded the accused, and that unless this procedure has been followed, the rights of the defendant will have been violated.

Section 558.830, RSMo 1949, referred to above, reads as follows:

"Any judge, magistrate or police judge who shall accept of a plea of guilty from any person charged with the violation of any statute or ordinance at any place other than at the place provided by law for holding court by said judge, magistrate or police judge, or who shall accept of any plea of guilty without first giving the person charged with an offense an opportunity and reasonable time to talk with a friend and an attorney, shall be deemed guilty of a

misdemeanor, and on conviction shall be punished by a fine of not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or by such fine and imprisonment; and in addition, shall forfeit his office."

Section 18(a), Article I, Constitution of Missouri, 1945, provides that the accused in a criminal prosecution shall have certain rights, and reads as follows:

"Rights of accused in criminal prosecutions. That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

Section 543.080, RSMo 1949, referred to in the opinion request reads as follows:

"When the defendant shall be brought before the magistrate, or shall be held in custody, charged by information with any misdemeanor, it shall be the duty of the magistrate, unless a continuance be granted, forthwith to hear the case as herein provided."

Section 543.180, RSMo 1949, is also referred to in said opinion request, and reads as follows:

"The charge made against the defendant shall be distinctly read to him unless he shall waive the reading of the same, and he must plead orally thereto, either guilty or not guilty, which plea the magistrate shall enter on his record; or if the defendant shall fail or refuse to plead, the magistrate shall enter the plea of not guilty on his record. Such plea may be entered on the record in the following form:

"Comes now the said A B, defendant, in person, and having seen and heard

read the information filed in this cause, for plea thereto, says he is guilty (or not guilty, as the case may be), in the manner and form as charged."

The sections of the statute quoted above provide the procedure to be followed when one accused of a misdemeanor is brought before a magistrate, and also when a plea is entered to such a charge by the defendant.

It appears that the above quoted sections merely implement that part of the constitutional provision which guarantees one accused of crime the right to a speedy, public trial, and prevents such one from being denied his liberty indefinitely while being held in custody awaiting trial, or prevents such one from being charged with a criminal offense for an indefinite period of time without being brought to trial on same.

The holding in the case of Ex Parte Stone, supra, is not in conflict with above quoted constitutional and statutory provisions, but said opinion is strictly in conformity with same, and is a declaration, or rather a reaffirmation of the rights guaranteed to persons accused of crime by the constitution, and said statutes. The opinion in Ex Parte Stone, supra, is to be read and interpreted along with said constitutional and statutory provisions.

In view of the helding in said case, it is believed that when one who is charged with a misdemeanor by information is brought before a magistrate as provided by Section 543.080, supra, it shall be the duty of the magistrate, unless a continuance is granted to hear the case without delay, but that before the trial is commenced the court must ascertain whether or not the defendant has been afforded sufficient time and opportunity to consult with counsel and a friend. In the event the magistrate finds the defendant has not been afforded such rights of consultation, then the magistrate must delay the trial of the case until after the defendant has been given such time and opportunity as may be necessary for that purpose. Unless the defendant requests time to consult counsel and a friend, then the court must of its own motion continue the case until such time as may be necessary to allow defendant the rights to which he is entitled in this respect. and the court record should reflect that this has been done. Absent this procedure having been taken by the magistrate, it is believed that the rights of the defendant will have been violated.

When, under the provisions of Section 543.180, supra, the defendant pleads guilty to the misdemeanor charge stated in the information, it is believed to be the duty of the magistrate, before accepting the plea of guilty to ascertain whether or not the defendant

has been accorded his rights to consult with counsel and a friend as stated above, then under the holding in Ex Parte Stone, supra, the court must grant sufficient time and opportunity within which said rights of the defendant may be exercised, and that the court should show that such time has been granted to the defendant. Unless this procedure is followed by the magistrate, it is believed that the defendant's rights will have been violated, and that this is true regardless of whether the defendant was arrested under authority of a state warrant or without same by a State Trooper, under the circumstances referred to in the opinion request.

The second inquiry of the opinion request asks whether it is necessary for the prosecuting attorney to be present in magistrate court when the defendant is arraigned and pleads guilty to a misdemeanor charge, and if the \$5.00 conviction fee of the prosecuting attorney should be taxed as costs regardless of whether or not the prosecuting attorney is present at the hearing.

Section 56.060, RSMo 1949, gives the general duties of the prosecuting attorney and reads in part as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned. * * *."

We are unable to find any decisions of the appellate courts of Missouri which interpret the meaning intended by the lawmakers to be given this section, especially to the terms "commence and prosecute," as therein used. Since the terms do not appear to have not been given any special meaning by any statutes or court decisions, they are to be given their ordinary or common meaning as they relate to court proceedings.

In the case of State v. Packard, 250 P. 2d, 561, the defendant was convicted of a criminal offense under a Utah statute which provided that the commencing of employment by one with any person, firm or corporation whose employees were out on strike called by a nationally recognized union was a crime unless such person be registered with the Industrial Commission. At, 1.c. 562, the court defined the term "commence" as follows:

"* * *The word commence means 'begin' 'perform the first act of' - 'take the
first step' - or 'to start', 7 Words and
Phrases, p. 726. In the context of the

Honorable E. C. Westhouse

term 'commencing' seems neither vague nor ambiguous. It has a fixed meaning which is commonly understood. It would apply only to persons commencing employment anew, that is, for the first time, while the strike is in progress and would not apply to former employees who merely returned to work and thus continued in employment."

In the case of State v. Bowles, 70 Kansas 821, at 1. c. 827, the court quoted the definition of the terms "to prosecute" from American and English Encyclopedia of Law (2d ed.), Vol. 23, page 268, as follows:

"'To prosecute is to proceed against judicially. A prosecution is the act of conducting or waging a proceeding in court; the means adopted to bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information.'"

(Underscoring ours.)

Again in the case of Brown v. Welch, 235 S.W. 997, it was held that the word "prosecute" includes a conviction under a plea of guilty, where the officer performs the preliminary duties in instituting the prosecution and attends the trial for the purpose of prosecution, and at l. c. 997, the Supreme Court of Arkansas said:

"The right of this officer to demand a fee depends upon the construction of the statute applicable to Clay and sertain other counties. Section 8308, Crawford & Moses' Digest, provides that the deputy prosecuting attorney shall have authority to file with justices of the peace information charging persons with the commission of 'any offense against the laws of this state,' and section 83.09 reads as follows:

"'When any person shall have been arrested under a warrant issued in accordance with the provisions of this act, it shall be the duty of the deputy prosecuting attorney to attend and prosecute such charge on behalf of the state, and he shall in like manner attend and prosecute on behalf of the state in any criminal case pending before any justice of the peace, or in the circuit court of his county, when so requested by any such justice of the peace or the prosecuting attorney of the circuit. and, in the event of a conviction, he shall be allowed the same fees as are now allowed by law to prosecuting attorneys in similar cases in the circuit court. Provided, that two may be appointed for Pulaski county.

"It is clear, we think, that the prosecution of a case by the officer, even where a plea of guilty is interposed before the trial of the cause, entitles him to the fee. The cases cited on the brief of counsel show that the legal definition of the word 'prosecute,' when used in this sense, includes a conviction under a plea of guilty where the officer performs the preliminary duties in instituting the prosecution and attends the trial for the purpose of conducting the prosecution. * * * *"

It is believed that the definition of the term "prosecute" given in the last above quoted case is applicable to the situation referred to in the second inquiry of the opinion request, except that the provisions of Section 56.060, supra, do not specifically require the prosecuting attorney or his assistants to attend the trial of every criminal case in his county. However, it is believed that the duties of the prosecuting attorney required by this section to "commence and prosecute all civil and criminal actions," in his county, would necessarily involve the filing of all informations in every criminal case in his county, and the doing of whatever duties that might be required of him under the circumstances and until the case was tried or otherwise disposed of according to law. Such duties of the prosecuting attorney would include the filing of informations in misdemeanor cases pending in the magistrate

courts of the county (as information is the only method provided by which cases of this nature may be prosecuted in magistrate courts, Section 543.020 RSMo 1949). The prosecuting attorney's duty to file informations charging persons with misdemeanors in magistrate courts is provided by Section 543.030, RSMo 1949, which reads as follows:

> "All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted, under his oath of office. and shall be filed with the magistrate as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer the charge for which they may be held in custody; provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

The information referred to in this section is not the first step of the criminal prosecution in magistrate court, for the affidavit for a state warrant authorized by Section 543.050, RSMo 1949, is the first step or beginning of such criminal prosecution. However, the drawing and filing of the information charging a misdemeanor, based upon the complaint made in writing before the magistrate is the beginning, or first duty of the prosecuting attorney specially provided by statute, in connection with cases of this kind.

Section 543.190, RSMo 1949, provides the procedure that shall be followed by the magistrate when the defendant is arraigned and enters a plea of guilty to a misdemeanor charge and reads as follows:

> "If the defendant shall plead guilty, the magistrate shall assess the punishment and enter the proper judgment and in order thereto he may hear evidence touching the nature of the case, or

otherwise ascertain the facts thereof; but in no case shall he accept the plea of the defendant and assess his punishment without giving the injured party notice and an opportunity to be heard."

The Arkansas statute quoted in Brown v. Welch, supra, required the deputy prosecuting attorney to commence and prosecute all criminal cases in the proper courts of his county when requested by the prosecuting attorney. Upon the conviction of the defendant he was entitled to receive the conviction fee provided by statute, the same as the prosecuting attorney. The definition of the term "prosecute" given in the above case, is fully applicable to the facts given in the opinion request, and would properly include cases in which a plea of guilty was made by the defendant, thereby entitling the prosecuting attorney to a conviction fee. The Arkansas statute required the deputy prosecuting attorney to prosecute and attend the trial of criminal cases in order to be entitled to the conviction fee, although the attendance of the prosecuting attorney or his assistants is not specifically required under any Missouri statutes, consequently this part of the opinion dealing with the attendance of the deputy prosecuting attorney has no application to the facts given in the opinion request.

While it is the official duty of the prosecuting attorney to commence all criminal cases in his county, as provided by Section 56.060, supra, we are unable to find any Missouri statutes which require the prosecuting attorney to be present in magistrate court, when a defendant charged with a misdemeanor pleads guilty, and is sentenced by the court under the provisions of Section 543.190, supra.

Although the prosecuting attorney is not required to be present when the defendant enters a plea of guilty, it is believed that in every case in magistrate court when the defendant is charged with any misdemeanor whenever it is possible for the prosecuting attorney or his assistants to be in attendance that he or they should do so.

In most criminal cases it is not known until trial day, when the defendant is arraigned as to what the plea will be, and it is proper that he attend and perform whatever duties that may be required of him in connection with the case.

In those instances when it is known in advance of the trial that a plea of guilty will be entered, or when it is impossible for the prosecuting attorney to be present at such hearing because he is required to represent the state or county in other proceedings on the same day, or for other good cause he is unable to be present when a defendant pleads guilty, his failure to be present does not amount to a dereliction of official duty nor will it in any manner affect the legality of the plea entered in his absence. Under the ruling in the Arkansas case, the prosecuting attorney would be entitled to a conviction fee when the defendant was convicted of a misdemeanor upon his plea of guilty.

We are unable to determine the exact meaning intended to be given the first part of the second inquiry by the writer, therefore, we find it necessary to qualify our answer, rather than to give an affirmative or negative answer to the inquiry as stated.

If the writer intended to inquire if it was the duty of the prosecuting attorney in representing the state to appear at the hearing of every criminal case before the magistrate courts of his county, in which defendants are charged with misdemeanors when pleas of guilty to such charges are made, then the answer would be in the negative, since no statutes require this duty of the prosecuting attorney.

If the prosecuting attorney has commenced and continued the prosecution, has filed the informations in such cases, and has done any or all duties required of him by the statutes in such instances, then it is immaterial whether he is present when pleas of guilty are made, and judgment rendered by the court. In all such cases the prosecuting attorney is entitled to the conviction fee of \$5.00 provided by statute.

CONCLUSION

It is the opinion of this department that when one charged by information with a misdemeanor in magistrate court is arraigned, before accepting the defendant's plea, it is the duty of the magistrate to ascertain if the defendant has been afforded sufficient time and opportunity within which to consult with an attorney, and a friend. That in the event it is found that the defendant has not been afforded such time and opportunety, it is the further duty of the magistrate to continue the case for whatever period of time may be reasonably necessary within which the defendant may exercise his said rights.

It is the further opinion of this department that the prosecuting attorney who instituted a criminal prosecution charging one Honorable E. C. Westhouse

with a misdemeanor in magistrate court, is not required by statute to be present when defendant pleads guilty and is sentenced, but whether he is present or absent, the prosecuting attorney is, under these conditions, entitled to the conviction fee of \$5.00, provided by statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON Attorney General DIVISION OF EMPLOYMENT SECURITY:

SUPPLIES:

Purchase of all supplies for Division of Employment Security must be made through the State Furchasing Agent unless he authorizes direct purchases by the Division.



July 31, 1953

Honorable Gordon P. Weir Director Division of Employment Security Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

Dear Director Weir:

This complies with your request, by letter, of recent date, for an official opinion of this office whether or not your Division may without personal liability pay out of your administrative fund certain items of expense in the nature of advertising without first having such expenditures approved by the State Purchasing Agent.

Your letter reads as follows:

"We desire an official opinion of your office on the following question:

"The Division of Employment Security have a program whereby they do a considerable amount of advertising in the newspapers. Occasionally some of this advertising is done over the radio and television. Our administrative fund, of which this service is paid from is the Federal administrative fund appropriated to this Division.

"The matter involved is a 105 hours of technical work at \$5.00 per hour to draw up 35 cartoon drawings to be photographed and reduced to television slides and then the slides are used on television for advertising purposes.

"However, to me this item would not clearly be within the realm of ordinary advertising, but would be the purchase of technical services and materials to be used in advertising.

"We are now presented with a bill in the amount of \$553.00, divided as follows: 105 hours at \$5.00 per hour, \$525.00; 35 drawings for television slides at 80¢ each, \$28.00; total \$553.00.

"The question is can we legally pay this item without it first having been requisitioned through the State Purchasing Agent of Missouri, without incurring liability on ourselves for so doing."

Section 34.030, RSMo 1949, provides that the purchase of supplies of all State Departments in this State shall be made by the State Purchasing Agent. Said section reads as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Section 34.130, RSMo 1949, requires each Department to submit a classified list of its estimated needs to the Purchasing Agent for the fiscal year following. Said section reads as follows:

"On or before May first of each year, each department shall submit to the purchasing agent a classified list of its estimated needs for supplies for the following fiscal year. The purchasing agent shall consolidate these and may purchase the entire amount or such part thereof at one time as he shall deem best. Any contract for such purchases may provide only the price at which the supplies needed during the year shall be purchased and that the supplies shall be delivered in such amounts and at such times as ordered throughout the year and be paid

Honorable Gordon P. Weir:

for at such time and for such amounts as delivered. In such case, certification from the comptroller and the auditor shall be required only for the amount ordered at any time."

Section 34.100, RSMo 1949, provides that, under certain conditions any Department may make direct purchases of certain supplies. Said section reads as follows:

"The purchasing agent shall have power to authorize any department to purchase direct any supplies of a technical nature which in his judgment can best be purchased direct by such department. He shall also have power to authorize emergency purchases direct by any department. He shall prescribe rules under which such direct purchases shall be made. All such direct purchases shall be reported immediately to the purchasing agent together with all bids received and prices paid."

The particular items of your expenditure, as noted in your letter and concerning which the uncertainty as to whether payment of such items may safely be made out of said fund without authorization by the State Purchasing Agent has arisen, you say consist of cartoon drawings which are later photographed and then reduced to television slides which are shown on television as advertising. Your letter states that as your Division views the matter such procedure would constitute the purchasing of technical services and materials to be used as advertising.

We have seen from Section 34.030, supra, that the Purchasing Agent shall purchase all "supplies" for the Departments. This statute must be obeyed in order that the Director of any division may be relieved of personal liability respecting the purchase of or contracting for supplies and the direct payment therefor, unless under other sections of the Purchasing Agent Act Departments may be authorized by the Purchasing Agent to make direct purchases of certain supplies. But there are exceptions to this plan. It is provided in Section 34.100, supra, that there may be conditions under which direct purchases may be made by any Department by authority of the Purchasing Agent. Said Section 34.100 plainly gives the Purchasing Agent discretionary powers to permit any Department to purchase any supplies

Honorable Gordon P. Weir:

of a technical nature which in his judgment can best be purchased direct by such Department and to prescribe rules under which such purchases may be made.

In a later letter, in reply to our request for further information, you advise that the item described in your first letter, constituting the expenditure in question, was not supplied by the radio station, but "was contracted for without going through the purchasing agent with an in-dividual who is in the professional business." It appears that the Director of your Division in office at the time and before the contract was made for the expenditure of this item had previously obtained verbal authority from the Purchasing Agent to make such contract and to purchase the said services and materials direct. Said former Director advises this office that the facts and conditions respecting the necessity for the contract and the purchase of this item were fully explained in detail to the then State Purchasing Agent with the statement that the artist in the production of such material would have to use his own ingenuity in the development thereof, with the implication that early delivery of such material for advertising purposes would be required, and that thereupon the then Purchasing Agent authorized the then Director of the Division to proceed with the arrangements so contemplated to contract and pay for such services and materials, and that then the contract with the artist was made; that consultation was had with the artist from time to time as the work progressed, and that several weeks later such former Director accepted delivery of the completed cartoon drawings.

It appears then, from the information in your letter and in the letter of such former Director, both submitted to this office, that such advertising by radio and television was carried out by such authorization, and by the fulfillment of said contract for the expenditure for such services and materials and that there has been sent to your Division a bill for the total amount of said expenditure.

We are advised that, among other rules promulgated by the Purchasing Agent under said Section 34.100, is Rule No. 16, which reads as follows:

> "Rule 16. Departments may make purchases of emergency or technical nature, where immediate delivery is necessary, with the verbal permission of the Purchasing Agent.

Vendors can be notified of such approval and make immediate delivery, and instructed not to make billing until departmental order is received. Departmental orders are to be made up at once and sent to Purchasing Agent for approval and encumbrance on the appropriation. Departments are to write on such order: 'This merely confirms a purchase previously made' (to avoid duplication)."

We believe the terms of said Rule No. 16 apply to the conditions and circumstances existing in the present case. It appears from such circumstances and conditions that such expenditure was of a technical character and that the completed development of such material by the artist required immediate delivery thereof in order for the Division to carry out the plan, so submitted to the Purchasing Agent, for advertising by radio and television. It further appears to us that the authority given by said Purchasing Agent to said Director to proceed to contract with the artist for the development and delivery of such items of material was proper, and was lawfully authorized by said Rule No. 16 and the provisions of said Section 34.100. We believe there was lawful authority for direct purchase thereof and payment therefor by your Division by reason of the verbal permission of the Purchasing Agent, and which would relieve, and does relieve, said former Director of your Division and you as the present Director of said Division from violation of the terms of said chapter and from any personal liability prescribed by the terms of Section 34.150, RSMo 1949, upon the payment direct of such expenditure by you as Director of said Division.

It appears clear, we believe, that since the Purchasing Agent is empowered to authorize any department by verbal permission to purchase, direct, supplies of a technical nature, and since such authority was given in this instance, after full explanation of the plan was made and was understood by him, such authorization would include all items of supplies constituting this expenditure and would render unnecessary the taking of bids on any items of such needs under the rules promulgated by the Purchasing Agent, whether over or under \$50.00, and thus having fully complied with the statutes in such cases made and provided, your Division is authorized by law to pay for such supplies without further reference to the office of the Purchasing Agent of this State.

CONCLUSION

Considering the premises it is, therefore, the opinion of this office that under Section 34.030, RSMo 1949, all Departments must purchase supplies through the office of the State Purchasing Agent in order that the Director of any such Department may be relieved of personal liability for violation of the terms of said Chapter 34, RSMo 1949, unless authority is given by the Purchasing Agent, as was given in this instance, under Section 34.100 of said Chapter, or under rules promulgated by the Purchasing Agent, authorizing any Department to make direct purchases of certain supplies of a technical or emergency character in which event, if such authority is given by the State Purchasing Agent for any Department to purchase such supplies direct and such supplies are so purchased the Director of any such Department would be relieved of violation of provisions of said chapter and would not be personally liable for contracting for the purchase and payment for such supplies.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

DIVISION OF EMPLOYMENT SECURITY: MERIT SYSTEM AND EMPLOYEES:

Director of Division of Employment Security may employ secretary for such Director without regard to provisions of Merit System.



December 31, 1953

Mr. Gordon P. Weir, Director Division of Employment Security Department of Labor and Industrial Relations Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

* * *

"The questions which I wish an opinion on are: (1) Under the State Merit System Law and under the law applicable to the Employment Security, which is Chapter 288, RSMo 1949, what authority does the Director of the Division of Employment Security have in appointing, hiring and paying a secretary . for the Director? (2) Can that secretary be either male or female? (3) Does the person selected as secretary have to be experienced in either or both typing, shorthand and transcribing shorthand notes in order to meet the qualifications of a secretary as provided for in Section 36.030, paragraph 3, subparagraph (3), RSMo 1949, before the Director can appoint such a person as his secretary.

"An early reply to this will be greatly appreciated."

Your attention is directed to the following portion of Paragraph 4 of Section 288.220, RSMo 1949, as amended by

Mr. Gordon P. Weir

Senate Bill No. 36 of the 67th General Assembly which now appears in the 1951 Supplement.

"4. It shall be the duty of the director to administer this law; and he shall have power and authority to adopt, amend, or rescind such regulations as he deems necessary to the efficient internal management of the division. The director shall determine the division's organization and methods of procedure. Subject to the provisions of the state merit system act, the director shall employ and prescribe the duties and powers of such persons as may be necessary. The director may delegate to any such person such power and authority as he deems reasonable and proper for the effective administration of the law, and may in his discretion bond any person handling moneys or signing checks. Further, the director shall have the power to make such expenditures, require such reports, make such investigations and take such other action, not inconsistent with this law, as he deems necessary to the efficient and proper administration of the law." (Emphasis ours).

You will note that the power of employment delegated to the Director under the above-quoted portion of the statute is qualified to the extent that such employment shall be subject to the provisions of the State Merit System. We therefore, must refer to that Act to determine the limitations, if any, imposed upon such employment. We direct your attention to the following portion of Paragraph 3 of Section 36.030, RSMo 1949:

"3. The following offices, positions and appointments in the agencies covered by this chapter are hereby exempted from the operation of this law and may be filled without regard to those provisions hereof which relate to the selection, appointment, pay, tenure and removal of persons employed in such agencies:

Mr. Gordon P. Weir

"(3) One secretary for each director, division head and each member of boards and commissions the members of which devote their full time to the business of the board or commission the members of which are appointed by the governor, except the personnel director; * * *" (Emphasis ours).

We have made further examination of the statute relating to the position which you fill, that is to say, Director of the Division of Employment Security, and we find that under the provisions of Section 286.130, RSMo 1949, such office is filled by appointment by the Governor. The statute mentioned reads, in part, as follows:

"The division of employment security shall be under the control, management and supervision of a director who shall be appointed by the governor as otherwise provided by law. * * *"

Therefrom it appears that to the extent of the employment of one secretary to serve the director, such employment has been exempted from the provisions of the State Merit System Act.

CONCLUSION

In the premises we are of the opinion that the Director of the Division of Employment Security may appoint and employ a secretary to serve such Director without regard to the provisions of the State Merit System Act. Having determined that such appointment and employment may be made in the manner indicated we feel that the qualifications of such secretary are to be determined solely by the Director, and that other qualifications such as the sex of the secretary, the qualifications with respect to the discharge of the duties of such secretary, etc., are matters to be determined solely at the discretion of the Director of the Division of Employment Security.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General TAXATION:

Students at School of Mines are subject personal property tax assessment in Phelps County, only if they establish legal residence in that county.

February 10, 1953



Honorable Jay White Prosecuting Attorney Phelps County Rolla, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The County Court of Phelps County has requested that I obtain an opinion as to whether students attending the School of Mines and Metalurgy here in Rolla will be subject to assessment for personal property tax for their personal property located here in Phelps County.

"In my experience, some of the students qualify as voters, while some others do not. Perhaps this would have some bearing on the question. I hope you can give me an opinion on this without too much trouble."

Section 137.075, RSMo 1949, provides:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

Section 137.090, RSMo 1949, provides:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

These statutes have been held to have fixed the situs of tangible personal property for the purpose of taxation at the domicil of the owner. State ex rel. Kelly v. Shepherd, 218 Mo. 656, 117 S.W. 1169; State ex rel. American Automobile Insurance Company v. Gehner, 320 Mo. 702, 8 S.W. (2d) 1057.

In State ex rel. Kelly v. Shepherd, the court discussed the meaning of residence, as used in the personal property tax statute, and stated (218 Mo. 1.c. 665):

"We have been cited to no statute embraced within the revenue laws of the State which attempts to define or fix the residence of any person for the purposes of taxation, and we have searched those laws in vain for such a statute, and consequently feel satisfied that no such exists. In the absence of any such statute, we must look to the common law and to other statutes in determining the meaning of the words 'residence' and 'domicile' as they are used by the Legislature in the revenue statutes.

"At common law, all of the authorities agree that those words are used interchangeably and have practically the same meaning. The latter seems to have been more generally used by the text-writers and in the adjudicated cases, but our statutes more frequently use the word 'residence.' The word

'domicile' is defined by Mr. Burrill in the following words: 'A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time;' and Mr. Blackstone defines the word 'residence' to be 'the abode of a person or incumbent or his benefice--opposed to non-residence.'

"While this court has not attempted to give a technical definition of either of said words, yet it has in numerous cases used them in the sense before mentioned. (Citations omitted).

"In this State we have many statutes which employ the words 'resident.' 'citizen,' 'domicile', 'place of residence, ' etc., which relate to exemptions. elections, officers, taxation, attachments, place of bringing suits, etc., but none of those statutes seem to have undertaken to define any of those words; and in all of the cases to which our attention has been called, the courts, in construing their meaning, have been controlled very largely by the intention of the person whose residence or domicile was in question. That was the sole controlling fact in the case of State ex rel. v. Renshaw, supra, which involves the question as to where his personal property should be taxed. The authorities are also uniform in holding that when a person has once acquired a residence or domicile, then such residence or domicile is not lost by reason of his temporary absence therefrom on pleasure or business. * * *"

Section 1.020 (9), RSMo 1949, defines "place of residence" as used generally in our statutes, as follows:

"'Place of residence' means the place where the family of any person shall

permanently reside in this state, and the place where any person having no family, shall generally lodge."

In the Shepherd case the court considered whether or not the definition in the latter part of this section (then Section 4160, RSMo 1899) was conclusive in determining the place of residence for purpose of personal property taxation. The facts of that case showed that the taxpayer, a single person without a family, resided on a farm outside of a school district, which was attempting to levy the tax. His parents lived within such school district and the taxpayer lodged there with his parents at night, because they were old and helpless and needed his care and attention. Every morning, however, he did return to his farm for the purpose of looking after it. The trial court expressly found (218 Mo. 1.c. 661):

"That at the time of the assessment of the taxes herein sued for and prior to that time defendant had never considered the home of his parents in Plattsburg as his home, but intended and considered his farm house as his home, where he occasionally took a meal with his tenant who occupied a portion of said farm house.!"

The Supreme Court held that the legislative definition was not conclusive and that it could "ascertain the prime meaning of the words 'residence' and 'domicile.'" (218 Mo. l.c. 668). Thus, the court held in effect that a person is subject to personal property taxation where his "home" is.

That is in accord with the general concept of domicil. The Restatement of Conflict of Laws, states (Section 12, page 24):

" * * * (W)hen a person has one home, and only one home, his domicil is the place where his home is."

Some cases have indicated that a domicil can be established only when there is no definite intention of leaving

the present place of abode at some future time. Very few students at Rolla have any intention of remaining there after completing their education. However, everyone must have a domicil (Restatement of Conflict of Laws, Section II, page 23), and the law now recognizes that, although a person may intend to leave a dwelling place at some future date, he may, nevertheless, have his home there. Comment a, Section 18, Restatement Conflict of Laws, page 36, states:

"The intention to make a new home involves to a certain extent the idea of fixity. A person does not intend to make a place his home unless he has an intention to remain there for a time at least. If he intends to remain there permanently, it is easier to find that he intends to make his home there than if he intends to move away at some time in the future. If he does not intend to move at a definite time, it is easier to find that he has made his home there than if he intends to move at a definite time. It is possible, however, for a person to make his home in a place even though he does intend to move at a definite time; although the more distant that time is the easier it is to find that he has an intention to make his home there."

In the case of Klutts v. Jones, 21 New Mexico, 720, 158 Pac. 490, the question of residence for the purpose of voting was involved and, in the course of its opinion, the court stated (158 Pac. 1.c. 491):

"Appellant argues that, because the witness testified that she did not intend
to remain in Taiban should she find a
situation in some other place that
suited her better, or should she fail
to secure employment in the schools at
that place, she was not a resident of
such voting precinct within the meaning
of the Constitution. This is the extreme

view, which finds some support in the earlier cases. In the case of Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706, the court says:

"The older cases and some of the modern ones require as an essential element the animus manendi, and construe this term as meaning an intention of always remaining."

"In this case, the question was as to whether or not a student at an institution of learning was a resident of the town in which such institution was located, and entitled to vote at elections held there. The opinion is so instructive upon the point here raised that we quote at length therefrom:

"That what place is any one's domicile is a question of fact; that if a student have a father living; if he remain a member of his father's family; if he return. to pass his vacations; if he be maintained by his father -- these are strong circumstances repelling a presumption of a change of domicile. But if he be separated from his father's family, not maintained by him; if he remove to a college town and take up his abode there without intending to return to his former domicile -- these are circumstances more or less conclusive to show the acquisition of a domicile in the town where the college is situated. The same view was taken in Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606. The Supreme Court of Ohio, quoting Story's definition of "Domicile", adds: "It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time as a place of fixed present domicile, and not as a place of temporary establishment, or for more transient purposes, it is, to all intents and for all purposes, his residence." Sturgeon v. Korte, 34 Ohio St. 525.

"'In Dale v. Irwin, 78 Ill. 170, the court said: "What is 'a permanent abode'? Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on the change. No man in active life in this state can say, wherever he may be placed, This is and ever, shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it.

"These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may, at a future time, intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place. and there must be no intention of presently removing. "

The court further stated (158 Pac. 1.c. 492):

"The question of whether a person is a resident of one place or another is largely a question of intention, and, where the intention and the acts of the party are in accord with the fact of residence in a given place, there can be no doubt of the fact that such a party is a bona fide resident of the

place where he intends to and does reside, and that he has the right to exercise all the rights and privileges accorded actual residents of such place, provided he comes within the provisions of the law regulating such rights."

The authorities cited in the Klutts case may appear to conflict with the decision of the Kansas City Court of Appeals in the case of Goben v. Murrell, 195 Mo. App. 104, in which it was held that students attending the American School of Osteopathy at Kirksville had not fulfilled the requirement of residence necessary to qualify them as voters there. That case, however, had been submitted to the court on an agreed statement of fact, which included the following (195 Mo. App. 1.c. 106):

"* * * It is further agreed that at the election held on the 4th day of April, 1916, there were cast and counted for the contestee more that two hundred votes cast by persons who came to the city of Kirksville from their respective homes and places of residence outside of the city of Kirksville and Adair county, Missouri, and were, before and at the time of leaving their said homes and places of residence to come to Kirksville, residents of the places from whence they came. That said persons came to Kirksville for the sole purpose of becoming students at the American School of Osteopathy, an institution of learning located at said city, with the intention of remaining in said school three years and of then locating at places elsewhere for the practice of osteopathy. And that they did so become students in said school and were such students at the time of said election and time of voting, and had been such students in said school for one year next before said election, and that each of said persons voted in the respective wards in which they lodged during said time. And that said persons have never altered their intentions of leaving the city of Kirksville as soon as their course of study at said school shall have been completed. # # #"

There was nothing in this statement to show that any of the students had evidenced any intention to make Kirks-ville their home. As the court pointed out (195 Mo. App. 1.c. 109):

"Under our election law a student neither loses his old residence nor gains a new one during his absence from the former, or presence at the latter. It is true that this law does not preclude his becoming a resident and voter at the school town or city, but his intention must be evidenced by something more than his mere physical stay in the place. He must intend to make it his home -- not that he shall remain for life -- but his home indefinitely. And so if he comes into the place for the temporary purpose of getting an education and then to leave for other parts, he has not such a residence as entitled him to vote." (Emphasis ours)

From the foregoing it can be seen that no hard and fast rule can be laid down, which would cover every situation which might arise under your question. However, certain situations might be pointed out. Insofar as unemancipated minors who are students are concerned, their domicil is fixed by law as that of their parents. 17 American Jurisprudence, Domicil, Section 57, page 625. Thus, they would not be taxable in Phelps County unless their parents were domiciled there. A single student over the age of twentyone, who attends school there, residing at a dormitory or boarding house, and remaining in Rolla only during the school year, and returning to his parents' residence during vacation, and having no intention of remaining in Rolla after having completed his education would not be considered, by reason of his presence there to attend school, to have established a residence in Phelps County for the purpose of taxation. Restatement of Conflict of Laws, Section 18, page 37, Section 22, page 46. On the other hand, a student who has married, and definitely left his family home and taken a house in Phelps County to live there with his family until he graduates, should be considered to have established his residence there for the purpose of taxation. Restatement of Conflict of Laws, Section 22. page 46.

Cases which lie between these two extremes must depend largely upon the intention of the persons involved. A previous domicil is presumed to have continued it until it is shown to have changed. 17 American Jurisprudence, Domicil, Section 81, page 637. Intention to change domicil may be shown by declarations of the party, (Id. Section 88, page 641), and by acts and conduct indicating an intention to change domicil. (Id. Section 89, page 641). Acts and conduct tending to throw light on the subject include "* * identification with regard to social and business life of a place; his membership in lodges and clubs; his church activities; * * *". (Id. Section 89, page 642).

The exercise of political rights is a fact and circumstance which may be considered. However, the fact that a student has exercised his right to vote in Phelps County does not conclusively establish that place as his residence for the purpose of taxation. State ex rel. Dowell v. Renshaw, 166 Mo. 682, 66 S.W. 953, Annotation, 107 A.L.R. 448.

Another problem must be considered insofar as students who are not residents of Missouri are concerned. Section 137.090, RSMo 1949, quoted above, merely provides the place where property of a Missouri resident having personal property in more than one county in the state should be assessed. In the case of City of St. Louis v. Wiggins Ferry Company, 40 Mo. 580, the court held that personal property of a non-resident which had acquired a situs in Missouri was subject to taxation here.

The principle behind this and similar cases is stated at 110 A.L.R. 715, as follows:

"The maxima 'mobilia sequentur personam' has never been allowed to stand in the way of the power of a state to tax property having an actual permanent situs within its jurisdiction; and it has always been held, assumed, or conceded that tangible personal property having an actual situs in a state, is there taxable, regardless of the foreign domicil of its owner, the theory being that inasmuch as the property enjoys the protection of the state, it must be made to contribute to its maintenance. * * *"

* * * * *

"The courts are all agreed that before tangible personal property may be taxed in a state other than its owner's domicil, it must acquire there a location more or less permanent. It is difficult to define the idea of permanency that this rule connotes. It is clear that 'permanency,' as used in this connection, does not convey the idea of the characteristics of the permanency of real estate. It merely involves the concept of being associated with the general mass of property in the state as contrasted with a transient status--viz., likelihood of being in one state today and in another tomorrow."

The cases in which this question has arisen, so far as we have been able to determine, have involved personal property used in business in a state other than that of the domicil of the owner. However, there would appear to be no reason for not applying the rule to personal property not used in business owned by a non-resident of Missouri, which has become permanently located in this state. As stated, exact definition of the degree of permanency required is impossible. Each case must depend upon its particular facts.

CONCLUSION

Therefore, it is the opinion of this department that personal property belonging to students at the Missouri School of Mines is subject to assessment in Phelps County only if the owner thereof is a resident of said county. Whether or not a person not otherwise a resident of Phelps County becomes such by reason of his attendance at the School of Mines, depends principally upon whether or not such student intends to make his place of abode there his home during the time that he is in school. Unemancipated minors, in no event, acquire residence there by reason of their attendance, as their domicil remains that of their parents. Personal property belonging to students, who are in no event residents of Missouri, may become taxable in Phelps County if its location there is of such a permanent nature as to give it a situs there.

Honorable Jay White

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW: 1w

COUNTY COURTS:
COUNTY DEPOSITARY:

County court cannot place county funds in an account outside the county depositary; such would not be grounds for removal from office in the absence of fraud or misappropriation.



March 12, 1953

Honorable J. Patrick Wheeler Prosecuting Attorney of Lewis County Monticello, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"The particular problem is whether or not the county court may lawfully and legally maintain a separate account outside the county depository and draw upon same without issuance of warrant. * * * Also, in connection with this section, whether or not maintenance of such separate account would be grounds for an action to remove the county judges involved, there being no evidence of malfeasance."

You inquire first whether or not the county court may lawfully maintain a separate account or fund, other than in a county depositary and draw upon such account without the issuance of warrants.

The fund or account to which you refer was established by the county court under the provisions of a will by which certain property was left to the county solely for the use of the county for the support of the poor. The fund once established constitutes county funds and would be subject to the provisions of law applicable to other county funds although it would be designated a separate fund to be used only for certain purposes.

Honorable J. Patrick Wheeler *

Chapter 110, RSMo 1949, Sections 110.010 to 110.060, contains general provisions relating to depositaries. Sections 110.130 to 110.260 specifically relate to county depositaries. Section 110.130 makes it the duty of the county court to advertise for bids for the selection of depositaries for county funds. Section 110.140 provides procedure for bidders. Section 110.150 relates to opening of the bids, etc. Section 110.030 provides that the various statutory provisions in relation to the advertisement for, and receipt of, bids and the award of funds to the lowest bidder need not be followed if, at the time of said advertisement of award, it shall be unlawful for banking institutions to pay interest upon demand deposits, and further provides that in such event the awards shall be made without bids by the authority or authorities who are by statute empowered to make the award of such funds upon bids.

Section 110.160 provides the character and kind of bonds to be given by county depositaries and other provisions. Under these provisions, we are of the opinion that county funds are required to be placed in depositaries selected and qualified as specified in the above noted provisions.

Noting these provisions, the Supreme Court of Missouri, in the case of Cantley v. Beard, 98 S. W. (2d) 730, said:

"* * *The Bank of Barnett was not a county depository at the time of the deposit, as stated, and the county court had no right to deposit public funds in this bank under the setup in the proposition. * * * * * * * County courts cannot lawfully place public funds in banks except by complying with the county depository law. * * *"

Again considering these provisions, the court, in the case of Ralls County v. Commissioners of Finance, 66 S.W. (2d) 115, said;

"A county has no lawful right to deposit county funds except in a county depositary. * * *"

and in Boone County v. Cantley, 51 S. W. (2d) 56:

"* * *A county is authorized to deposit its funds in county depositaries only. * * *"

It, of course, would be a meaningless and futile gesture to prescribe a method of selecting and qualifying county depositaries if county funds were not required to be placed in them once selected.

Honorable J. Patrick Wheeler

Having determined that an account could not be maintained other than in a county depositary, it, of course, and of necessity follows, that such funds could not be drawn upon by the county court without issuance of warrant. However, in any event, we do not believe that county funds can be paid out except through a warrant. It is stated in the case of Thompson v. St. Charles County, 227 Mo. 220, 1. c. 234:

"* * *Under our statutory scheme not a dollar can be paid from the treasury of a county on a claim except through a warrant. Such warrants are the only legal vouchers for the payment of public money. Our statutes contemplate that county warrants should be drawn in the name of the person presenting a claim for payment, and once a year county courts are required to make a full showing to the people in this regard.

You next inquire whether or not the maintenance of such separate account and drawing on same without issuance of warrant would be grounds for an action to remove the county judges involved, there being no evidence of malfeasance. We note further from your opinion request the following:

"There have been accusations of misappropriation of these funds, although my investigation thus far does not disclose any such acts."

Section 4 of Article VII, of the Constitution of Missouri 1945, provides as follows:

"Except as provided in this Constitution, all officers not subject to impeachment shall be subject to removal from office in the manner and for the causes provided by law."

Section 106.220, RSMo 1949, specifies the grounds for removal in statutory proceedings as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such

Honorable J. Patrick Wheeler

office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290."

You will note that under the provisions of this section, in order for a violation or neglect of any official duty to constitute a ground for removal, it must be willful or fraudulent. The term "malfeasance" in the sense in which you have used it is defined in 26 Words and Phrases, Cumulative Supplement, pages 27 and 28 as follows:

"In determining whether officer was guilty of 'malfeasance in office', true motive or intent with which he acted must be considered, and act done with dishonest, oppressive, or corrupt motive, of which fear and favor may be considered elements, constitutes malfeasance, but if act proceeded from honest mistake or error, unusual circumstances must accompany transaction to constitute offense of corrupt or willful malfeasance. State v. Seitz, Del. Gen. Sess., 14 A. 2d 710, 711, 712, 1 Terry 572.

"A justice of the peace, remitting fines imposed by him after payment thereof or personally collecting such fines with evil intent or corrupt motive, is guilty of 'malfeasance in office,' but justice unlawfully remitting or collecting fines without such intent or motive is not guilty of such offense. Rev. Code, 1935, Secs. 4459, 5180, 5683(d), State v. Seitz, Del. Gen. Sess., 14 A. 2d 710, 711, 712, 1 Terry 572."

Under the provisions of Section 106.220 and the above noted definitions of malfeasance, we are of the opinion that maintaining such a fund outside of a county depositary and drawing on same without issuance of warrant, absent the showing of fraud, misappropriation or willfulness, would not be grounds for removal from office.

Honorable J. Patrick Wheeler

CONCLUSION

Therefore it is the opinion of this office that a county court cannot maintain an account comprised of county funds other than in a county depositary selected and qualified as provided by law, nor draw on such funds without issuance of warrant.

We are further of the opinion that maintenance of such an account and drawing on same without issuance of warrant other than as provided by law would not be grounds for an action to remove the county judges from office, absent a showing of fraud or misappropriation of said funds.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General ABSENTEE VOTING: Absente

Absentee voting not authorized at elections

ELECTIONS: TOWNSHIPS:

VOTING:

wherein only township officers are elected.

FILED

March 26, 1953

Honorable James J. Wheeler Prosecuting Attorney Chariton County Keytesville, Missouri

Dear Mr. Wheeler:

In your letter of March 16, 1953, you requested an official opinion on the following question:

"The question has arisen as to whether or not absentee ballots can be cast at this township election under section 112.010, R.S.Mo. 1949, which provides for the casting of absentee ballots at any 'special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy * * * ."

Constitutional authorization for absentee voting is provided by Article VIII, Section 7, Missouri Constitution of 1945, as follows:

"Absentee voting. -- Qualified electors of the state who are absent, whether within or without the state, may be enabled by general law to vote at all elections by the people."

Statutory provision for absentee voting by persons not in military or naval service is provided by Section

Hon. James J. Wheeler

112.010, RSMo 1949, as follows:

"Any person being a duly qualified elector of the state of Missouri, other than a person in military or naval service, who expects to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, or any person who through illness or physical disability expects to be prevented from personally going to the polls to vote on election day, may vote at such election as herein provided."

In order to determine whether absentee ballots may be cast at township elections the above section must be examined and construed. To aid in the construction of said statute is the statement of the Supreme Court in Nance v. Kearbey, 251 Mo. 374, 158 S.W. 629: "Election laws must be liberally construed in aid of the right of suffrage. * * * "

Section 112.010 states in considerable detail at what elections absentee ballots may be cast. Such ballots may be cast at only special, general, or primary elections at which any presidential preference is indicated or any candidates are chosen or elected for any cangressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted.

In construing statutes having such detailed provisions the maxim of "expressio unius est exclusio alterius" should be applied. This maxim is discussed and defined in City of Hannibal v. Minor, 224 S.W. 2d 598, as follows:

" * * * There is a fundamental principle of construction which has been recognized and applied from time immemorial by our courts to such questions as we have here. It is embodied in the maxim: 'Expressio unius est exclusio alterius' which means that the express mention of one thing, person or place implies the exclusion of another. * * * "

It is also noted that Section 112.300, RSMo 1949, provides for casting of absentee war ballots by persons in military or naval service in the following instances: "Special, primary or general election in which any presidential preference is indicated, or any candidates are chosen or elected for any congressional, state, district or county election or at which any question of public policy is submitted." (Emphasis ours.)

Since there are two statutes providing for absentee voting by different classes of persons, viz., military and civilian, and both statutes go into considerable detail as to the elections in which absentee voting is authorized, and are not identical, it must be presumed that the legislature intended to authorize absentee voting only in the elections which are set forth. In neither section are "township offices" or "township elections" mentioned.

CONCLUSION

It is, therefore, the opinion of this office that absentee voting is not authorized at elections wherein only township officers are elected.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON Attorney General

PMcG:sw:lrt

TOWNSHIP ELECTIONS:

FORM OF BALLOT:

It is not permissible to write or print the name of any political party on the ballot used in township elections of township of ficers to designate the political party of the various candidates on the ballot.



March 28, 1953

Honorable James J. Wheeler Prosecuting Attorney Chariton County Keytesville, Missouri

Dear Mr. Wheeler:

This office is herein supplying the opinion you requested on March 23, 1953, for the construction of the statutes of this State governing the election of township officers in counties under township organization to determine whether the ballot used at such elections shall designate the political party of the various candidates on the ballot. Your letter requesting this opinion reads as follows:

"Chariton County has township organization and the township election will be held here March 31, 1953.

"The question has arisen as to whether or not it is permissible to designate the political party of the various candidates on the ballot. I am of the opinion that this is not permissible, but the township clerk wishes me to write you."

The procedure for holding elections in townships in counties having adopted township organization is set out in Section 65.060 of Chapter 65 of the Revised Statutes of Missouri, 1949. Said section reads as follows:

"65.060. Elections, when, where.-The citizens of the several townships
in all counties having adopted the township organization law of this state, who
are qualified by the constitution and
laws of this state to vote at general
elections, shall assemble biennially
on the last Tuesday in March at their
usual place of voting, or at such place

Honorable James J. Wheeler:

in their respective townships as they may have previously agreed upon, for the purpose of electing township officers and such other officers and transacting such other business as may be necessary."

The procedure to be followed in the election of township officers as prescribed in said Section 65.060, supra, is contained in Section 65.080 of said Chapter 65 of the said Revision of our statutes. This section reads as follows:

"65.080. Election procedure .-- On the day of the township election the polls shall be opened between seven and eight o'clock a.m. and be kept open until six o'clock p.m. by the judges of the election, and when so opened the electors of the township shall have to elect all officers to be chosen at said election. Said officers shall be chosen by ballot. Each ballot shall contain the name of every officer or measure voted for, written or printed on the face of such ballot. with the name of the office for which the persons voted for are intended to be chosen, which ballot shall be folded so as to conceal the names of the persons voted for; where the names of two or more persons appear on any ballot for the same office, such ballot shall be rejected by the judges in canvassing the votes, only as to the persons erroneously voted for. Said township election shall in all things conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of this chapter."

Section 65.090 of said Chapter 65 defines the qualifications of voters at any township organization election as follows:

"65.090. Qualification of voters.--No person shall be a voter at any township election unless he be a qualified voter at general elections, and has been an actual resident of the township in which he offers to vote for sixty days next preceding such election."

Honorable James J. Wheeler:

It will be observed that Section 65.080, supra, provides that such township election shall in all things conform to the general law concerning elections for state and county officers, so far as the same is consistent with the provisions of Chapter 65. This provision, with respect to the ballot is made inoperative and cannot be followed in such township elections under the terms of Section 111.010 of Chapter 111, RSMo 1949. Said Section 111.010 provides as follows:

"The provisions of this chapter shall apply to all the election precincts in this state but shall not apply to township or village elections, to school elections, or to any city election in cities of the fourth class, or in cities of under three thousand inhabitants existing under any special law."

Said Section 111.010 was first enacted as a part of the Australian Ballot Law in this State found in Laws of 1889, page 105, Section 36. This section has been carried through the succeeding revisions of our statutes. and as now existing in our Revised Statutes, 1949, clearly shows that none of the provisions of said Chapter 111, relating to the ballot to be used in general elections for state and county officers, are to be applied to the form of ballots used in a township election for township officers under Chapter 65 of our present revised statutes of this State. It appears clear, we believe, that under the terms of said Section 111.010 exempting township elections from the terms of Chapter 111, RSMo 1949, it is not permissible to write or print the name of any political party to designate the political party of the various candidates on the ballot in elections for township offices held under said Chapter 65 of the statutes of this State.

CONCLUSION.

It is, therefore, the opinion of this office, considering the premises, that it is not permissible to write or print the name of any political party on the ballot to be used in township elections to elect township officers to designate the political party of the various candidates on the ballot used in such township elections.

Honorable James J. Wheeler:

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Yours very truly,

JOHN M. DALTON Attorney General

GWC:irk

RULES OF CRIMINAL PROCEDURE:

A magistrate is not required to keep a record of bonds taken by him in connection with preliminary examinations in fel ony cases.

April 3, 1953

Mr. W. C. Whitlow Prosecuting Attorney Callaway County Fulton, Missouri



Dear Mr. Whitlow:

We have given careful consideration to your request for an opinion, which request is as follows:

"At the request of Judge John Yates, Magistrate of Callaway County, Missouri, I would like some information regarding the records the Magistrate Court is required to keep pertaining to the felony bonds the Magistrate takes in felony cases.

"Judge Yates is of the opinion that he is not required to keep a record of these bonds under the new criminal code and believes that your office has previously rendered an opinion to this effect.

"Your assistance in this matter will be appreciated."

The question contained in your request is grounded in the Rules of Criminal Procedure, adopted by the Supreme Court of Missouri, and made effective January 1, 1953.

Rule 32.10 is as follows:

"(a) When a bail bond is taken in a misdemeanor case, the clerk of the court in which such bond is filed shall cause the original bond to be

kept in a safe place which is not accessible to the public, and shall cause a true copy of such bond to be entered in a bound, permanent record which shall be properly indexed.

- "(b) When bail is taken prior to a preliminary examination, the clerk of the court in which such preliminary examination is to be conducted shall keep the original bail bond in a safe place until the defendant is discharged or bound over. If the defendant is bound over, the bail bond, together with the security therefor if cash or bonds, shall be delivered to the clerk of the court in which the charge is to be tried.
- "(c) If bail is taken during or subsequent to a preliminary examination, the bail bond, together with the security therefor if cash or bonds, shall be immediately transmitted to and filed with the clerk of the court in which the case is to be tried.
- "(d) Original bonds filed with the clerk of the court in which a felony charge is to be tried shall be kept by the clerk in a safe place which is not accessible to the public, and the clerk shall cause a true copy of such bond to be entered in a bound, permanent record which shall be properly indexed."

In accordance with this rule a bail bond filed with a magistrate in preliminary examination of a felony charge is governed by subsections (b) and (c) of the rule. The bond must be kept in a safe place and delivered or transmitted to the clerk of the trial court in case the defendant is bound over. No record of the bond is required to be kept in magistrate court. The record, when required to be kept, must be entered by the clerk of the court in which the charge is to be tried, as provided in subsection (d) of the rule.

Mr. W. C. Whitlow

CONCLUSION.

It is the opinion of this office that a magistrate is not required under the new Rules of Criminal Procedure to keep a record of the bonds taken by him in connection with preliminary examinations in felony cases.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. B. A. Taylor.

Very truly yours,

JOHN M. DALTON Attorney General

BAT:sw

RESIDENCE:

TOWNSHIP ASSESSOR: Residence is dependent upon intention and when established is not changed by temporary change of place of abode if no intention to change residence is entertained.

May 19, 1953



Hon. James J. Wheeler Prosecuting Attorney Chariton County Keytesville, Missouri

Dear Mr. Wheeler:

We have your recent letter in which you request an opinion of this department. Your letter is as follows:

"One Earl McSparren has been township assessor in Cockrell Township in Chariton County for some sixteen years. Chariton County is under township organization. McSparren owns 450 acres, all in Cockrell Township. Recently, McSparren moved to the town of Salisbury for the purpose of providing his children a more convenient access to school. He still owns his land in Cockrell Township which he works himself, and he has reserved a room on the farm which he will occupy during the busy season.

"Mr. McSparren wishes to run for the Office of Township Assessor in Cockrell Township again. We are wondering if he has sufficient residence to qualify for township office under Section 65.150, Revised Statutes of Missouri 1949. This section provides 'no person shall be eligible to any township office unless he shall be a qualified voter of such township'.

"We will appreciate it very much if you will advise."

Section 65.150 RSMo 1949 pertaining to qualifications for township office is as follows:

Hon. James J. Wheeler

"No person shall be eligible to any township office unless he shall be a qualified voter and a resident of such township."

Article VIII, Section 2 of the Constitution of Missouri, provides in part as follows:

Section 111.060 RSMo 1949 provides in part as follows:

It is obvious from an examination of the above quoted Section 15.150 RSMo 1949 that in order to be a township office holder it is necessary for the aspirant to be a qualified voter of the township and it is obvious from the above quoted constitutional and statutory provisions that in order to be a qualified voter in the township the aspirant must be a resident of the township.

The question to be decided therefore is whether or not under the circumstances set forth in your aforesaid letter McSparren is a resident of Cockrell Township.

You state in your letter that McSparren recently moved to

Hon. James J. Wheeler

Salisbury for the purpose of providing more convenient access to schools for the purpose of educating his children. Your letter also discloses that he has reserved a room in his farm house where he intends to live during the busy season on the farm. The fact that Mr. McSparren aspires to the office of Township Assessor of Cockrell Township tends to indicate to us that he claims to be a resident of said township.

A man's residence is established by his intention as to where he shall reside. This does not mean that a declared intention prevails over an intention that can be inferred from his course of conduct.

We are of the opinion that when a man's residence has been established in a given locality as Mr. McSparren's has been in Cockrell Township by his having lived in said township with his family his residence is not changed to another locality merely by reason of his moving into town for the purpose of educating his children particularly when he retains a room in his old home and occupies it for a portion of the time and continues to farm the land.

In this connection we quote as follows from the opinion of the court in the case of Hall v. Schoenecke, 31 SW 197, 128 Mo. 661, 1. c. 667:

"A temporary absence of a person from his usual residence, through a series of years, does not necessarily cause a loss of such residence. Whether a change was effected in any case depends upon the intention with which the removal from the former residence was made. McCrary on Elections 2 Ed. 7, sec. 62

"A temporary removal by a parson, for the sole purpose of educating his children, without an intention of abandoning his usual residence, and with the intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as would, under the law, entitle him to vote at his temporary abode."

Hon. James J. Wheeler

CONCLUSION

We are accordingly of the opinion that the fact that Mr. McSparren has moved his family into town for the purpose of giving his children more convenient access to school does not necessarily indicate an intention on his part to change his residence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Samuel M. Watson.

Yours very truly

JOHN M. DALTON ATTORNEY GENERAL

SMW: A

INTOXICATING LIQUORS: Regulation of Supervisor not basis for criminal prosecution.

JOHN M. DALTON

June 6, 1953

John C. Johnsen

Honorable J. Patrick Wheeler Prosecuting Attorney Lewis County Monticello, Missouri

Dear Mr. Wheeler:

We have received your request for an opinion of this office, which request reads, in part, as follows:

> "Under the provisions of the Missouri Statutes, the Supervisor of Liquor Control is given the power to make rules governing the sale and possession of liquor.

> "Would you kindly furnish our office with an official opinion on the following question:

"If a licensee violates any of the provisions of the rules and regulations promulgated and in effect by order of the Supervisor of Liquor Control, may he be criminally prosecuted? If so, does a plea of guilty to a charge of violation of these rules and regulations constitute a revocation of the license under the provisions of Sec. 312.510, R.S. Mo., 1949?"

Section 312.360, RSMo 1949, provides, in part:

"The supervisor of liquor control shall have the authority to suspend or revoke for cause all such licenses and to make the following regulations, without limiting the generality of provisions empowering the supervisor of liquor control as in this chapter set forth, as to the following matters, acts, and things:

4 4 4 4 4 4

"(6) Establish rules and regulations for the conduct of the business carried on by each specific licensee under the license, and such rules and regulations if not obeyed by every licensee shall be grounds for the revocation or suspension of the license."

According to our information, your inquiry relates to a violation of Regulation No. 14(c) of the Supervisor of Liquor Control, which provides:

"(c) Loitering of Immoral Persons. -- No retail licensee shall employ or knowingly allow the loitering upon or about the licensed premises of any known police character, felon, gangster, racketeer, pickpocket, swindler, confidence man, female impersonator, prostitute, narcotic addict, vagrant, delinquent minor or other degenerate or dissolute person."

Regulation No. 14 is captioned "Retailers Conduct on the Premises."

Section 312.510, RSMo 1949, provides, in part:

"1. Any violation of any of the provisions of this chapter not otherwise defined, shall be a misdemeanor, and any person guilty of violating any of said provisions, and for which violation no other penalty is by this chapter imposed, shall, upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than fifty dollars, nor more than one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

Honorable J. Patrick Wheeler

"Prescribing of penalties is a legislative function, and a commission may not be empowered to impose penalties for violation of duties which it creates under a statute permitting it to make rules. However, the legislature may validly provide a criminal or penal sanction for the violation of the rules and regulations which it may empower administrative authorities to enact." 42 Am. Jur., Public Administrative Law, Section 50, page 355. However, as with any criminal statute, the Legislature must clearly make violation of administrative regulations a criminal offense. This was pointed out by the United States Supreme Court in the case of United States vs. Eaton, 144 U.S. 677, in which the court stated, 1.c. 688:

"It is necessary that a sufficient statutory authority should exist for declaring any Act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Sec. 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as law-fully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

We find, in Chapter 312, RSMo 1949, no legislative declaration that violation of the regulations of the Supervisor of Liquor Control shall be punishable as a criminal offense. Section 312.360(6), RSMo 1949, quoted above, does make violation of

Honorable J. Patrick Wheeler

regulations for the conduct of the licensee's business, under which Regulation No. 14 would fall, grounds for suspension or revocation of licenses, but no reference whatsoever is made to criminal prosecution.

We do not feel that Section 312.510, RSMo 1949, quoted supra, can be construed to make violation of such regulations punishable criminally. That section merely prescribes the penalty for offenses covered by the act and for which the penalty has not been otherwise provided.

The Legislature has seen fit to make violation of regulations and orders of some administrative agencies in this state criminally punishable. Thus, Section 252.230, RSMo 1949, applicable to the Conservation Commission, provides:

"Any person violating any of the provisions of this chapter wherein other
specific punishment is not provided, and
any person violating any of such rules
and regulations relating to wild life,
shall be guilty of a misdemeanor and upon
conviction shall be punished by imprisonment in the county jail not exceeding
three months or by a fine not exceeding
five hundred dollars, or by both such fine
and imprisonment."

Section 356.580, RSMo 1949, makes violation of orders of the Public Service Commission criminally punishable. However, such provision is significantly lacking from the Non-Intoxicating Beer Law, here involved, and the failure of the Legislature to make such provision must preclude criminal prosecution as a means of enforcement of regulations promulgated under that Act.

In your letter you refer to Section 312.380, RSMo 1949. That section, however, merely provides an additional procedure for suspension and revocation of licenses. That such is its effect is clear from the title of the bill enacting it, which reads as follows:

"AN ACT to amend Article 2, Chapter 32 of the Revised Statutes of Missouri, 1939, known as the Non-Intoxicating Beer Law, chapter 32, to be known as Section 1996a, providing, in addition to the penalties and proceedings for revocation of licenses provided for in the Non-Intoxicating Beer Law, for special proceedings for the suspension or revocation of licenses because of certain violations of the Non-Intoxicating Beer Law; providing that such proceedings may be instituted by tax-paying resident citizens, the sheriff or any peace officer; providing hearings before the Circuit Court; providing for the duties of the Prosecuting or Circuit Attorney in the City of St. Louis and the Prosecuting Attorney of the Counties of the State, and providing for the taxing of the costs of such hearings." (Emphasis ours.)

(Laws of Missouri, 1943, page 614.)

The duty imposed upon the prosecuting attorney "to prosecute diligently and without delay any complaints coming to him" under this section relates to the complaints therein provided for which may be made the basis for suspension or revocation of licenses.

CONCLUSION

Therefore, it is the opinion of this office that violation of the regulations of the Supervisor of Liquor Control may not be the basis of criminal prosecution.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON Attorney General

RRW:irk:ml

SCHOOLS: SCHOOL FUNDS: CONSTITUTIONAL LAW: Effect of decision in McVey v. Hawkins, 258 S.W.2d 927, on state aid for transportation to private schools.

August 25, 1953

FILED 96

Honorable Hubert Wheeler Commissioner of Education Jefferson Building Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for an opinion, dated July 2, 1953, which reads, in part, as follows:

"I shall be glad to have your advice and official opinion in regard to the following questions:

- "1. In view of the court's judgment that public school funds used to transport pupils to and from a private parochial school are not used for the purpose of maintaining free public schools and that such use of funds is unlawful, does it render unconstitutional and void the provisions of Section 165.140 and 165.143 in reference to private school transportation?
- "2. If the statutory provisions for private school transportation are null and void, do boards of education have any legal basis for aiding private school transportation, for either elementary or high school pupils?
- "3. Does the court's decision become effective from the date it was rendered, June 8, 1953, or is the court's opinion in the form of a declaratory judgment indicating what the law has always been since its enactment and thereby prohibit any further claim for transportation aid?

"4. If the court's decision became effective from the date the opinion was rendered would it be legal and proper for school boards in districts where private school transportation was provided last school year to file application for the state transportation aid?

"5. Applications for state aid for transportation of pupils which includes transportation to parochial schools are now being
filed with the State Department of Education.
Shall the State Board accept the certification
of these applications as a valid basis for
the distribution of transportation aid in the
August 31 apportionment of state school moneys?

"6. If the court's decision became effective from the date the opinion was rendered, would it be legal for the State Board of Education to apportion transportation aid for the transportation completed and approved prior to such date for pupils transported to private schools?"

Question No. 1

In your request you refer to the case of McVey et al. v. Hawkins et al., 258 S.W. (2d) 927, and question whether it has the effect of rendering unconstitutional and void the provisions of Section 165.140 and Section 165.143, RSMo 1949. In order better to understand the law as it now stands, following the decision of the McVey case, it might be well to give a short summary of that case.

Briefly, the facts involved therein were these:

Commerce Consolidated School District No. 9 lies in the northeastern part of Scott County. Benton Consolidated School District No. 19 lies west of the Commerce District in Scott County. A public elementary or grade school is maintained in the village of Commerce in the Commerce District, and a public secondary or high school is maintained in the village of Benton in the Benton District. The Roman Catholic Church maintains and operates the St. Dennis Catholic School, a private parochial school in Benton, the school offering courses up to and including the eighth grade.

On school days a school bus owned and operated by the Commerce District, the whole expense of which was paid out of the incidental fund of the district, moved over designated roads in the Commerce district transporting the grade school children of the district to the Commerce School. During and after this movement, children attending the St. Dennis Catholic School at Benton boarded the bus and were transported to a point near the line between the Commerce and Benton districts. There the children were received and transported by the Benton District school bus to Benton and discharged at the Benton High School or at the St. Dennis Catholic School.

This was a suit by resident taxpayers to enjoin the transportation of the grade school children by a public school bus for that portion of the way above mentioned to and from the private parochial school at Benton. It further appeared that the entire cost of such transportation had been and was being paid for out of public school funds by warrants drawn on the incidental fund of the district.

In the lower court, judgment was rendered for the defendants, the board of education of the district and the driver of the school bus, a motion to dismiss having been sustained as to the county superintendent of schools. This latter action was not complained of on appeal, and hence was not considered. The upper court reversed and remanded the judgment for judgment consistent with the opinion.

Appellants, plaintiffs below, contended that the conduct of respondents, defendants below, in causing the parochial school children to be hauled in a public school bus to and from a private religious school at public expense and with the public school funds of the district was in violation of specific provisions of the Constitution of Missouri, 1945, to wit: Sections 5 and 8 of Article IX, and Sections 6 and 7 of Article I. For sake of convenience, we now set said sections out in full:

Sec. 5, Art. IX. "The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under

the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

"Neither the general Sec. 8, Art. IX. assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

Sec. 6, Art. I. "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Sec. 7, Art. I. "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

They also insisted that Section 165.143, RSMo 1949, was violative of these same constitutional provisions. Respondents contended that the constitutionality of Section 165.143 was not in issue because the records showed that the Commerce District received no state aid under Section 165.143 for transporting within the district the students attending the St. Dennis Catholic School at Benton.

The court pointed out that Section 165.140 was not mentioned in plaintiffs' petition or in appellants' brief, and although appellants insisted that Section 165.143 was violative of the constitutional provisions mentioned, in what respects or why did not appear from appellants' brief. However, since respondents relied on Sections 165.140 and 165.143 as a defense to this action, the court considered the constitutionality of these sections. Said sections read as follows:

Sec. 165.140. "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 165.037. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority

and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district; provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

"When any school district makes Sec. 165.143. provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is

begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils; provided, any cost incurred for transporting such pupils in excess of three dollars per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

Other contentions were made and other questions determined which are of no particular moment at this time.

In addition to the constitutional and statutory provisions above mentioned, the court also quoted Section 3, Article IX, Constitution of Missouri, 1945, Section 161.225, Laws of Missouri, 1951, p. 495, Sections 2.120 and 2.121, Laws of Missouri, 1949, p. 27 (appropriation bills), and Section 161.180, RSMo 1949, Amended, Laws of Missouri, 1951, p. 493, all of which refer to the use of public school moneys for the establishment and maintenance of free public schools.

At page 929 the court said:

" * * * We shall consider only the constitutional questions raised by the pleadings and urged herein upon this appeal."

Then, in defining the question, the court said, page 932:

"In view of the issues presented on this appeal, we think the essential question is whether the use of the public school moneys, to wit, the incidental funds of the district, for defraying the expenses of transporting the parochial school children to, or part way to and from, a private school is a use for the purpose of 'establishing and maintaining free public schools, and for no other uses or purposes whatsoever; as provided by Sec. 5, Art. IX of the Constitution. And see Sec. 161.180, RSMo 1949, as amended Laws 1951, p. 493, V.A.M.S. Also involved is the question of whether the income from the State Public School Fund is applied to 'the support of free public schools', as provided by Sec. 3. Art. IX and whether such income and the other moneys appropriated are properly used within the meaning of the act of the Legislature setting the fund aside 'to be used for the support of the free public schools' and 'to be apportioned and distributed for the support of the free public schools. Laws 1949, p. 27, Secs. 2.120 and 2.121. And see Sec. 28, Art. IV, supra. If the use of the fund mentioned for the purpose of transportation of parochial school children to a private school or part of the way to the private school and return is not a use 'for establishing and maintaining free public schools, and if the use of the fund or any part thereof is not within the purpose for which it was dedicated and appropriated, the use must be enjoined and the transportation discontinued."

Then again, at page 933, the court said:

" * * * If the parts of what are now Section 165.140 and Section 165.143, as added in 1939, see Laws 1939, pp. 718-720, are in direct conflict with controlling provisions of the Constitution of Missouri 1945, to wit, Section 5 of Article IX, they do not and can not constitute any defense to the present action and must be disregarded. Since the added portions of these sections do conflict with the mentioned constitutional provisions they constitute no

defense to the present action. We may not in this proceeding determine the effect of such holding upon the remaining portions of said sections, however, see Missouri Ins. Co. v. Morris, Mo. Sup., 255 S.W. 2d 781, 782."

The added portions referred to are the provisos at the end of each of Section 165.140 and Section 165.143, i.e:

1939

(Sec. 165.140) "provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

L 1939 (Sec. 165.143) "and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

The court concluded by saying, 1.c. 933:

" * * * We must and do hold that the public school funds used to transport the pupils part way to and from the St. Dennis Catholic School at Benton are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful. It necessarily follows that such transportation of said students at the expense of the district is unlawful and must be enjoined. We express no opinion on any issues not directly decided herein."

Although the court did not at any time use the term "unconstitutional," it did, by the phraseology above quoted, directly hold that the above-quoted provisos of Sections 165.140 and 165.143 are in conflict with the constitutional provisions above mentioned. Therefore, it did as effectively hold such provisos "unconstitutional" as if the word itself had been used.

However, it is to be noted that the court expressly refrained from ruling on any other portion of those statutes so

that the remainder of such sections stands with the validity that they did before the rendition of this decision. (State ex inf. Hadley v. Washburn, 167 Mo. 680, 697, 67 S.W. 592.)

Question No. 2

Your next inquiry is whether boards of education have any legal basis for aiding private school transportation for either elementary or high school pupils if the statutory provisions for private school transportation are null and void.

We have concluded in answer to Question No. 1 that the court has held the provisos of Sections 165.140 and 165.143 with regard to private school transportation unconstitutional. The effect of such a holding is to render such portions of the statutes null and void.

It is stated in 12 C.J., Constitutional Law, page 800, Section 228:

"The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the legislature; and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void,

(Gilkeson v. Mo. Pac. R. Co., 222 Mo. 173, 121 S.W. 138, 24 L.R.A., NS, 844, 17 Ann. Cas. 888.)

It is further said in 56 C.J., Schools and School Districts, page 186, Section 41:

" * * * where the constitution requires the revenues from the school fund to be applied exclusively to the public or common schools, a statute providing for the payment of any part thereof to a private school or a sectarian or denominational school is void.

Subject to any such constitutional provisions or restrictions, however, the school moneys may be distributed and disposed of as the legislature may direct, provided the division is according to some reasonable and uniform

rule, and not arbitrary; and the distribution and apportionment or disposition thereof must be in accordance with the provision of the constitution with respect thereto, and statutes enacted within its terms or under its authority.

Therefore, in order to justify the expenditure of public funds for aiding private school transportation, beards of education must be able to point to some legislative enactment consonant with the provisions of the Constitution which authorize such expenditure. Since the only statutory provisions purporting to authorize the payment of public funds for this purpose have been held in violation of the Constitution, and consequently null and void, there is no legal basis for boards of education to provide assistance from public funds for transportation of pupils to private schools whether they be elementary or high schools.

Question No. 3

Your third question is whether the court's decision became effective from the date the decision of McVey v. Hawkins, supra, was rendered or whether the opinion was in the form of a declaratory judgment indicating what the law has always been since the enactment and thereby prohibits any further claim for transportation aid.

The effect of holding a statute unconstitutional was discussed in Lieber v. Heil (Mo. App.), 32 S.W. (2d) 792. There the Supreme Court had held a statute for legitimation of an illegitimate child unconstitutional while a similar case was pending transfer to the St. Louis Court of Appeals. The Court of Appeals, in ruling on this case, said, l.c. 792, 793:

"Meanwhile, pending the submission of the case in the Supreme Court, the case of Southard v. Short, 320 Mo. 932, 8 S.W. (2d) 903, presenting the identical question in proper manner, was argued and submitted to that court, and the court in its decision held that the statute was unconstitutional and void, as pertaining to a different subject than was indicated by and expressed in the title.

"Obviously, the effect of the decision of the Supreme Court in Southard v. Short, supra, was to render the statute null and void, not only from and after the date of such judicial pronouncement, but even from the date of its enactment. Ex parte Smith, 135 Mo. 223, 36 S.W. 628, 33 L.R.A. 606, 58 Am. St. Rep. 576; State v. Hayes, 14 Mo. App. 173; 12 C.J. 800. In other words, the statute is now to be regarded as void ab initio, and as though it had never been in existence; and it is our constitutional duty, following the ruling of the Supreme Court, so to treat it in all matters affecting its constitutionality. State v. Finley, 259 Mo. 414, 168 S.W. 921; State v. Finley, 187 Mo. App. 72, 172 S.W. 1162."

The law generally is declared in 12 C.J., Constitutional Law, page 800, Section 228:

" * * * a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void, from the date of its enactment, and not only from the date on which it is judicially declared unconstitutional. * * *"

This principle is asserted in many other cases, among which is Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178, where it was said:

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Therefore, it is apparent that the provisos of Sections 165.140 and 165.143, supra, with regard to private school transportation, found by the court to be violative of provisions of the Constitution, were void from their very enactment, and it follows that no claim for transportation aid from public moneys or the public school fund can be made for transportation to private schools.

Question No. 4

Your fourth question is premised upon the condition that the answer to Question No. 3 would be that the court's decision became effective from the date that the opinion was rendered. Whereas, in answer to Question No. 3, we have stated that the decision had the effect of holding the portion of the statutes in question null and void from the date of their enactment. However, as stated above in answer to Question No. 1, the remaining portions of those statutes are now as effective as they were before the rendition of the decision in the McVey case.

The amount of state aid for transportation, which is a part of the minimum guarantee of the district for the ensuing year. is based upon the number of eligible students transported in the preceding year. The fact that a school district may have provided transportation for some children to private schools in the preceding year would not necessarily deprive the district of the right to state aid for the ensuing year based upon the number of children transported to the public schools in the previous year. The district would not be entitled to state aid for those children transported to private schools, but as long as the application is based upon the number of children transported to public schools, there would seem to be no reason to deny that application regardless of the fact that the transportation of children to private schools in the preceding year, the cost of which was paid from funds illegally apportioned in the preceding year, may have been unlawful.

Therefore, it would be proper for a school district to make application for state aid for transportation for the school year 1953-54 based upon the number of children transported to free public schools in the school year 1952-53, excluding therefrom any children that may have been transported to private schools.

Question No. 5

The method of applying for state aid for transportation, authorized by Section 165.143, supra, as we understand it, is the same as the method used in applying for other state aid, the procedure for which is set out in Section 161.030(2), RSMo 1949. Under that section the district clerk is required to make and forward to the county superintendent of schools a report showing the number of teachers employed, the total number of days' attendance of all pupils, the length of the school term, the average

attendance, the number of days taught by each teacher, the salary of each teacher, and any other information that the State Board of Education may require.

Section 161.040, RSMo 1949, in providing for the apportionment of the public school fund, says, inter alia: "provided, further, that the state board of education shall at the time of making the annual apportionment, apportion to the various districts their allotments of building, transportation and tuition aid as provided by law."

On this same certification required by Section 161.030 is included an item for transportation as a basis for the annual apportionment from the public school fund.

After the report is properly made, the county superintendent of schools approves it and turns it over to the county clerk who summarizes all of these reports and forwards to the State Board of Education a report showing for the county substantially the same information above required from each district. It is made a misdemeanor, punishable by fine and imprisonment, for any district clerk, teacher or county clerk knowingly to furnish any false information in such reports.

Then Subsection 3 of Section 161.030 says: "The state board of education shall certify the amount so apportioned to the comptroller for his approval, and warrants shall be issued payable to the treasurers of the several counties and the same shall be forwarded to them." Thereafter, the county treasurer immediately distributes and credits the money to the various school districts in accordance with the statute.

It appears also that, in addition to the information contained on the above certified application, the State Department of Education requires a further report on transportation on which is shown the name of each pupil transported and to what school he or she was transported.

Your fifth question states that applications for state aid for transportation are now being filed in which some pupils being transported to private schools are included. The question then is whether the State Board of Education must accept the certification of these applications as a valid basis for the distribution of transportation aid in the August 31 apportionment of state school moneys.

In answering this question we are not unmindful of the case of State ex rel. Randolph County v. Evans, 240 Mo. 95, 145 S.W. 40. In that case an enumeration list was certified to Evans, the state superintendent of schools, who refused to apportion state aid on the basis thereof on the ground that the list was fraudulent in that it contained names of persons not between the ages of six and twenty years and who did not reside in the district, and the names of many persons who were dead, and further contained many false and fictitious names and the names of many persons who were not entitled to be enumerated as residents of the school district.

The county brought mandamus to compel the issuance of state aid based on the enumeration list as certified to the state superintendent of schools.

In a four to three decision, the majority opinion written by Graves, J., the court held that the act of the school directors in making the enumeration list was a judicial act which was not subject to collateral attack and although the list might be attacked and corrected in a direct proceeding by the state superintendent as long as the list existed, the state superintendent must accept it as a proper basis for the distribution of the school money.

As a further reason for its holding, the court said that the duties of the state superintendent were purely ministerial and that no statute authorized him to revise and correct enumeration lists on the ground of fraud; that no machinery had been set up whereby he could hold hearings, etc., and determine the question of fraud. The court said that, as to the frauds alleged for prior years, the state superintendent was in legal effect rendering judgment against the district, issuing execution and then satisfying the execution and judgment, which he could not do.

A dissent, in part, was filed by Brown, J., and concurred in by Kennish, J.

Section 10823, R.S. Mo. 1909, substantially the same as Section 161.080, RSMo 1949, was also discussed by the court in this case. That section authorizes the State Board of Education (then the state superintendent of schools) to correct any errors made in the apportionment. It was held not to grant such powers as were contended for by the state superintendent. That section and the Evans case were discussed in a later case, that of State ex rel. Consolidated School Dist. No. 9, Bates County, v. Lee, 303 Mo. 641, 262 S.W. 344. We do not believe, however, that either of these cases in this connection, or Section 161,080, supra, are applicable to the case at hand.

It may be conceded that the State Board of Education has no such equity powers that it could hold hearings, etc., for the purpose of determining the issue of fraud, and it need not be contended that being a ministerial body it could refuse to honor or could question a properly certified application for state aid valid on its face. Nor is there here any question of correcting any error made in an apportionment. Here we have an entirely different situation from that presented in the Evans case or the Lee case.

The Supreme Court has held in the McVey case that public funds may not be used for the purpose of providing transportation of children to private schools. The State Department of Education may be presumed to know the public schools of the state and that those schools which are not public schools shown on the additional report concerning transportation must of necessity be private schools.

The law specifies those things which may properly be the basis of an apportionment of state aid. Section 161.030, supra, states, in part, that: "The state board of education shall, annually, before August thirty-first, apportion the public school fund applied for the benefit of the public schools in the manner provided by law." (Emphasis ours.) From this we see that the State Department of Education has the power and the duty to see that only those items specified by the Legislature are used as a basis for its apportionment. If a district should submit an application for state aid on which was shown an item of one pair of boots for each child in the district, for which there is clearly no authorization in law, could it by any logic be said that the Department of Education must nevertheless make the apportionment?

So here it has been declared by the highest court in our state that public funds may not be used for providing transportation of children to private schools and has held the portions of the statutes purporting to authorize such aid unconstitutional, hence null and void. By reports in the Department of Education filed with the application for state aid, the Department has official knowledge what portion of the application for transportation aid is based on transportation to private schools and what part on transportation to public schools. Since the part based on transportation to private schools is not authorized by law, it is not a proper item to be included in an application for state aid of which the State Department must take cognizance and deny that part of the application.

This ruling is applicable only to a situation where, as here, the fact that the application for state aid is based, in part at least, on items not eligible for state aid appears on the face of the application or on other required reports accompanying the application. This ruling is not meant to apply to a case where the application and all other reports in the office of the Department of Education are regular on their face.

Question No. 6

Your sixth question is again premised on the condition that the decision in the McVey case became effective law from the date of its rendition, and you then inquire as to whether, based upon that premise, it would be legal for the State Board of Education to apportion transportation aid for the transportation completed and approved prior to such date for pupils transported to private schools.

In view of our answer to Question No. 3, the above specific question need not be answered. Combining our answers to questions numbers 3 and 5, it follows that since those portions of the law purporting to authorize state aid for transportation to private schools have been held unconstitutional, hence null and void, since their enactment, and since the State Board of Education must take cognizance of undisputed facts which appear on the face of an application for state aid or on other required reports filed in the office of the State Department of Education, if it appears thereby that an application is based in whole or in part on transportation to private schools, the application as to that part must be denied although the transportation was completed and approved prior to the date of the decision in the McVey case.

CONCLUSION

It is the opinion of this office that the case of McVey v. Hawkins, 258 S.W. (2d) 927, held unconstitutional the provisos of Sections 165.140 and 165.143, RSMo 1949, purporting to authorize the expenditure of public funds for transportation of children to private schools, and that the holding of such portions of the above statutes unconstitutional renders such portions null and void from their very enactment.

It is the further opinion of this office that, under the present state of the law, boards of education have no legal basis for aiding private school transportation for either elementary

Honorable Hubert Wheeler

or high school pupils, but that it would be legal and proper for school boards in districts where private school transportation was provided last school year to make application for state transportation aid based upon the number of children transported to public schools and excluding therefrom those children transported to private schools.

This office is of the further opinion that the State Board of Education may deny an application for state transportation aid for transportation to private schools where the fact that the application is based on transportation to private schools appears on the face of the application or on other reports required to be filed in the office of the State Department of Education, and this is true although the transportation may have been completed and approved prior to the date of the rendition of the decision in the McVey case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml

LEGISLATION: EFFECTIVE DATE: BOUNTIES ON WOLVES: H. B. No. 88, passed by the last General Assembly, reducing the bounty on wolves, will become effective on August 29, 1953.

XXXXXXXXX

John M. Dalton

August 27, 1953

XXXXXXX

John C. Johnsen



Honorable J. Patrick Wheeler Prosecuting Attorney Lewis County Monticello, Missouri

Dear Mr. Wheeler:

This will be the opinion you requested from this office as to the date when the Act, passed by the Sixty-seventh General Assembly of this state, reducing the bounties on wolves, will become effective.

The Act of the Legislature to which you refer was House Bill No. 88, passed by the General Assembly at its last session. This Act repealed Sections 279.010 and 279.030, Laws of Missouri, 1951, page 15 (Accumulative Supplement, Laws of Missouri, 1951, page 351), and enacted two new sections numbered, respectively, 279.010 and 279.030, in lieu thereof. House Bill No. 88 was passed without an emergency clause.

Section 29, Article III, Constitution of Missouri, 1945, prescribing the effective date of laws passed by the General Assembly reads as follows:

"Effective Date of Laws - Exceptions - Procedure in Emergencies and upon Recess. - No law passed by the general assembly shall take effect until ninety days after the adjournment of the session at which it was enacted, except an appropriation act or in case of an emergency which must be expressed in the preamble or in the body of the act, the general assembly shall otherwise direct by a two-thirds vote of the members elected to each house, taken by yeas and nays; provided, if the general assembly recesses for thirty days or more it may prescribe by joint resolution that laws previously passed and not effective shall take effect ninety days from the beginning of such recess."

Honorable J. Patrick Wheeler

This office is advised by the Secretary of the Senate that the Sixty-seventh General Assembly adjourned on Sunday, May 31, 1953, at midnight.

Under the terms of said Section 29, Article III, Constitution of Missouri, 1945, the Act reducing the bounties on wolves will go into effect ninety days after May 31, 1953. Counting the ninety days from the date of adjournment brings us to August 29, 1953, which will be the effective date of said Act.

CONCLUSION

It is, therefore, the advice and opinion of this office, considering the premises, that the effective date of House Bill No. 88, passed by the Sixty-seventh General Assembly of this state, reducing the bounty on wolves, will become effective on August 29, 1953.

This opinion, which I approve, has been prepared by my Assistant, George W. Crowley.

Very truly yours,

JOHN M. DALTON Attorney General

GWC/Ic/mv

TAXATION: Corporation organized under general business corporation statutes liable for ad valorem taxes.



September 3, 1953

Honorable Jay White Prosecuting Attorney Phelps County Rolla, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading in part, as follows:

"I have been requested by the County Court to examine papers of the Central Missouri Regional Fair, Inc. herein Phelps County, Missouri, to see if it is subject to county and state taxes.

"If you can be of help to me in this matter, I would certainly appreciate it."

Your attention is first directed to the provisions of Section 137.075, RSMo 1949, reading as follows:

Property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year."

also, to the further provisions of Section 137.095, RSMo 1949, reading as follows:

"All tangible personal property of business and manufacturing corporations shall
be taxable in the county in which such
property may be situated on the first
day of January of the year for which such
taxes may be assessed and every business

or manufacturing corporation having or owing tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

and to the further provisions of Section 137.140, RSMo 1949, reading as follows:

"The real and tangible personal property of all corporations operating in any county in the state of Missouri and in the city of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

The above quoted statutes imposes liability for ad valorem taxes upon business corporations generally and provides the scheme by which the situs for tax purposes of the tangible personal property and real property of such corporations may be ascertained.

Your attention is further directed to the provisions of Section 6, Article X, Constitution of Missouri, 1945, which reads as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Accordingly, under the constitutional authorization contained in the above quoted provisions, the General Assembly has provided for the exemptions from taxation of the real and personal property of certain corporations. Your letter of

inquiry did not inform us as to the exact nature of the corporation mentioned therein. We, therefore, directed an inquiry to the Office of the Secretary of State of the State of Missouri and received, therefrom, the following information:

"Our files on the above named organization show the following information:

- "1. On September 3, 1948, the Phelps County Fair Association, Incorporated was qualified under the General and Business Corporation Act of Missouri showing a registered office at Rolla, Mo.
- "2. On May 20, 1950 this corporation filed an amendment changing name only-from Phelps County Fair Association to Central Missouri Regional Fair, Inc.
- "3. On January 1, 1953 this corporation's charter was forfeited for failure to file Anti-Trust Affidavit and Annual Registration Report for the year 1952. The status of this corporation today is inactive and not in goodstanding with this department.

"Pursuant to your verbal inquiry, we further advise that there is nothing whatsoever in our file to indicate that this corporation had at any time converted to a Non Profit status."

From the foregoing, it becomes clear that the corporation referred to in your letter of inquiry, in so far as the records in the Office of the Secretary of State indicate, is not within the group which have been exempted from taxation by the General Assembly.

CONCLUSION.

In the premises, we are of the opinion that a corporation organized under the General Business Corporation Act of the State of Missouri is liable for ad valorem taxes upon all of its property.

Honorable Jay White

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General

WFB/mv

COUNTY WELFARE DEPARTMENT: HOUSE BILL NO. 355:

House Bill No. 355 imposes certain duties upon the County Welfare Department in each county in the state, which duty the County Welfare Department in each county is legally obliged to discharge.

September 19, 1953

Filed: #96

Honorable Jay White Prosecuting Attorney Phelps County Rolla, Missouri

Dear Sir:



This department is in receipt of your recent request for an official opinion. You thus state your request:

"I would be pleased to have your opinion as to whether or not the Department of Health and Welfare, State Division of Welfare, is the proper agency to aid in the administering of Section 202.807 of the new law which just went into effect on August 29th in reference to Judicial procedure for admittance of mentally ill to State Hospitals.

"If your opinion is that this department is not responsible for the administration of this new law as is indicated by the new law, then I would like to have your opinion as to what should be done in a county such as Phelps County where we have no County Welfare Department as such."

We note your statement that Phelps County has no County Welfare Department. In this regard we direct your attention to Section 207.060, RSMo 1949, which states, in part:

"County officers - director - agreements with subdivisions - other employees.
1. The director of welfare shall establish a county office in every county, which shall be in the charge of a county welfare director who shall have been a resident of the state of Missouri for a period of at least five years and whose salary shall be paid from funds appropriated for the division of welfare."

From the above it will be observed that it is mandatory that the Division of Welfare have a department in each county in the state. The State Division of Welfare informs us that Phelps County does have such a department and that Mrs. Frances Frame is the director in Phelps County. You are, therefore, in our opinion, mistaken in stating that Phelps County does not have a County Welfare Department.

Section 202.807 of House Bill No. 355 imposes certain duties upon these County Welfare Departments. These duties are set out in such section and it is our opinion that the County Welfare Department of Phelps County is obligated to assume the duties imposed upon it by the aforesaid section .

CONCLUSION

It is the opinion of this department that Section 202.807 of House Bill No. 355 imposes certain duties upon the County Welfare Department in each county in the state, which duty the County Welfare Department in each county is legally obliged to discharge.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON Attorney General

HPW:lw

MOTOR VEHICLES:
PUBLIC SERVICE COMMISSION:
SCHOOLS:
SCHOOL TRANSPORTATION:

A private bus owner who uses his bus solely for the purpose of transporting children to or from schools, whether public or private, does not need to obtain a certificate from the Public Service Commission authorizing him to do so.



September 19, 1953

Honorable Jay White Prosecuting Attorney Phelps County Rolla, Missouri

Dear Mr. White:

This is in response to your request for an opinion, dated August 31, 1953, which reads, in part, as follows:

"I have been requested to obtain an opinion from you as to the following question:

"1. Is it lawful for a bus owner who contracts with the public school district to transport children to the public schools to also make a separate contract with children going to religious and parochial schools to transport such children in the same bus and along with children going to the public schools without first obtaining public service authority to transport as a carrier of passengers other than what is required to transport children to the public schools."

Ordinarily, this office does not write opinions concerning duties and liabilities arising under laws, rules or regulations of the Public Service Commission. However, inasmuch

Honorable Jay White

as a violation of the provisions of Chapter 390, RSMo 1949, Amended Laws of Missouri, 1951, p. 547, et seq., dealing with the regulation of motor carriers and contract haulers is made a misdemeanor under Section 390.175, Laws of Missouri, 1951, we are responding to this request.

Section 390.050, Laws of Missouri, 1951, Page 552, provides that:

"1. Except as otherwise provided in section 390.030, no person shall engage in the business of a common carrier in intrastate commerce on any public highway in this state unless there is in force with respect to such carrier a certificate issued by the Commission authorizing such operations."

Section 390.060, Laws of Missouri, 1951, Page 553 provides that:

"1. Except as otherwise provided in section 390.030, no person shall engage in the business of a contract carrier in intrastate commerce on any public highway in this state unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such operations."

Section 390,030, referred to in the above sections, reads, in part, as follows:

"The provisions of sections 390.011 to 390.176 shall not apply to:

"2. School buses."

Section 390.020, the definition section, reads, in part, as follows:

"As used in sections 390.011 to 390.176

"13. The term 'school bus' means any motor vehicle while being used solely to transport students to or from school or to transport students to or from any place for educational purposes."

Prior to the 1951 amendment, Section 390.020, 5, (RSMo 1949), defining the term "school bus", read as follows:

"5. The term 'school bus,' when used in said sections, means any motor vehicle used to transport students to and from school, either public or private, or to transport pupils properly chaperoned, to and from any place within the state for educational purposes."

Prior to the 1951 amendment, it was perfectly clear, of course, that the exemption of school buses was meant to apply to buses used in transporting students to or from school, whether public or private. Under the 1951 amendment, with removal of the words "public or private" it is not so clear.

In interpreting the word "school" or "school district", when used in connection with the chapter dealing with public schools, it has been held that those words apply only to public schools. However, we see no prevailing reason why the term "school" as used in Chapter 390, with regard to the regulation of motor carriers and contract haulers, should receive such a limited interpretation. Certainly, the last portion of the definition in Section 390.020, 13, "to transport students to or from any place for educational purposes" would seem broad enough to include any educational institution, whether public or private. Therefore, we are of the opinion that a private hauler who uses his motor vehicle solely for the purpose of transporting students to or from educational institutions, whether public or private, does not need a certificate from the Public Service Commission authorizing him to do so.

CONCLUSION

It is the opinion of this office that a private bus owner who uses his bus solely for the purpose of transporting children to or from schools, whether public or private, does not need to obtain a certificate from the Public Service Commission authorizing him to do so.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General TAXATION: Possessory rights under a lease are to be taxed as "real property" under Missouri tax laws.

September 19, 1953

FILED 96

Honorable Hubert Wheeler Commissioner of Education Department of Education Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department wherein you proposed the following inquiry:

"I shall be glad to have your advice and official opinion in answer to the following question:

"Under the laws of this state, where the surface of federal real property is used exclusively for industrial purposes by private parties, are the leasehold or possessory rights of those parties taxable as real property?"

Your attention is directed to the provisions of Section 137.075, RSMo 1949, which read as follows:

"Every person owning or holding real property or tangible personal property on the first day of January including all such property purchased on that day, shall be liable for taxes thereon during the same calendar year." (Emphasis ours.)

To properly construe the term "real property" as used in the statute quoted we must resort to the definition of the term as found in Section 137.010, Subsection (2), RSMo 1949, which reads as follows: "The following words, terms and phrases when used in laws governing taxation and revenue in the state of Missouri shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

"(2) 'Real property' includes land itself, whether laid out in town lots or otherwise, and all growing crops, buildings, structures, improvements and fixtures of whatever kind thereon, and all rights and privileges belonging or appertaining thereto." (Emphasis ours.)

It thereupon becomes pertinent to determine whether the possessory right conferred under a lease of real property is such a "right" or "privilege" within the meaning of those words, or either of them, as they appear in the statute quoted supra.

That the rights conferred upon the lessee of real property under a lease embody those "rights" and "privileges" as those words are used in the statute quoted supra seem to be so elementary as to not require the citation of authority. Among such "rights" and "privileges" as come most readily to mind is the right to undisburbed possession of the premises during the period of the lessee's term, the right to resort to the courts to protect his possessory rights, the right to sue for damages to his quiet enjoyment of the premises and for damages which have been suffered as a result of trespasses by others, the right to the rents and profits arising from the premises during his term, and the right to use the demised premises in all manners commensurate with the terms of the letting. These "rights" and "privileges" are well recognized in our system of jurisprudence and they may be protected by the lessee in appropriate court proceedings in the proper tribunals.

At this point we desire to call your attention to the general rule with respect to the taxation of leaseholds. The following enunciation of the rule appears in American Juris-prudence, Volume 51, page 452:

"* * Although by virtue of the common law
a leasehold remains a chattel real, it is
within the power of the state to declare its
nature contrary to the common law for the
purpose of taxation. A lease of real estate
is undoubtedly property in the hands of the
lessee, and is assessable to the lessee if
it is a valuable asset to him." (Emphasis ours.)

This rule was applied by the Supreme Court of Missouri in the case of State ex rel. Ziegenhein v. Missouri Free School, reported 62 S.W. 998, 162 Mo. 332. This was an action brought to enforce the lien of the State of Missouri for claimed taxes due upon a building standing upon a lot owned by a concededly tax exempt organization. The building was under lease to one of the defendants who did not occupy a tax exempt status. The contention was advanced in the course of the appeal that the interest of the nontax-exempt defendant in the building and lot under this lease could not be taxed inasmuch as no specific statute subjected such interests to taxation. This contention was overruled by the court in the following language:

"In this view we do not concur. property except such as is specifically exempted by the Constitution and the statute made in pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the State is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. (People ex rel. Muller v. Board of Assessors, 93 New York, 308; People ex rel. v. Commrs. of Taxes, 82 N.Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayor, 68 N.Y. 552.)

"In most States the interest of Thompson under a lease like this is real estate, and as our statute provides that the words 'real estate' shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. As it is obvious he has not been

Honorable Hubert Wheeler

assessed at all, no judgment can be rendered against him in the present action, but the statute supplies the remedy in such cases."

It seems quite clear from the foregoing that the Supreme Court of Missouri has held that the possessory rights conferred under a lease of real property are subject to taxation.

CONCLUSION

In the premises, we are of the opinion that the possessory rights in real property conferred upon a lessee are "rights and privileges" within the meaning of that phrase as used in Section 137.010, Subparagraph (2), RSMo 1949, and therefore are "real property" and subject to ad valorem taxation under the provisions of Section 137.075. RSMo 1949.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

JOHN M. DALTON Attorney General MOTOR VEHICLES: DRIVER'S LICENSE: Expiration date of driver's license issued under authority of Section 302.050, RSMo 1949.



October 17, 1953

Honorable W. C. Whitlow Prosecuting Attorney of Callaway County Fulton, Missouri

Dear Sir:

Reference is made to your recent request for an official opinion of this office which request reads as follows:

"At the request of the Missouri State Highway Patrol, I filed a complaint in the Magistrate Court charging one M. W. Cave with operating a motor vehicle without a valid driver's license.

"I am enclosing a photostat of Mr. Cave's application for a drivers license which shows that he applied for his license on January 1, 1951. He apparently was issued license number 504226 which bears the date, February 22, 1951. Cave's birthdate is January 10, 1928. His license bears the statement 'this license expires two years after the first anniversary of the date of the birth of the applicant'. The balance of the statement has been scratched out and is illegible.

"There has been a good deal of confusion regarding the expiration date regarding driver's license in Missouri.

"Mr. Cave contends that his driver's license expires January 10, 1954, basing his contention on the fact that this license expires two years after the first anniversary of the date of the birth of the applicant after his license was issued. The Highway Patrol contends, along with the Department of Revenue, that his license expired on his birthday in 1953.

"I thought probably your office had been requested to render an opinion on this situation. I would like to have an opinion regarding the expiration date of this license."

We wish first to note that you, in your opinion request, state that a particular driver's license was applied for on January 1, 1951; whereas, the photostatic copy of the driver's license submitted in the case states that it was actually applied for on January 31, 1951.

The facts briefly stated are as follows: A person whose birth date is on January 10th, did on January 31, 1951, make application for a driver's license which was duly issued on February 22, 1951. Such license was issued under authority of Section 302.050, RSMo 1949, which was the governing statutory provision at that time. Under these facts the question is presented as to when a license issued under the particular facts mentioned would expire.

Section 302.050, RSMo 1949, provides as follows:

"To all applicants, submitting a satisfactory application under the requirements set forth in sections 302.010 to 302.270, the director of revenue shall issue a motor vehicle driver's license upon the payment of a fee of twenty-five cents therefor, for two years. Motor vehicle driver's license shall expire two years after the first anniversary of the date of the birth of any applicant occuring after June 30, 1948. The anniversary of the date of birth of any applicant

born on February twenty-ninth, shall, for the purposes of this section, during the years in which there is no February twenty-ninth, be considered as March first. Every such license shall be renewable on or before its expiration upon application and payment of the required fee."

It is noted that this statutory provision contains the provision that "Motor vehicle driver's license shall expire two years after the first anniversary of the date of birth of any applicant occuring after January 30, 1948." Without a discussion of its legislative history or its applicability, we are of the opinion that such provision cannot be held to be governing upon a license issued as above noted. The reason is obvious. A person whose birth date is January 10th, and who makes application for a license after such date in 1951, could not obtain a valid license.

Since we have held that this provision does not control the expiration date of a license issued under these circumstances, we must look elsewhere. Section 302.050, provides that a license shall be issued upon proper application and payment of a fee for a period of "two years," with this direction in mind, we are of the opinion that a license issued on February 22, 1951, upon an application filed on January 31, 1951, would be valid two years from date of issuance.

It is axiomatic and needs no discussion to state that the law may not be changed by language appearing on the face of a driver's license form prepared by the proper authorities.

CONCLUSION

Therefore it is the opinion of this office that a driver's license issued on February 22, 1951, to a person whose birth date is January 10th, upon application made the 31st day of January, 1951, would be valid for a period of two years from date of issuance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON Attorney General NONINTOXICATING BEER:

Prohibition against the selling of nonintoxicating beer to minors, contained in Section 312.400, RSMo 1949, not confined to licensees and their employees, but extends to all persons who are not specifically excepted by the statute.



November 17, 1953

Honorable J. Patrick Wheeler Prosecuting Attorney of Lewis County Monticello, Missouri

Dear Sir:

We render herewith our opinion based upon your request of November 9, 1953, which request reads as follows:

"A question has arisen concerning the class of persons to which Section 312.400 applies. Will you kindly furnish our office with an opinion concerning this section?

"Section 312.400 recites, 'No person or his employee . . . shall give liquor to a minor. Section 311.310 provides, 'Any licensee under this chapter or his employee . . . who sells liquor or allows a minor to procure liquor shall be guilty of a misdemeanor.

"The question we have is whether 312.400 applies to persons other than licensees under the chapter who procure non-intoxicating beer for minors. It seems clear that 312.400 applies to the licensee who sells non-intoxicating beer to a minor, but as to other persons it is not clear."

It is our judgment that the prohibition against selling, giving or supplying of nonintoxicating beer to minors is not confined to licensees under this chapter, but applies to all persons (except where supplied for medicinal purposes, or by a parent or guardian, or by a physician.)

The argument that the statute applies only to licensees and their employees would run this way: The inclusion of the phrase "or his employee" after the word "person" in the first part of the statute indicates that the word "person" means a person having a nonintoxicating beer license, since, otherwise, the words "or his employee" would be superfluous. Since the prohibition against selling nonintoxicating beer to minors is part and parcel of the same statute, and in the passive voice, it is intended to apply to the same class of persons, i.e., to licensees and their employees only.

However, we think the word "person" is not confined to licensees. In other parts of the act which are intended to apply only to licensees, the words are "any person holding a permit authorizing the sale of nonintoxicating beer" (Section 312.390, RSMo 1949); and "no person having a license under the provisions of this chapter" (Section 312.410, RSMo 1949). Such qualifying words are absent in Section 312.400, supra.

Also, certain classes of persons are specifically excepted from the operation of that portion of Section 312.400 prohibiting supplying to minors - parents and guardians, and physicians. Having specifically excepted these, we discern a legislative intent to include all others.

CONCLUSION

The prohibition against the supplying of nonintoxicating beer to minors, contained in Section 312.400, RSMo 1949, is not confined to licensees and their employees, but extends to all persons who are not specifically excepted by the statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General ACCOUNTANTS:
PUBLIC ACCOUNTANTS:

Operation of bookkeeping and tax service not the practice of public accountancy, and its operation without certificate of registration as public accountant is not a violation of law. Use by the proprietor of such service of the business name "auditing and tax service," "indicates that such person is entitled to practice as a public accountant," and is unlawful.



November 20, 1953

Honorable Jay White Prosecuting Attorney of Phelps County Rolla, Missouri

Dear Sir:

We render herewith our opinion based upon your request of October 17, 1953, which request reads as follows:

"I would be pleased to have you render an opinion as to whether a person who engages in bookkeeping and tax service is in violation of Chapter 326, Revised Statutes of Missouri, 1949, when the following appears on their letterhead, door and window: 'John Boe Auditing and Tax Service', when there is no certified public accountant of Missouri in the office."

We assume that a "bookkeeping and tax service," referred to in your letter, is a service rendered to merchants and others engaged in business, in which the merchant or businessman furnishes to the bookkeeping service his invoices, sales slips, notes, the amounts from which the proprietor of the service posts in a set of books maintained for the subscriber. The service would also include the preparation of tax returns and reports for the subscriber from the information contained in such books. The proprietor of the bookkeeping and tax service receiving from the subscriber a weekly, monthly or yearly stipend as compensation for such service.

Honorable Jay White

We further assume that the proprietor of the service does not do any of those things described in Subsections 1, 2, 3, and 4 of Section 326.010, RSMo 1949, as being the practice of public accountancy.

Under the circumstances, we believe that the operation of such bookkeeping and tax service comes within this portion of Section 326.010, RSMo 1949:

"Provided that nothing contained in this chapter shall apply to any person who may be employed by one or more persons, firms or corporations for the purpose of keeping books, making trial balances or statements or preparing reports, provided such reports are not used or issued by the employer or employers as having been prepared by a public accountant."

Hence, the operation of a bookkeeping and tax service as above described, is not the practice of accountancy.

While without the scope of your request, we wish to point out that the preparation of income tax returns which are of a complex nature and which require an analysis of statutes and judicial decisions, may be considered as the practice of law. We do not mean to be approving of the preparation of such returns by one who is not licensed to practice law.

However, we think it improper for a person or firm, not having a license to practice public accountancy in Missouri, to employ the word "auditing" in his business name. Subsection 2 of Section 326.030, RSMo 1949 reads thus:

"2. No person shall represent himself as, permit himself to be styled
or known as, or use or assume the
title of a 'public accountant,' nor
add or suffix, nor permit the addition
or suffixing, to his name or business
appellation, any such designation, or
any other word, words or letters to
indicate that such person is entitled
to practice as a public accountant,
unless such person has received from
the board a public accountant registration certificate which is still in
full force and effect."

Honorable Jay White

The use of the word "audit" indicates that such person is entitled to practice as a public accountant in violation of this statute.

The word means considerably more than mere bookkeeping. We take the following definitions from 4, Words and Phrases, page 811, Audit:

"To 'audit' is to hear; to examine and account; and in its proper sense it includes its adjustment or allowance, disallowance, or rejection.

New York Catholic Protectory v.

Rockland County, 144 N.Y.S. 552, 556, 159 App. Div. 455."

"'To audit' means to hear, determine, and adjust or certify, and an 'audit' means an official examination of account, comparing vouchers with charges and fixing balance. Fuller & Hiller Hardware Co. v. Shannon & Willfong, Iowa, 215 N. W. 611, 613."

"While the word 'audit' is sometimes restricted to a mere mathematical process; it generally includes investigation, the weighing of evidence, and deciding whether items should or should not be included in the account. Travelers' Ins. Co. v. Pierce Engine Co., 123 N. W. 643, 644, 141 Wis. 103."

"To 'audit' means to hear, determine, and adjust or certify, and an 'audit' means that an official examination has been made of an account or claim, comparing vouchers, charges, and fixing the balance. Under Dallas charter, claim 'audited' by commissioner heading proper department and approved by board of commissioners is established for payment. Williams v. Tompkins (Tex.) 42 S.W. (2d) 106, 110."

The purpose of said Subsection 2 of Section 326.030, supra, is to protect the public from misleading. We think the use of the word "auditing" in the business name may well mislead the public to believe that the proprietor of the service is entitled to practice public accountancy.

CONCLUSION

The operation of a bookkeeping and tax service is not the practice of public accountancy, and its operation without a certificate of registration as a public accountant is not a violation of the law relating to the practice of accountancy, although preparation of income tax returns of a complex nature might be the practice of law.

The use by the proprietor of such service of the business name "auditing and tax service," however, "indicates that such person is entitled to practice as a public accountant," and is unlawful.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Very truly yours,

JOHN M. DALTON Attorney General COUNTY TRUSTEE:
DRAINAGE DISTRICT:
TAXATION:

A drainage district is not entitled to participate in the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949. A drainage district does not have the authority to compromise delinquent drainage taxes.

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December 14, 1953

Honorable James J. Wheeler Prosecuting Attorney Chariton County Keytesville, Missouri

Dear Mr. Wheeler:

In your letter of September 14th, 1953, you requested an opinion of this office as follows:

"On August 25, 1952, the trustee for this county purchased 40 acres of land at the third tax sale for \$85.69, and received a tax deed for same.

"This land was subject to drainage district tax in the amount of approximately \$490.00 at the time.

"On August 3, 1953, the county trustee sold the land for the sum of \$250.00.

"The County Court wishes to know if the excess amount received above state and county taxes should go to the tax sale surplus fund or be applied on the delinquent drainage tax.

"Also, the County Court wishes to know if a drainage district has the power to rebate delinquent drainage taxes."

Provision is made for the purchase by the county of land sold at the third offering, by Section 140.260, RSMo 1949.

"1. It shall be lawful for the county court of any county, and the comptroller, mayor and president of the board of assessors of the

city of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which section 140.250 is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids.

* * *

"5. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the county court of the respective counties and the comptroller, mayor and president of the board of assessors of the city of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * " (Emphasis ours.)

Thus, the answer to your first question depends upon the interpretation given to the words "funds entitled to receive the taxes on the lands or lots so disposed of."

That the Jones-Munger Act, of which Section 140.260 is a part, was not intended to apply to collection of drainage and levee district taxes is indicated in St. John Levee and Drainage District of Missouri vs. Pillman, 336 Mo. 93, 76 S.W. (2d) 1095, 1.c. 1096, wherein the court stated:

"* * * We find nothing in the act which indicates that the Legislature intended to change the procedure for the enforcement of levee and drainage taxes. * * *"

Thus, Section 140.260 does not apply to drainage districts. To buttress our conclusion that drainage districts are not entitled to participate in the proceeds at hand, it is noted that Section 242.590 and Section 243.370 provide for liens for drainage districts, and give to drainage districts the power to preserve their right to taxes on the land if they take advantage of the statutory methods provided. In view of the distinct and separate categories into which collection of drainage district taxes, and the collection of general taxes are placed, it is our conclusion that the drainage

Honorable James J. Wheeler

district tax collection provisions are exclusive, and that if a drainage district fails to take advantage of its rights under those provisions, it cannot fall back upon the Jones-Munger Act to remedy its own neglect.

The next question is whether a drainage district has the power to "rebate" delinquent drainage district taxes. It is our assumption that you do not mean "rebate" but rather inquire whether the county court has the power to compromise drainage district taxes. Section 140.120, RSMo 1949, authorizes the compromise of back taxes as follows:

"Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said back tax book or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said back tax book or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said back tax book or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said back tax book or recorded list of delinguent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

Honorable James J. Wheeler

The above section does not authorize compromise by drainage districts, of delinquent drainage taxes, nor does any other statute so authorize. The powers of drainage districts is defined in Thompson v. City of Malden, 118 S.W. (2d) 1059, 1.c. 1063, as follows:

"* * * Their rights, powers and liabilities are specifically limited by the statutes that create them. * * * "

Thus in the absence of such statutory authority, it is our conclusion that such compromise is not permitted.

CONCLUSION

It is therefore, the opinion of this office that a drainage district is not entitled to participate in the distribution of the surplus of proceeds received from lands sold by a county trustee under the provisions of Section 140.260, RSMo 1949, and that a drainage district does not have the authority to compromise delinquent drainage taxes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON Attorney General

PMcG:vlw

CITIES, TOWNS and VILLAGES: Cities of fourth class not required CIVIL PROCEDURE: to pay filing fee in magistrate court but must furnish bonds in attachment suits.

FILED 97

April 21, 1953

Honorable Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"I would appreciate an opinion on the following question: Are fourth class cities required to pay a filing fee and furnish bond in attachment suits in the Magistrate Court?"

The first question presented is the necessity for the payment of the filing fee. In this regard your attention is directed to the following portion of Section 483.615, RSMo 1949:

"483.615. 1. A fee of five dollars shall be allowed the magistrate in each civil proceeding, general or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars. * * * "

(Emphasis ours.)

That a city is a "political subdivision" as that phrase is used in the quoted statute appears from Mitchell v. Bank of Ava, 65 S.W. 2d 97, l.c. 99, from which we quote:

"Is a city of the third class a political subdivision? A standard work on municipal corporations so defines it in the following language: 'A municipal corporation, in its strict and proper sense is a body politic and corporate constituted by the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law as an agency of the State to assist in civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated. Dillon (5th Ed.) Vol. I, Sec. 31. (Italics ours.)

"Section 47 of article 4 of the original Constitution, prohibiting the lending of credit, refers to counties, cities, towns, or townships as 'political corporations or subdivisions of the State.' (Italics ours.)"

Therefore, under the expressed provisions of the quoted portion of the statute mentioned supra, a city of the fourth class is not required to pay the filing fee of five dollars as a condition precedent to the institution of an action in the magistrate court.

Your second question relates to the necessity of such cities being required to furnish a bond in attachment suits filed in the magistrate court.

In this regard your attention is directed to Section 521.660, RSMo 1949, reading as follows:

"521.660. The provisions of law governing attachments in circuit courts shall apply to attachments in magistrate courts so far as the same may not be inconsistent with the provisions which are specially applicable to magistrate courts. Real estate may not be attached under an attachment issued in magistrate court."

Also, to the provisions of Section 521.050, RSMo 1949, from which we quote:

"521.050. Any plaintiff wishing to sue by attachment may file in the clerk's office of the court in which the attachment is instituted, or with the magistrate before whom the suit is brought, a petition or other lawful statement or exhibit of his cause of action, and except in suits instituted by the state or a county in its own behalf, and also, except in cases where the defendant is not a resident of the state of Missouri, in either of which cases no bond shall be required, shall also file an affidavit and bond, * * * "

(Emphasis ours.)

You will note that the latter statute expressly exempts the state and counties from furnishing attachment bonds. Cities and other political subdivisions have not been included within the exemption specifically made, nor can the purview of the statute be extended by implication.

Therefore, since such exemption does not prevail, it will be necessary that a city of the fourth class furnish an attachment bond upon bringing an attachment suit in the magistrate court.

CONCLUSION

In the premises, we are of the opinion:

- (1) A city of the fourth class is not required to pay the filing fee of five dollars in the magistrate court upon the filing of an action on behalf of such city in said court; and
- (2) That a city of the fourth class must furnish an attachment bond in actions of that nature instituted on behalf

Honorable Homer F. Williams

of such city in magistrate court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General CO-OPERATIVES:

Sec. 357.150, RSMo 1949, prevents use of funds of co-operative company organized under this chapter in order to pay expenses of organizing such company.

JOHN M. DALTON

May 8, 1953



John C. Johnsen

Honorable George D. Will, Jr. Member, Missouri House of Representatives State Capitol Jefferson City, Missouri

Dear Mr. Will:

This is in response to your request for an opinion dated April 22, 1953, which reads, in part, as follows:

"Thank you very much for your time this morning regarding Section 357.150 of the Revised Statutes of Missouri, 1949.

"In the above mentioned statute, you will find that the funds of any association organized under the provision of this chapter shall not be used in the payment of expenses for promotion of any such organization. It is my desire to have your opinion as to whether or not this section, referred to above, applies to the expenses for the promotion prior to organization or to expenses for promotion after the organization has been formed."

Section 357.150, RSMo 1949, reads as follows:

"None of the funds of any association organized under the provisions of this chapter shall be used in the payment of any expenses for promotion of any such organization, such, for instance, as commissions, salaries or expenses of any kind, character, or nature whatsoever."

Honorable George D. Will, Jr.

This section was Section 14, Laws of 1919, page 119, and remains the same now as it was then. We are unable to find any case in which the Missouri courts have construed this particular section. Construction of this section is confused by the use of the words "promotion of any such organization."

A co-operative company organized under Chapter 357, RSMo 1949, is nevertheless a corporation, and we take it that the word "promotion" is used in the sense that it ordinarily is with respect to corporations.

The word "promoters" is defined in Black's Law Dictionary, Second Edition, as follows:

"In the law relating to corporations, those persons are called the 'promoters' of a company who first associate themselves together for the purpose of organizing the company, issuing its prospectus, precuring subscriptions to the stock, securing a charter, etc. See Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; Bosher v. Richmond & H. Land Co., 89 Va. 455, 16 S.E. 360, 37 Am. St. Rep. 879; Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L.R.A. 90, 42 Am. St. Rep. 159; Densmore Oil Co. v. Densmore, 64 Pa. 49."

This term has also been defined by the Missouri courts as follows:

" * * * 'A promoter is a person who takes such preliminary steps in the formation of a corporation as to bring himself into a fiduciary relation thereto, analogous to that of trustee and cestui que trust.'

Cook on Stock and Stockholders (2 Ed.), sec. 651, gives the following definition:
'A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.'

Honorable George D. Will, Jr.

Our court has adopted practically the same definitions. (Exter v. Sawyer, 146 Mo. 302; Land Co. v. Case, 104 Mo. 572.) * * *"

(South Missouri Pine Lumber Co. v. Crommer, 202 Mo. 504, 518, 101 S.W. 22.)

Section 357.010, RSMo 1949, reads, in part, as follows:

"2. For the purposes of this section the words 'association,' 'company,' 'corporation,' 'society' or 'exchange' shall be construed to mean the same."

Thus, the word "association" as used in Section 357.150, supra, refers to the corporate entity as that word is defined in Section 357.010, supra. The word "organization" does not refer to the corporate entity, but rather relates back to the word "organized" as it modifies the word "association" in this section. "Organization" as used here means the act of organizing, and not the result accomplished after that act is completed.

A similar provision is found in the laws relating to the organizing of banks. Section 362.070, RSMo 1949, in the chapter on banks, reads as follows:

- "1. No individual, partnership or corporation shall, directly or indirectly, receive or contract to receive any commission, compensation, bonus, right or privilege, of any kind for organizing any bank in this state, or for securing a subscription to the original capital stock or surplus of any bank in this state, or to any increase thereof; provided, that this action shall not be construed as prohibiting an attorney at law from receiving compensation for legal service in connection therewith.
- "2. Each and every individual, partnership or corporation violating the provisions of this section shall forfeit to the state one hundred dollars for each and every such violation, and in addition thereto double the amount of such commission, compensation or bonus."

Honorable George D. Will, Jr.

That section is more explicit than Section 357.150, supra, but we believe that Section 357.150 was designed to prevent the same evil with regard to the organization of co-operative companies that Section 362.070 prohibited with regard to the organization of banks.

CONCLUSION

Therefore, it is the opinion of this office that Section 357.150, RSMo 1949, prevents the use of the funds of any co-operative company organized under the provisions of Chapter 357, RSMo 1949, in order to pay the expenses of organizing such a company and does not refer to the furtherance of the activities of such a company after it has been organized and has acquired its corporate status.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. Inglish.

Yours very truly,

JOHN M. DALTON Attorney General

JWI:ml

made by supervisor of liquor control or by court under appropriate circumstances.

July 6, 1953



TELL CAST CREETING BETWEEN

Honorable Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Mr. Williams:

Reference is made to your recent request for an official opinion from this department, which reads:

"Some of the agents of the supervisor of liquor control of the state have notified certain tavern owners nor to sell beers or liquors to certain named parties, which parties these agents name as habitual drinkards.

"Do these employees of the Liquor Control have the right to make determinations of who are habitual drunkards, and if so by virtue of what section of the law?"

The sale of intoxicating liquors to persons who are habitual drunkards is prohibited and made a criminal offense under the provisions of Section 311.310, RSMo 1949, which reads as follows:

"Any licensee under this chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty-one years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his or her parent or guardian who shall procure for, sell, give away or otherwise supply

intoxicating liquor to any person under the age of twenty-one years, or to any intoxicated person or any person appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misdemeanor; provided, however, that this section shall not apply to the supplying of intoxicating liquor to a person under the age of twenty-one years for medical purposes only, or to the administering of said intoxicating liquor to any person by a duly licensed physician."

(Underscoring ours.)

The conviction of such criminal offense amounts to an automatic revocation of the license of the offending person under the provisions of Section 311.720, RSMo 1949. In addition complaints based upon such sales may be brought directly in the circuit court in which the licenses premises are located by either the sheriff or other peace officer of such county or by any eight or more taxpaying citizens. Such procedure is authorized under paragraph (1) of Section 311.710.

We have examined cases previously decided by the appellate courts of this state, particularly those under a now repealed act imposing penalties upon dramshop keepers who sold intoxicating liquor to persons who were "habitual drunkards" after notice by designated members of the family of such persons to not do so. In Jackson County v. Schmid et al., 124 S.W. 1074, the court quoted approvingly from Page v. Page, 43 Wash. 293, the following definition of "habitual drunkard":

" * * * 'To be an habitual drunkard a person does not have to be drunk all the time, nor necessarily incapacitated from pursuing, during the working hours of the day, ordinary unskilled manual labor. One is an habitual drunkard, in the meaning of the divorce laws, who has a fixed habit of frequently getting drunk. It is not necessary that he be constantly or universally drunk, nor that he have more drunken than sober hours. It is enough that he have the habit so firmly fixed upon him that he becomes drunk

with recurring frequence periodically, or that he is unable to resist when the opportunity and temptation is presented."

This definition was further approved in 180 S.W. 419 in the case of Lester v. Sampson.

We have searched the statutes relating to the enforcement of the liquor control laws of this state and the regulations promulgated by the supervisor of liquor control and do not find that any authority has been delegated or purportedly delegated to the agents of that department to make a determination as to whether or not a particular person is or is not an "habitual drunkard". On the contrary it is our thought that such determination is a factual matter to be determined by the supervisor of liquor control or by a court in appropriate proceedings based upon an alleged violation of Section 311.310, cited supra.

As a practical matter, however, we do wish to point out that if information is given the holder of a license that a particular person is an "habitual drunkard", and that without regard to the source of such information, it is certainly sufficient to put such holder of a license on notice that a question exists as to the right of such person to purchase intoxicating liquor. If such holder of a license thereafter should sell intoxicating liquor to such a designated person and it be later determined that such a person in fact is an "habitual drunkard", the penalties consequent upon such sale would necessarily have to be shown by the holder of the license.

CONCLUSION.

In the premises we are of the opinion that agents of the department of liquor control, as such, have no authority to determine whether or not a particular person is or is not an "habitual drunkard", but that such determination is a factual matter to be determined in appropriate proceedings by either the supervisor of liquor control or a court.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General TAXATION:

SCHOOL DISTRICTS: Last date for certification of levy increase vote.

July 16, 1953

Opinion No. 97

Honorable Homer F. Williams Prosecuting Attorney Bollinger County Marble Hill, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

> "The county clerk of our county would like information in the following manner:

"One of the consolidated School districts have been trying to vote a special levy for school purposes and have already voted on it three times since April, each time it has been defeated, they are now getting ready to vote on it on the 9th day of July, and the question he is interested in is just how late they can vote and force him to put the levy on the taxes due and payable this year. He says that ordinarily these estimates are given him in June, in order for him to get them in the tax books for the current year, and so he would like to know what date is the latest that they can vote and give him the estimates through the Board thereafter, or at that time, and make him put them on this years taxes.

In this opinion we have assumed that the "special levy" referred to in your letter of inquiry is the increased levy authorized under the Constitution and which may be voted under the provisions of Section 165.080, Laws of Mo., 1951, p. 469. This statute, insofar as it relates to the duties of the county clerk, reads as follows:

" * * * and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law." (Emphasis ours.)

The duties enjoined upon the county clerk after receipt of the certified additional levy are outlined by Section 165.083, RSMo 1949, which reads in part as follows:

"Upon receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in each district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes;

* * * " (Emphasis ours.)

In order to determine the last possible date upon which such certification and extension of taxes may be made, it is necessary to refer to the general statutes relating to the preparation of the tax books and the extension of levies thereof. This is made necessary by reason of the incorporation in each of the statutes quoted of the phrase "last annual assessment for state and county purposes" which discloses that the levies are to be extended only upon the assessment lists embraced in the then current tax rolls.

In this regard we direct your attention to Section 137.290, RSMo 1949, relating to the preparation and final correction of the assessment lists in which said section reads as follows:

"The assessor's book shall be corrected and adjusted not later than September first of each year. The clerk of the county court in each county, upon receipt of the certificates of the rates levied by the county court, school districts and other political subdivisions authorized by law to make levies or required by law to certify levies to the county court or clerk of the county court, shall then extend the taxes in the assessor's book, in proper columns prepared for such extensions, according to the rates levied; and shall on or before the thirty-first day of October of each year deliver the tax book with the rates extended therein to the collector, The assessor's book, with the taxes so extended therein, shall be authenticated by the seal of the court as the tax book for the use of the collector; and when the assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the clerk with the seal of the court. And upon a failure to make out such extension of taxes in the assessor's book or books, as the case may be, and deliver same to the collector not later than October thirty-first, the county court shall deduct twenty per cent from the amount of fees which may be due the clerk for making such extension, and such assessor's book, with the taxes so extended therein, shall be called the 'tax book.'"

You will note that under the provisions of this section no specific time has been set out within which the county clerk must commence the extension of the tax levies against the various properties against which taxes are to be levied. However, you will also note that on or before the thirty-first day of October of each year such books are to be

delivered to the Collector of Revenue for the use of such officer in the collection of taxes.

A fair construction of the statute then, it seems to us, is that if the certification is made to the county clerk prior to his having extended the levies against the property of the persons resident within the school district voting the increased levy and sufficient time remains within that limited by the statute during which the county clerk can make the extension, then it is the duty of the county clerk to do so. On the other hand, if insufficient time in fact does not remain, or if the prior extension of levies has been made, then we do not think that the county clerk can be held negligent in the discharge of the duties of his office in failing to extend the duly certified levies. In other words, the problem is one of a practical application of the mechanics involved in the actual computation of the taxes and the extension thereof upon the tax books related to the time within which such tax books are to be finally completed.

CONCLUSION

In the premises, we are of the opinion that it is the duty of the county clerk to extend upon the tax rolls all levies which are certified to such officer prior to the time that such officer has actually entered upon the discharge of his duties as provided by Section 137.290, RSMo 1949. In other words, it is purely a question of the reasonableness of the time remaining prior to the thirty-first day of October of the current year, so that if such reasonable length of time, in fact, remains, then the county clerk should extend the taxes as certified.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Will F. Berry, Jr.

Yours very truly,

JOHN M. DALTON Attorney General

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